ATTACHMENT 1

Dashboard Cover Sheet, Introduction, Model Rule Comparison Table, Clean Rule Draft, Public Comment Synopsis Table and State Variation Excerpts for the Batch 6 Proposed Rules

Proposed Rule 1.0.1 [1-100]
"Terminology"

(**Draft #6.1, 04/24/10**)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 ("Terminology"), defines 15 terms used in other Rules in order to place these definitions in a single location for ease of reference (it also cross-references one definition that is located in another Rule and one definition defined in California by statute). Eleven of these definitions exactly track or closely track the corresponding Model Rule definition; the remaining definitions differ from the Model Rule counterpart, as explained in the Comparison Chart.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-310(A)
Statute	Evid. Code section 250
Case law	

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

Michigan Rule 1.0.1(b) (definition of "person").

☐ 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 __1___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See minority position re definition of "tribunal."): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

The Commission's definitions of certain terms (i.e., "fraud," "screened," and "tribunal") depart from the Model Rule counterpart definitions and the rules which use those terms will, as a result, be subject to different interpretations and may effectively constitute different standards of conduct notwithstanding the fact that the same terms are used in the respective California and ABA rules.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0.1[*] Terminology

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.0.1 is based on Model Rule 1.0. For convenience of reference, this Rule is the repository for most of the defined terms used in other rules. It contains 15 separate definitions, including the incorporation of the Evidence Code definition of "writing". It also contains a cross-reference to the definition found in another rule of the term "information protected by Business and Professions Code section 6068(e)". The Commission recommends including this cross-reference because the term is particularly important since it is used in several other rules. The Commission believes this cross-reference will make it more easily available.

Minority. A minority of the Commission dissents from the Commission's recommended departure from the Model Rule's definition of tribunal. The minority takes the position that the Commission's proposed definition is substantially narrower than in any other jurisdiction and will be a source of confusion for lawyers practicing in California. See full Minority Dissent, below.

Variations in other jurisdictions. There is a wide range of variation among the jurisdictions in their adoption of Model Rule 1.0. Although nearly every jurisdiction has adopted the Model Rule number (Alaska is an exception), many have revised, added, or deleted terms within the Rule. See "Selected State Variations," below.

A Note on the Rule Number. Because the Commission has recommended and the Board of Governors has adopted Rule 1.0, which sets forth the purpose and scope of the Rules of Professional Conduct, the Commission recommends re-numbering the Terminology section as "Rule 1.0.1".

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[*] Proposed Rule 1.0.1, Draft #6.1 (4/24/10).

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule[*] Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	(a) "Belief" or "believes" ~~denotes~~means that the person involved actually ~~supposed~~supposes the fact in question to be true. A person's belief may be inferred from circumstances.	The Commission recommends changing "denotes" to "means" throughout the definitions in order to be more specific and definite. At least Maine has also made the same change in its Rules. The verb "supposes" has been substituted for "supposed" to conform its tense with "believes".
(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.	~~(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~	The phrase "confirmed in writing" is not used in the proposed Rules and therefore has been removed. The proposed Rules use either the Model Rule term "informed consent" [see paragraph (e), below] or California's higher standard of "informed written consent" [see paragraph (e-1), below].
	(b) [Reserved]	The Commission has decided to leave paragraph (b) as "[Reserved]" in an attempt to keep the Commission's proposed definitions as close as possible to the Model Rule numbering.

[*] Proposed Rule 1.0.1, Draft 6.1 (04/24/10).

ABA Model Rule **Rule 1.0 Terminology**	**Commission's Proposed Rule[*]** **Rule 1.0.1 Terminology**	**Explanation of Changes to the ABA Model Rule**
(c) "Firm" or "law firm" denotes a lawyer or 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.	(c) "Firm" or "law firm" ~~denotes a lawyer or lawyers in~~means a law partnership~~,~~; a professional law corporation~~,~~; a sole proprietorship or ~~other~~an association ~~authorized to~~engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or ~~other~~of another organization.	Paragraph (c) modifies the Model Rule definition in several non-substantive ways, including referring to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, specifically including government lawyers. See *People ex rel. Deumkejian v. Brown* (1981) 29 Cal.3d 150). The substitution of "engage in" for "authorized to" is to assure that the requirements of the Rules apply to everyone acting as a law firm even if not authorized to do so [at least Maryland, Michigan, and South Carolina similarly have removed "authorized to"]. The remaining changes are for clarity.
(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.	(d) "Fraud" or "fraudulent" ~~denotes~~means conduct that is fraudulent under the ~~substantive or procedural~~ law of the applicable jurisdiction and has a purpose to deceive.	Paragraph (d) is nearly identical to the Model Rule definition but removes "substantive or procedural" because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes. There are other substantive changes to the definition in the versions adopted in New York, North Carolina, South Carolina, Washington, and Wyoming.
(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.	(e) "Informed consent" ~~denotes the agreement by~~means a ~~person~~person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available	The re-ordering of the first portion of this definition is for clarity. The same change has been made at least in Maine. The addition of "reasonably foreseeable" conforms the definition to California case law that a lawyer's disclosure only needs to include reasonably foreseeable consequences. See, *e.g.*, *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 410, 429-31. There

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
	alternatives to, the proposed course of conduct.	are substantive changes to the definition in Alaska, Maine Rule, Michigan Missouri; New York, North Carolina, Oregon, Penn., South Carolina, and Wyoming.
	(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.	Paragraph (e-1) has no counterpart in Model Rule 1.0. The Commission has added this definition of California's higher standard of written disclosure and written consent, a concept that is not found in the Model Rules. The use of Model Rule language is not intended to substantively change California's current rule 3-310(A) definition.
	(e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] - [6].	Paragraph (e-3) has no counterpart in Model Rule 1.0. The threshold use of the term "information protected by Business & Professions Code section 6068(e)" is in the confidentiality rule, Rule 1.6, and the Commission proposes to keep the definition in that Rule. It has added this cross-reference merely to simplify locating the definition. New York and North Carolina similarly cross-reference their Rule 1.6 definitions. Oregon has changed its term to "information relating to the representation of a client", and Wyoming uses the Model Rule term, but both have placed their definitions in Rule 1.0.
(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	(f) "Knowingly," "known," or "knows" ~~denotes~~means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	Paragraph (f) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	(g) "Partner" ~~denotes~~means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	Paragraph (g) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).
	(g-1) "Person" means a natural person or an organization.	Paragraph (g-1) has no counterpart in Model Rule 1.0. The Commission added the paragraph (g-1) definition in order to avoid any possibility that "person" might be read as referring only to natural persons. There are six other jurisdictions that have adopted definitions of "person"; the Commission's definition is based on the definition adopted in Michigan.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.	(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer ~~denotes~~means the conduct of a reasonably prudent and competent lawyer.	Paragraph (h) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).
(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer ~~denotes~~means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.	Paragraph (i) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).

ABA Model Rule **Rule 1.0 Terminology**	Commission's Proposed Rule[*] **Rule 1.0.1 Terminology**	Explanation of Changes to the ABA Model Rule
(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.	(j) "Reasonably should know" when used in reference to a lawyer ~~denotes~~means that a lawyer of reasonable prudence and competence would ascertain the matter in question.	Paragraph (j) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).
(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.	(k) "Screened" ~~denotes~~means the isolation of a lawyer from any participation in a matter ~~through~~, including the timely imposition of procedures within a law firm that are ~~reasonably~~ adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.	Paragraph (k) is identical to the Model Rule definition but makes three changes. First, the substitution of "including" for "through" reflects the variability of what is needed to impose an effective screen, as is discussed in Comment [10], below. Second, the removal of "reasonably" is intended to avoid the suggestion that half-way measures will suffice. The imposition of a non-consensual screen by a law firm is an extremely serious matter. Finally, the Commission recommends added the concept in subpart (ii), which fills a gap in the Model Rule definition.
(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.	(l) "Substantial" when used in reference to degree or extent ~~denotes~~means a material matter of clear and weighty importance.	Paragraph (l) is identical to the Model Rule definition except for the substitution of "means" for "denotes". See Explanation for paragraph (a).
(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral	(m) "Tribunal" ~~denotes~~means: (i) a court, an arbitrator~~ in a binding arbitration proceeding~~, or ~~a legislative body,~~an administrative ~~agency or other body~~law judge acting in an adjudicative capacity~~. A legislative body, administrative agency~~ and authorized to make a decision that	Paragraph (m) is a material change from the Model Rule definition. The purpose of the changes is to distinguish the extremely high standards that apply to a lawyer's conduct as a client representative in a court of law or its equivalent, which is labeled as a "tribunal" by this definition (see Rule 3.3), from the more limited but still important duty of honesty that applies when a

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.	can be binding on the parties involved; or (ii) a special master or other ~~body acts in an adjudicative capacity when~~person to whom a ~~neutral official, after the presentation of evidence~~court refers one or ~~legal argument by a party~~more issues and whose decision or ~~parties, will render a~~recommendation can be binding ~~legal judgment directly affecting a party's interests in a particular matter~~on the parties if approved by the court.	lawyer appears in a representative capacity before a legislative or administrative body (see Rule 3.9). The Commission concluded that this distinction is important because First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits. First Amendment considerations do not similarly apply to court proceedings. Also, a lawyer's representative work with legislative and administrative bodies involves elements of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations.
(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.	(n) ~~"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.~~ "Writing" or "written" has the meaning stated in Evidence Code section 250.	Because California has a statutory definition of "writing", the Commission recommends substituting a reference to it in place of the Model Rule definition. Although the statutory definition and the Model Rule definition are substantially the same, the Commission concluded that substituting a cross-reference to the statute would avoid confusion by California lawyers who are familiar with the statutory definition.

ABA Model Rule **Rule 1.0 Terminology** **Comment**	**Commission's Proposed Rule** **Rule 1.0.1 Terminology** **Comment**	**Explanation of Changes to the ABA Model Rule**
Confirmed in Writing [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.	~~**Confirmed in Writing**~~ ~~[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.~~	The Commission removed Model Rule 1.0, cmt. [1] because the term explained in the Comment is not used in the proposed Rules.
Firm [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule	***Firm or Law Firm*** [~~2~~1] Whether two or more lawyers constitute a law firm ~~within paragraph (c)~~ can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they ~~should~~may be regarded as a law firm for purposes of ~~the~~these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying	Comment [1] is nearly the same as Model Rule 1.0, cmt. [2], but the Commission recommends removal of the last Model Rule sentence because it does not serve to explain the defined term but instead muses about other legal issues.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.	purpose of the ~~Rule~~rule that is involved. ~~A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~	
[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.	~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~	The Commission recommends deleting Model Rule 1.0, cmt. [3]. The first sentence contradicts the plain language of paragraph (c). The second sentence does not help explain the rule but instead muses to no effect on the question of who a lawyer's client is.
	[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of a law firm will also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and	Comment [2] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to express a pertinent rule of California law.

ABA Model Rule **Rule 1.0 Terminology** **Comment**	**Commission's Proposed Rule** **Rule 1.0.1 Terminology** **Comment**	**Explanation of Changes to the ABA Model Rule**
	continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the law firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as "special counsel", or by another term having no commonly understood definition, also will depend on the specific facts.	
[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.	[43] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.	Comment [3] is identical to Model Rule 1.0, cmt. [4].

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
	[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.	Comment [4] has no counterpart in Model Rule 1.0. The Commission recommends its addition in order to prevent the definition of "law firm" from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.
Fraud [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.	**Fraud** [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the ~~substantive or procedural~~ law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.	Comment [5] is identical to Model Rule 1.0, cmt. [5], changed only to track the revision to paragraph (d).
Informed Consent [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication	***Informed Consent and Informed Written Consent*** [6] Many of the rules ~~of Professional Conduct~~ require ~~the~~a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. See, e.g.,	Comment [6] is based on Model Rule 1.0, cmt. [6]. It has been modified to cover the paragraph (e) and (e-1) definitions of "informed consent" and "informed written consent". The removal of "ordinarily" clarifies that the obligation to disclose exists invariably. The addition of "reasonably available" tracks the change in paragraph (e), explained above. The removal of the two sentences beginning "In some circumstances ..." sentence

ABA Model Rule **Rule 1.0 Terminology** **Comment**	**Commission's Proposed Rule** **Rule 1.0.1 Terminology** **Comment**	**Explanation of Changes to the ABA Model Rule**
necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving	Rules 1.2(c), 1.6(a), and 1.7~~(b)~~. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain ~~informed~~ consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. ~~Ordinarily~~ In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's reasonably available options and alternatives. ~~In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.~~ In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. ~~Normally, such persons need less information and explanation than others, and generally a client or~~	removes practice tips that do not explain the Rule. The removal of the last sentence is to avoid its suggestion that a lawyer has no disclosure obligation to a client that is independently represented.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
the consent should be assumed to have given informed consent	~~other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.~~	
[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).	[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. ~~Consent~~ However, except where the standard is one of informed *written* consent, consent may be inferred~~, however,~~ from the conduct of a client or other person who has reasonably adequate information about the matter. ~~A number of Rules require that a person's consent be confirmed in writing.~~ See ~~Rules 1.7~~paragraph (~~b~~n) ~~and 1.9(a). For a~~for the definition of "writing" and "~~confirmed in writing,~~written" ~~see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n)~~.	Comment [7] is based on Model Rule 1.0, cmt. [7]. Changes conform the Comment to the paragraph (e) definition.
Screened [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.	**Screened** [8] This definition applies to situations where screening of a personally ~~disqualified~~prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules ~~1.10,~~ 1.11~~,~~ or 1.12 ~~or 1.18~~.	Comment [8] is identical to Model Rule 1.0, cmt. [8], except that the reference to Rule 1.10 has been deleted because the Board has declined to adopt Model Rule 1.10, and the reference to Rule 1.18 has been deleted because the Commission has recommended that Model Rule 1.18 not be adopted.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.	[9] The purpose of screening is to assure the affected partiesclient, former client, or prospective client that confidential information known by the personally disqualifiedprohibited lawyer remains protectedis neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally disqualifiedprohibited lawyer shouldshall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter shouldpromptly shall be informed that the screening is in place and that they may not communicate with the personally disqualifiedprohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyerslaw firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the screenedpersonally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the screenedpersonally prohibited lawyer relating to the matter, denial of access by the screenedthat lawyer	Comment [9] is based on Model Rule 1.0, cmt. [9], but makes several changes: First, "parties" in the first sentence is replaced because a lawyer's duty of confidentiality is owed only to clients, former clients, and prospective clients and not to anyone else that might be called a "party". Second, to conform to proposed language in the applicable conflicts rules, "disqualified" has been replaced throughout the comment with "prohibited". Similarly, the one appearance of the phrase "screened lawyer" has been replaced with "personally prohibited lawyer." Third, a gap in the Model Rule Comment has been eliminated by stating on each occasion that screening involves both all other law firm lawyers and all non-lawyer personnel. The same change has been made to paragraph (k). Fourth, the obligation of the screened lawyer to acknowledge the existence of the screen is stated in mandatory ("shall") rather than permissive ("should") terms. Fifth, the obligation to inform other law firm personnel of the screen is made mandatory and, to conform to the paragraph (k) requirement of timeliness, the requirement is to do so "promptly". This mandatory statement also appears in the Connecticut Comment, and the mandatory language also appears in the New York Comment.

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
	to law firm files or other materials relating to the matter, and periodic reminders of the screen to the ~~screened~~personally prohibited lawyer and all other law firm personnel.	
[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.	[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.	Comment [10] is identical to Model Rule 1.0, cmt. [10].
	Tribunal [11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.	Comment [11] has no counterpart in Model Rule 1.0. It has been added as a brief explanation of the narrow definition of "tribunal" that the Commission recommends. See the paragraph (m) explanation, above.
	Writing and Written [12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.	See the Explanation for paragraph (n), above.

Dissent to Proposed Rule 1.0.1(m) – Definition of "Tribunal"

A minority dissents from the proposed definition of "tribunal" in paragraph (m). The definition proposed by the Commission is substantially narrower than the definition of "tribunal" in Model Rule 1.0(m) and the rules in most jurisdictions. If approved, various governmental agencies and boards acting in an adjudicative capacity and deciding contested matters will not have the protection of rules governing lawyers appearing as advocates in such proceedings. Under the definition proposed by the Commission, "tribunal" would be limited to a court, an arbitrator, an ALJ or a special master or other person to whom a court refers an issue for recommendation or decision. The definition would exclude numerous administrative agencies and boards at the federal, state and local level acting in an adjudicative capacity and rendering legally binding decisions directly affecting a party's interests following the presentation of evidence or legal arguments (e.g., the PUC, Worker's Compensation Appeals Board, SEC and FTB). The result will be that a host of administrative and legislative boards and agencies that adjudicate disputes will be left without the protection of rules aimed at assuring candor, impartiality and decorum by lawyers who represent clients as advocates in such matters. This includes Rule 3.3 (candor toward the tribunal) and Rule 3.5 (impartiality and decorum of the tribunal). For example, there would be no rule prohibiting ex parte communications and other forms of improper influence in adjudicative proceedings before various boards and administrative agencies that would otherwise come within the definition of "tribunal" under the Model Rule but which are excluded under the Commission's definition.

The Commission's restricted definition of "tribunal" is without precedent and will be a source of confusion as evidenced by the comments received from OCTC and the San Diego County Bar Association. No other jurisdiction employs such an overly restrictive definition of tribunal in the rules. There is no First Amendment or other reason for excluding from the definition of "tribunal" a legislative or administrative board or agency acting in an adjudicative capacity and rendering binding decisions directly affecting a person's rights based on the presentation of evidence or legal argument by counsel. One of the stated objectives of the rules is promoting the fair administration of justice. This objective is not limited to courts but includes governmental agencies and bodies acting in an adjudicative capacity as defined in Model Rule 1.0(m). The explanation that a narrow definition is needed to distinguish proceedings governed by Rule 3.9 (advocate in non-adjudicative proceedings) is incorrect. The definition of "tribunal" in the Model Rules does not apply in situations governed by Rule 3.9. California should conform to the Model Rule definition and explain, if necessary, in a comment that the definition of tribunal does not apply in situations governed by proposed rule 3.9.

Rule 1.0.1: Terminology

(Commission's Proposed Rule – Clean Version)

(a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) [reserved]

(c) "Firm" or "law firm" means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

(e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.

(e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] – [6].

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(g-1) "Person" means a natural person or an organization.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

(l) "Substantial" when used in reference to degree or extent means a material matter of clear and weighty importance.

(m) "Tribunal" means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(n) "Writing" or "written" has the meaning stated in Evidence Code section 250.

COMMENT

Firm or Law Firm

[1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of a law firm will also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the law firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as "special counsel", or by another term having no commonly understood definition, also will depend on the specific facts.

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

[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent and Informed Written Consent

[6] Many of the rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's reasonably available options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of "writing" and "written".

Screened

[8] This definition applies to situations where screening of a personally prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.

[9] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the

matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Tribunal

[11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

Writing and Written

[12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.

						TOTAL = 7 Agree = 4 Disagree = 0 Modify = 3 NI = 0

Rule 1.0.1 Terminology
[Sorted by Commenter]

TOTAL = 7 Agree = 4 Disagree = 0 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	COPRAC	M		(e)	In paragraph (e), COPRAC objects to the requirement that, for consent to be informed, the lawyer must communicate (among other things) the "reasonably available alternatives to the proposed course of conduct." No such communication is required under the current California rules with respect to informed consent or informed written consent, nor is such communications generally necessary for consent to be informed.	COPRAC is correct that the current California rule, rule 3-310(A)(1), does not state the lawyer's obligation to advise the client of alternatives to either accepting or rejecting the representation; however, the Commission believes that a client's consent cannot fairly be described as having been "informed" if the lawyer has not competently advised the client about the situation. Competent advice includes an explanation of the reasonably available alternatives. As a result, the "reasonably available alternatives" requirement also is found in the Model Rule version of paragraph (e). This treatment is consistent with the requirements of Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Also, see Comment [6], which helps to explain paragraph (e).
				(k)	In paragraph (k), COPRAC disagrees with the deletion of the word "reasonably" from the Model Rule (as in "the timely imposition of procedures within a firm that are ***reasonably***	See the response to the similar comment from the O.C. Bar Assoc.

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					adequate under the circumstances to (i) protect information . . .”). Firms should be entitled to rely on their reasonably imposed procedures, and not be held to a strict liability standard (judged after the fact) as to whether the procedures in fact proved to be adequate. Contrary to the suggestion contained in the Explanation of Changes to paragraph (k), “half-way measures” should never be sufficient anyway because they are not “reasonably adequate.”	
				Comment [8]	Comment [8]: This Comment refers to a “personally *disqualified”* lawyer.” Because the rules relate to discipline, we recommend conforming this term to the more preferred “personally prohibited lawyer,” or for more clarity: “lawyer who is personally prohibited with respect to a matter.”	The Commission agrees and has made the requested change in somewhat different language.
				Comment [9]	Comment [9]: The use of the term “screened lawyer” in this Comment is imprecise and possibly confusing. We recommend revising the language of this Comment to clarify whether it applies to the lawyer in possession of confidential information, all other lawyers in the law firm on the other side of such screen, or both. We further recommend that the language in the last sentence of this Comment be revised to clarify which files or	The Commission agrees and has made the suggested change.

TOTAL = 7	Agree = 4 Disagree = 0 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					other materials will be subject to restricted access by reference to the appropriately screened lawyer or lawyers.	
				Comment [1]	Comment [1]: COPRAC disagrees with the deletion of the last sentence from the corresponding Comment to the Model Rule. We believe that sentence adds textual clarity to the prior sentence and makes a very important point: namely, a group of lawyers may constitute a law firm for purposes of one rule, but not a law firm for the purposes of another rule. We further believe that the commentary for the definition of the term "law firm" is the appropriate place to make this important point. To make this point more clearly, however, COPRAC recommends revising the current last sentence of this proposed Comment, by adding language to the end thereof so that it would read as follows: "Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved, and to recognize that a group of lawyers could be regarded as a law firm for purposes of one rule but such same group of lawyers might not regarded as a law firm purposes of another rule."	The Commission is not convinced that there are circumstances in which a group of lawyers could be considered a law firm so that they could not represent adverse parties in litigation but not be considered a law firm for purposes of the presumed sharing of information within a law firm. For this reason the Commission has not included any version of the last sentence of Model Rule Comment [2] so that this unusual question can be addressed in case law over time.

Rule 1.0.1 Terminology
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Finally, we note (and agree with) the Commission's stated intention to use the single term "law firm," and to drop the reference to "firm" [see last sentence in the Explanations of Changes to paragraph (c) of the rule]. Consistent with such approach, COPRAC recommends (1) using the term "law firm" consistently throughout the rules and commentary (e.g., the use of the term "firm" in the definition of "Screened" should be conformed), (2) changing the subheading in the commentary above Comment [1] from "Firm" to "Law Firm," and (3) rearranging the definitions such that the definition of "Law Firm" is correctly placed alphabetically afer the definition of "Knowingly."	The Commission agrees and has made the suggested changes. On reconsideration, the Commission voted to retain the Model Rule's use of the dual terms "firm" and "law firm" because there was insufficient reason to depart from the Model Rule on this minor point.
3	McIntyre, Sandra K.	A			No comment.	No response required.
4	Office of the Chief Trial Counsel	M			Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.	The Commission's general policy has been to place in Rule 1.0.1 all of the definitions that are used in more than one substantive Rule so that the definition does not have to be repeated. As a result, this proposed Rule generally tracks the corresponding rule found in other jurisdictions.
				1.0.1(b)	Rule 1.0.1(b) states that "confidential information relating to representation" is defined in Rule 1.6, Comments [3] – [6]. This is not a precise definition. Moreover, the	No response needed as the Commission has eliminated this term.

TOTAL = 7	Agree = 4
	Disagree = 0
	Modify = 3
	NI = 0

Rule 1.0.1 Terminology
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.	
				1.0.1(m)	Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjucative capacities should be included within the definition of "tribunal." Attorneys representing clients before legislative bodies acting in adjucicative capacities should be held to the same standards as those appearing before any other adjudicative body. It is confusing to have comments which simply define terms. For example, Comment [2] discusses the term "of counsel," if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments [1], [3], [4], [5], [11] and [12] are so general as to provide no meaningful assistance. Comments [6] – [10] attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.	See response to the comment from the San Diego County Bar Assoc., below. The Commission disagrees and has not made the requested changes. The Comment paragraphs regarding informed written consent and screening are not definitional but descriptive. Also see the response to the O.C. Bar Assn. letter regarding Comment [9] and see the response to S.D. Bar Assn regarding "tribunal".

						TOTAL = 7 Agree = 4 Disagree = 0 Modify = 3 NI = 0
Rule 1.0.1 Terminology [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
5	Orange County Bar Association	M		(k)	We oppose removing the word "reasonably" from the Model Rule definition of "Screened." We believe there is little risk members of the Bar will interpret the word "reasonably" as authorizing "half-way" measures. Rather, we believe the greater risk is that removal of "reasonably" from the definition of screening will create a strict liability rule in a context where "adequate" – which would be the only standard remaining – is not even defined.	The Commission does not agree and has not made the requested change. It believes that the definition should emphasize the need for rigor because of the significant risk of injury to client trust in lawyers and the legal system that is implicit in any ethics screen imposed by a law firm without client consent. This language does not suggest that the law firm is a guarantor that procedures will be followed, but the law firm should be detailed and conscientious about creating and enforcing the screening protocol.
				Comment [1]	Moreover, the Commission does not appear to have considered whether there is or should be a distinction between "adequate" screening procedures in a large firm versus a small firm. In Comment [1], the Commission proposes adding that "A sole proprietorship is a law firm for purposes of these Rules." However, because a sole proprietorship already is included in the definition of "law firm" under paragraph (c), it is unnecessary to include the proposed language in Comment [1]. Moreover, the heading to Comment [1] should read "Law Firm" instead of "Firm" in order to be consistent with the Commission's expressed preference for the former term.	The Commission agrees with the first comment and has deleted the first sentence of Comment [1]. However, the Commission has revised the definition of "law firm" to include both "firm" and "law firm" to conform to the Model Rule, so has not made the second change. See Response to COPRAC.
				Comment [2]	We propose revising Comment [2] to generally clarify that the relationship between the attorney and the law firm depends upon	The Commission agrees that Comment [2] would benefit from the addition of a reference to other creative titles that might be assigned to lawyers in a

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 7 Agree = 4 Disagree = 0 Modify = 3 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					the circumstances, rather than the attorney's title. Accordingly, we recommend against singling out the title "Of Counsel" to the exclusion of other, similar titles, like "Special Counsel," "Senior Counsel," and "Special Partner." We also recommend that the substance of this provision (whether revised to encompass additional "alternative" titles or not) be incorporated into a Rule rather than into a Comment because it bears upon the substance of the definition of "law firm."	law firm whose meaning might not be obvious. It has made this change by adding a sentence at the end of the Comment. The Commission does not agree that the substance of Comment [2] should be moved to the Rule's definition of "law firm". The question of whether a lawyer is part of a law firm is distinct from the question of what a law firm is. Moreover, it is not possible to define whether a lawyer should be considered to be part of a particular law firm while acting in future, unknown circumstances.
				Comment [9]	We recommend deleting Comment [9], which contains substantive guidance regarding screening procedures. This guidance, if it is to be given, properly belongs either in one or more substantive Rules related to screening, or in the Comment(s) to those Rules, not in a Comment to a definition, where it is less likely to be seen by lawyers searching for substantive rules regarding screening.	The Commission disagrees and has not made the suggested changes. First, it believes that the discussion of screening methods does not belong in the Rule because it is not in the nature of a definition. Instead, it is descriptive and therefore is placed in a Comment. Second, the Commission concluded that the definition and discussion are best placed in this Rule because this is the location used almost without exception in other jurisdictions. Third, non-consensual screening is permitted under multiple rules, e.g., Rules 1.11 and 1.12, and the Commission believes it is better to have the definition and comment in a single location.
6	San Diego County Bar Association Legal Ethics Committee	A			SDCBA expressed concern with the definition of a "tribunal," which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. SDCBA suggests a broader definition of "tribunal" so	The Commission believes that an expansive definition of "tribunal" might be appropriate if used only as a reminder of best practices, but it believes that an expansive definition would not function properly as a disciplinary standard. If the Rule 3.3

TOTAL = 7 Agree = 4
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that a lawyer's duty of candor would extend beyond adjudicative bodies.	duty of candor were extended to legislative and administrative activities, it would intrude on First Amendment requirements. In addition, there are concepts that are problematic outside of the court context. These include, *e.g.*: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii) the application of the *ex parte* requirements of Rule 3.3(d). Moreover, California uniquiely has a statutory duty of honesty under B&P C § 6106 that will supplement Rule 3.3 in egregious situations. The Commission sees no benefit to extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, *et seq*. The Comission believes it is important to retain the distinction between the special responsiblities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.
7	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 1.0: Terminology

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alaska: In the rules effective April 15, 2009, Rule 9.1 (Alaska's terminology rule) adds an unusually detailed definition of ''substantially related matters'' to help guide lawyers in their assessment of conflicts of interest. The definition draws, in part, on Comment 3 to Model Rule 1.9.

Connecticut adds: '''Client' or 'person' as used in these Rules includes an authorized representative unless otherwise stated.''

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

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

New York: In the rules effective April 1, 2009, New York adds definitions for the terms ''advertisement,'' ''computer-accessed communication,'' ''differing interests,'' ''domestic relations matters,'' ''matter,'' ''person,'' ''reasonable lawyers,'' and ''sexual relations.'' New York also includes a more detailed definition of ''fraud,'' providing as follows:

> ''Fraud'' or ''fraudulent'' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

In addition, the definition of ''confirmed in writing'' includes ''a statement by the person made on the record of any proceeding before a tribunal.''

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

> (1) an actual or implied misrepresentation of a material fact that is made either with knowledge

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

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

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

> "Adjudicatory Official" denotes a person who serves on a Tribunal.
>
> "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal. "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.
>
> "Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.
>
> "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.
>
> "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.
>
> "Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.
>
> "Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

Virginia retains the 1983 version of the Terminology section and adds: "'Should' when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard."

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

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Proposed Rule 1.4.1 [3-410]
"Disclosure of Professional Liability Insurance"

(Draft #6, 04/01/10)

Summary: Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court and became operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer. Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the rule court-appointed lawyers as to those matters in which they have been appointed.

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 3-410
Statute	Repealed Bus. & Prof. Code §§ 6147 & 6148.
Case law	

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

☐ Other Primary Factor(s)

*NOTE: While there is no ABA Model Rule of Professional Conduct, the ABA has adopted a Model Court Rule which requires a lawyer to certify to the state's attorney regulatory body (State Bar or Sup. Ct.) whether the lawyer is covered by professional liability insurance.

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 __1___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ 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 1.4.1[*] Disclosure of Professional Liability Insurance*

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court in July 2009 and became operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer.

Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the Rule court-appointed lawyers as to those matters in which they have been appointed. See Explanation of Changes for paragraph (c) and Comment [5].

[*] Proposed Rule 1.4.1, Draft 6 (04/01/10).

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule**[*] (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.	(~~A~~a) A ~~member~~ lawyer who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the ~~member~~lawyer, that the ~~member~~ lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the ~~member~~lawyer's legal representation of the client in the matter will exceed four hours.	The word "member" is changed to "lawyer" throughout the Rule to conform to the format and style of the proposed Rules, which is based upon that of the Model Rules. Paragraph "(A)" has been changed to paragraph "(a)" to conform to the format and style of the proposed Rules.
(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.	(~~B~~b) If a ~~member~~lawyer does not provide the notice required under paragraph (~~A~~a) at the time of a client's engagement of the ~~member~~lawyer, and the ~~member~~lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the ~~member~~lawyer shall inform the client in writing within thirty days of the date that the ~~member~~lawyer knows or should know that he or she no longer has professional liability insurance.	See Explanation of Changes to Paragraph (a).

[*] Proposed Rule 1.4.1, Draft 6 (04/04/10). Redline comparisons are to current rule 3-410.

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule**[*] (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.	(~~C~~c) This ~~rule~~Rule does not apply to a ~~member~~lawyer who is employed as a government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed.	Paragraph (c) has been modified to include court-appointed lawyers in criminal and civil matters who represent or provide advice to clients in that capacity. The change is recommended in response to concerns raised by criminal defense lawyers and civil lawyers who regularly serve on panels as court appointed counsel for indigent clients. The public policy of encouraging lawyers to serve as court appointed counsel merits including these lawyers along with government lawyers and full time in house counsel in the exception to the rule. "Member" has also been changed to "lawyer." See Explanation of Changes to Paragraph (a).
(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.	(~~D~~d) This ~~rule~~ Rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.	See Explanation of Changes to Paragraph (a).
(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.	(~~E~~e) This ~~rule~~Rule does not apply where the ~~member~~lawyer has previously advised the client under ~~Paragraph~~paragraph (~~A~~a) or (~~B~~b) that the ~~member~~lawyer does not have professional liability insurance.	See Explanation of Changes to Paragraph (a).

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule*** (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
Discussion:	~~Discussion~~Comment:	
[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.	[1] The disclosure obligation imposed by Paragraph (~~A~~a) ~~of this rule~~ applies with respect to new clients and new engagements with returning clients.	Comment [1] has been modified to conform to the format and style of the proposed Rules. See Explanation of Changes to Paragraph (a).
[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing: *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."*	[2] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (~~A~~a), and may include that language in a written fee agreement with the client or in a separate writing: *"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I do not have professional liability insurance."*	"Member" has been changed to "lawyer." The reference to "Rule 3-410(A)" has been changed to "paragraph (a)" to conform to the format and style of the proposed Rules. The reference to "3-410" in the form notice has been changed to "1.4.1" to conform to the rule numbering system the Commission recommends for the proposed Rules, which largely tracks the Model Rule numbering system.
[3] A member may use the following language in making the disclosure required by Rule 3-410(B): *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."*	[3] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (~~B~~b): *"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I no longer have professional liability insurance."*	See Explanation of Changes to Comment [1]. See Explanation of Changes to Comment [2].

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	**Commission's Proposed Rule*** (Redline/strikeout showing changes to the current California Rule 3-410)	**Explanation of Changes to California Rule 3-410**
[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.	[4] ~~Rule 3-410~~Paragraph (~~C~~c) in part provides an exemption for a "government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this ~~rule~~Rule is to provide information directly to a client if a ~~member~~lawyer is not covered by professional liability insurance. If a ~~member~~lawyer is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the ~~member~~lawyer is or is not covered by professional liability insurance. The exemptions ~~under this rule~~for government lawyers and in-house counsels are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.	"Rule 3-410(C)" has been changed to "Paragraph (c)" and "member" has been changed to "lawyer" to conform to the format and style of the proposed Rules, which are based on the Model Rules. The phrase, "for government lawyers and in-house counsel" has been substituted for "under this Rule" because paragraph (c) now also refers to "court-appointed" lawyers and the rationale underlying the extension of the exemption to the latter is not the same as for government lawyers or in-house counsel. See Explanation of Changes for paragraph (c).
	[5] Paragraph (c) also provides an exemption for "a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed." A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).	Comment [5] is new. It has been added to explain the limited scope of the paragraph (c) exemption for court-appointed lawyers. The comment clarifies that such lawyers must comply with the notification requirements of paragraphs (a) and (b) in actions and proceedings where the lawyers are not serving by court appointment.

Rule 1.4.1: Disclosure of Professional Liability Insurance

(Commission's Proposed Rule – Clean Version)

(a) A lawyer who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer's legal representation of the client in the matter will exceed four hours.

(b) If a lawyer does not provide the notice required under paragraph (a) at the time of a client's engagement of the lawyer, and the lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the lawyer shall inform the client in writing within thirty days of the date that the lawyer knows or should know that he or she no longer has professional liability insurance.

(c) This Rule does not apply to a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed.

(d) This Rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(e) This Rule does not apply where the lawyer has previously advised the client under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

COMMENT

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I no longer have professional liability insurance."

[4] Paragraph (c) in part provides an exemption for a "government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this Rule is to provide information directly to a client if a lawyer is not covered by professional liability insurance. If a lawyer is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the lawyer is or is not covered by professional liability insurance. The exemptions

for government lawyers and in-house counsels are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

[5] Paragraph (c) also provides an exemption for "a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed." A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).

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

Rule 1.4.1 Insurance Disclosure
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	McIntyre, Sandra K.	A			No comment.	No response required.
3	Orange County Bar Association	A			The only change we suggest is the insertion of the word "reasonably" into the first sentence of Section (a), so that it reads: "A lawyer who knows or reasonably should know that he or she does not have professional liability insurance . . . ."	The Commission agrees with the commenter and has implement the requested change. The term "reasonably should know" is a defined term in proposed Rule 1.0.1(j) and is used elsewhere in the Rules.
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	A			No comment.	No response required.

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

As of April 19, 2010
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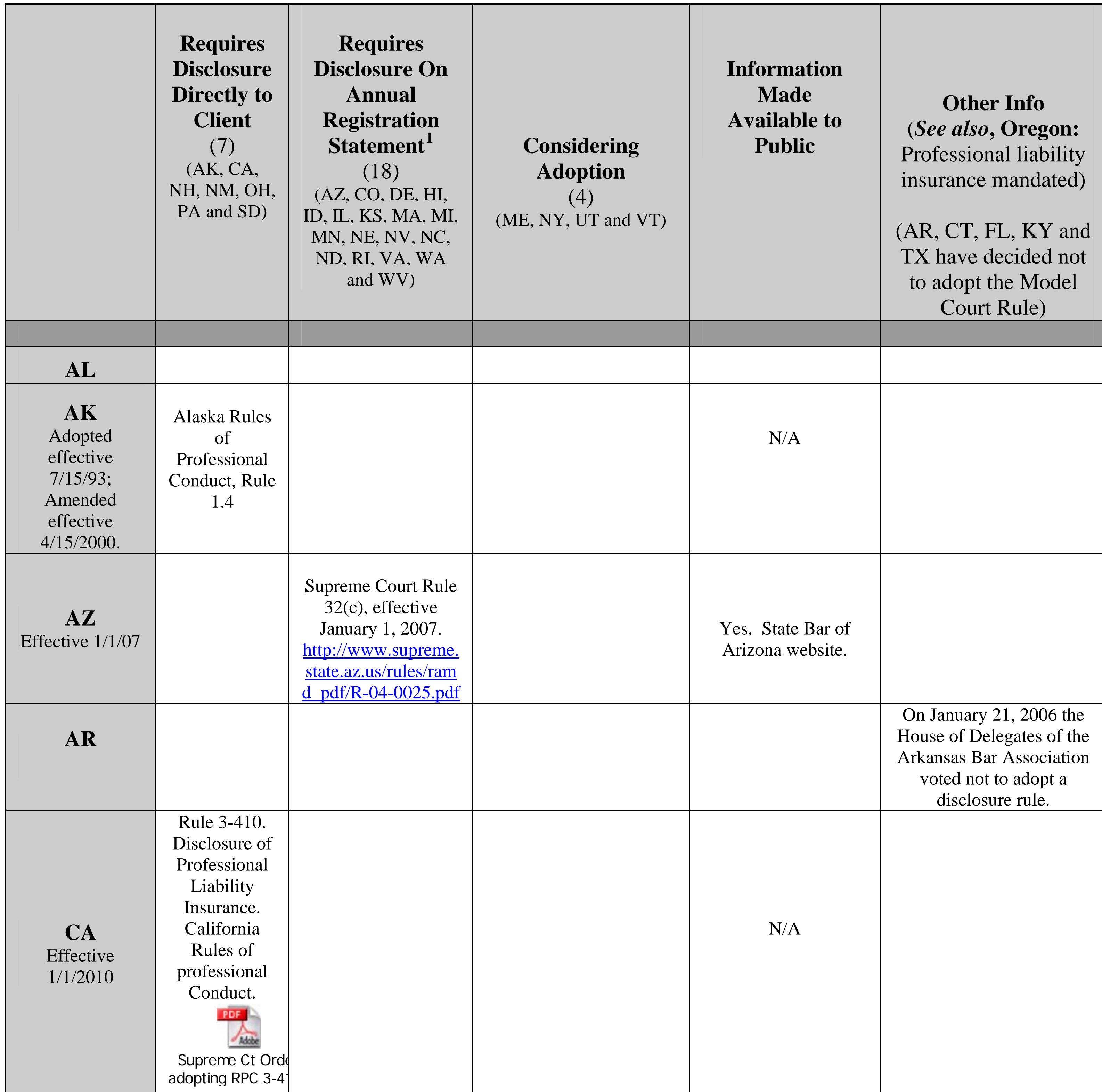
AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF ABA *MODEL COURT RULE ON INSURANCE DISCLOSURE*



	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
AL					
AK Adopted effective 7/15/93; Amended effective 4/15/2000.	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ Effective 1/1/07		Supreme Court Rule 32(c), effective January 1, 2007. http://www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA Effective 1/1/2010	Rule 3-410. Disclosure of Professional Liability Insurance. California Rules of professional Conduct. Supreme Ct Orde adopting RPC 3-41			N/A	

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
CO Effective 1/1/09		**X** http://www.courts.state.co.us/Media/Press_Docs/attorney%20reg%20insurance%20disclosure%20FINAL.pdf		**X** C.R.C.P. 227: **(c) Availability of Information.** The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.	**Colorado:** Supreme Court requires Colorado lawyers to disclose insurance status *Private-practice attorneys must make disclosure in annual registration.* DENVER – Beginning Jan. 1, 2009, all
CT					At its February 23, 2009 meeting, the Connecticut Superior Court Rules Committee voted unanimously to deny a proposal to adopt an insurance disclosure rule. http://www.jud.ct.gov/Committees/rules/rules_minutes_022309.pdf

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
DE Beginning with 1007 Annual Registration Form.		Registration Form		2007 Registration Form no longer available to public. 2009 Registration Form: http://courts.delaware.gov/forms/download.aspx?id=27968	
DC					
FL					Have declined to adopt the Model Court Rule.
GA					
HI Effective 12/1/07		**RSCH 2.17(d)** http://www.state.hi.us/jud/ctrules/rsch.htm#Rule_17		N/A	
ID Effective 10/1/06		Idaho Bar Commission Rule 302(7), effective October 1, 2006		Available to the public upon request.	
IL Effective 10/1/04		Amended Illinois Supreme Court Rule 756		Yes http://www.iardc.org/malpracticeinfo.html	
KS Effective 9/6/05		Supreme Court Rule 208A		Yes, by means designated by the Court.	http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=281
KY					On or about November 14,

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
					2006 the KY Sup. Ct. declined to adopt a disclosure rule.
LA					
ME			**X**		The Advisory Committee on the Rules of Professional Conduct is studying the proposed rule on insurance disclosure. On Maine's annual registration forms, there is a question regarding insurance. No detail is required. It is merely do you have professional liability insurance, 'yes' or 'no'
MD					
MA Effective 9/1/06		Rule 4:02 Effective Sept. 1, 2006. http://www.massreports.com/courtrules/sjcrules.htm#4:02		Yes.	

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
MI Beginning with the notice issued for fiscal year 2003-2004		Administrative Order No. 2003-5, dated August 6, 2003 http://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-27_08-06-03%20_or.html		**No.**	
MN Effective 10/1/06		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006) http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc		Yes. Rule 7. Access to Lawyer Registration Records	
MO					Not currently being considered.
NE Effective 11/1/03	http://casemaker.nebar.com/pdfs/nsbainfo/rules.pdf	Rules Creating, Controlling, and Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		Shall be made available to the public.	
NV Adopted 9/13/05 and effective 11/13/05	http://www.leg.state.nv.us/CourtRules/scr.html	Amended Supreme Court Rule 79 (Adopted September 13, 2005 and effective November 13, 2005)		Yes. It will be part of the lawyer's public record available by phone or email inquiry.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
NH Effective 3/1/03	New Hampshire Rules of Professional Conduct, Rule 1.19. (Disclosure of Information to the Client) http://www.courts.state.nh.us/supreme/orders/20072507.pdf			N/A	
NM Effective 11/2/09	Rule 16-104 Rules of Professional Conduct http://www.nmcompcomm.us/nmrules/nmruleset.aspx?rs=16				
NY			Under consideration.		
NC Adopted 10/1/03		North Carolina- Rules and Regulations, Subchapter A, Organization of the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		On the Bar's website: http://www.ncbar.com/home/member_directory.asp and http://www.ncbar.com/InsuranceDisclosure.asp	The North Carolina State Bar Association has proposed that the Rule Requiring Certification of Insurance Coverage be eliminated. http://www.ncbar.gov/rules/proprul.asp

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
ND Effective 8/1/09	http://www.court.state.nd.us/rules/Conduct/frameset.htm	Amended Rule 1.15 of the North Dakota Rules of Professional Conduct		Yes	
OH Effective 7/1/01	Ohio Rules of Professional Conduct, Rule 1.4(c) http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_4			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OR					All lawyers required to maintain professional liability insurance.
PA Effective 7/1/06	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. http://www.aopc.org/OpPosting/Supreme/out/50drd.1attach.pdf			N/A	
RI Effective 4/15/07		Rule 1(b) of Article IV "Periodic Registration of Attorneys". (Effective April 15, 2007)		http://www.courts.state.ri.us/supreme/pdf-files/ORDER_Amendments_to_RI_Supreme_Court_Aticle_IV_Rule_1(Attorney_registration).pdf	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (***See also*****, Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
SC					
SD Effective 1/1/99	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication)	(SD also requires lawyers to disclose on their annual registration statements.) http://www.sdbar.org/memberspublic/Information/2007_Certificate.pdf		N/A	SD has 7 years of certification to the Supreme Court - 97% have at least $100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year.
TX					By letter dated April 14, 2010 to the President of the State Bar of Texas, the Supreme Court of Texas declined to adopt an insurance disclosure rule. http://www.supreme.courts.state.tx.us/advisories/pdf/WBJ_Letter_Mandatory_Insurance_Disclosure_041410.PDF
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication. http://webster.utahbar.org/news/2005/07/		Required to disclose on registration statement but no Rule enacted. Bar will collect date on coverage for a 2-year period (2009-2011).
			On December 28, 2006 the Civil Rules		

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	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	**Considering Adoption** (4) (ME, NY, UT and VT)	**Information Made Available to Public**	**Other Info** (*See also*, **Oregon:** Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
VT			Committee proposed that the Vermont Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		
VA Amended effective 7/1/89; 1/1/90; 4/1/90.		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility		Yes, on Bar's website: (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). Total Members Answering PL Questions: 25,921 - FY2005 Private Practice – No Insurance: 1,892 (11%) Private Practice – With Insurance: 14,703 (89%)	Virginia State Bar is seeking comments on a proposed Rule requiring legal malpractice insurance. Comments are due by September 26, 2008. http://www.vsb.org/site/news/item/proposed-insurance-requirement/
WA Effective 7/1/07		Admission to Practice Rule 26 - Insurance Disclosure.		Yes.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (18) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV)	Considering Adoption (4) (ME, NY, UT and VT)	Information Made Available to Public	Other Info (*See also*, Oregon: Professional liability insurance mandated) (AR, CT, FL, KY and TX have decided not to adopt the Model Court Rule)
		(Effective July 1, 2007) http://www.courts.wa.gov/court_Rules/proposed/2005Dec/APR26.doc.			
WV Effective 5/6/05		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure http://www.state.wv.us/wvsca/rules/ArticleIII.htm		Yes. . . . shall be made available to the public by such means as may be designated by the West Virginia State Bar.	
WI					
WY					

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Model Rule 1.8(d)
“Literary or Media Rights”

RECOMMENDATION: NO ADOPTION

(Draft # -- N/A)

Summary: The Commission is not recommending adoption of a California version of Model Rule 1.8(d), which prohibits a lawyer from acquiring literary or media rights to a portrayal or an account of a client’s representation prior to the conclusion of that matter. See Introduction for reasons supporting this recommendation.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule rejected	☑ ABA Model Rule 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 3-300
Statute	
Case law	*Maxwell v. Superior Court* (1982) 30 Cal.3d 606; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706

☐ 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 for Adoption __1___
Opposed Rule for Adoption __7___
Abstain __1___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ 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 1.8.4* Literary or Media Rights

April 2010
(No rule is recommended for adoption.)

INTRODUCTION:

The Commission is not recommending adoption of a California version of Model Rule 1.8(d). In considering whether to adopt a California version of Model Rule 1.8(d), the Commission reassessed California's existing law and policy and concluded that the absolute prohibition in Rule 1.8(d) is not warranted. Adequate client protection is afforded if literary rights agreements are permitted with appropriate disclosures and consents that are involved with compliance with the Commission's proposed Rule 1.8.1.

The Model Rule carries forward concepts expressed in the Model Code. DR 5-103(A) stated in relevant part: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client..." EC 5-4 stated: "If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended."

California has not adopted a similar prohibition. Instead, literary rights arrangements between lawyers and clients have been considered under the Rule 3-300 rubric. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616, n. 6.) The California Supreme Court addressed the conflict issues associated with literary rights agreements in *Maxwell* and rejected the conflict of interest considerations that have been used to justify the Model Rule. *Maxwell* involved an agreement by which a criminal defendant charged with a capital offense entered into an agreement to confer the ownership of his life story to his defense counsel. The agreement had extensive disclosures. It advised the client to seek the advice of

independent counsel. The defendant was examined and was determined to have knowingly consented to the arrangement. Nevertheless, the trial court recused the defendant's lawyers on the grounds that the agreement created a conflict of interest.

The Supreme Court disagreed. It stated, "A life-story agreement creates no such inherent or inevitable conflict. The contract here discloses that the value of petitioner's story might benefit from a long, sensational trial leading to conviction and death. It seems not unlikely, though, that counsel's self-interests might best be served by a careful, diligent defense that avoids conviction or minimizes the penalty. A quiet strategy that succeeds may well make a better story than a flamboyant failure. Counsel's reputation, a precious professional and commercial asset, is enhanced; and the risks of professional discipline and demeaning criticism are reduced. Also, it may be commercially prudent to keep lurid facts confidential until the legal battle has ended.

Justice Files' dissenting remarks in the Court of Appeal are particularly apt: 'Although the literary rights contract is not a common experience for attorneys, the kind of 'conflict' discussed here is not at all unusual. . . . [Almost] any fee arrangement between attorney and client may give rise to a 'conflict.' An attorney who received a flat fee in advance would have a 'conflicting interest' to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a 'conflicting interest' to drag the case on beyond the point of maximum benefit to the client.

The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest.'" (*Maxwell*, *supra*, 30 Cal.3d at 619, n. 8.) The Court concluded that a client could give an informed consent to the conflicts of interest that could arise from a literary rights agreement.

The Court's concluding comment in *Maxwell* states, "We stress that our opinion connotes no moral or ethical approval of life-story fee contracts. We have addressed only this narrow question: May a criminal defendant (here charged with capital crimes) be denied his right to representation by retained counsel simply because of potential conflicts or ethical concerns even when he has asserted, after extensive disclosure of the risks, that he wishes to proceed with his chosen lawyers and no others? Our answer is No." (*Maxwell*, *supra*, 30 Cal.3d at 622.)

In a concluding footnote, the Court stated, "As Justice Files observed below: 'I do not disagree with EC 5-4 of the American Bar Association's Code of Professional Responsibility, which declares that the kind of contract which is here involved 'should be scrupulously avoided.' But we are here dealing with a fact and not a theory. The defendant and his attorneys have made the contract. The question now is whether this defendant, charged with four capital offenses, shall be deprived of his chosen attorneys and forced to accept the trial court's choice who, in the words of the Faretta court: '"represents" the defendant only through a tenuous and unacceptable legal fiction.'" (*Maxwell*, *supra*, 30 Cal.3d at 622, n. 13.)

Model Rule 1.8(d) imposes an unconsentable prohibition on literary right agreements based on principles that the Supreme Court did not accept in *Maxwell*. *Maxwell* demonstrates that such agreements do not always involve a conflict of interest and that a client can consent to a literary rights agreement in the face of potential conflicts. The Commission is not aware of any particular development that would suggest that the Court would be prepared to abandon *Maxwell.* Indeed, the Court cited *Maxwell* in its concluding footnote in *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 without questioning its holding.

ABA Model Rule Rule 1.8(d) Conflict Of Interest: Specific Rules: Literary or Media Rights	Commission's Proposed Rule* Rule 1.8.4 Literary or Media Rights	Explanation of Changes to the ABA Model Rule
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.	~~(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.~~	The Commission is recommending that no version of Model Rule 1.8(d) be adopted. See introduction.

* No California version of Model Rule 1.8 (d) is recommended.

ABA Model Rule **Rule 1.8(d) Conflict Of Interest: Specific Rules: Literary or Media Rights Comment**	**Commission's Proposed Rule** **Rule 1.8.4 Literary or Media Rights Comment**	**Explanation of Changes to the ABA Model Rule**
[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).	~~[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).~~	The Commission is recommending that no version of Model Rule 1.8(d) be adopted. See introduction.

Rule 1.8.4 Literary or Media Rights [Sorted by Commenter]						
TOTAL = 2 Agree = 2 Disagree = 0 Modify = 0 NI = 0						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
1	McIntyre, Sandra K.	A			No comment. (Agrees with the recommendation to not adopt the rule).	No response required.
2	Santa Clara County Bar Association	A			We support the Rules Revision Commission proposed recommendation to not adopt Rule 1.8.4.	No response required.

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

Rule 1.8(d): Literary or Media Rights

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8(d) is highlighted.)

Alabama. Alabama's Rule 1.8(e)(3) provides as follows:

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

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

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

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

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

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a

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

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

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

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

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

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

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

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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**:** In the rules effective January 1, 2010, Rule 1.8(a)(2) omits the phrase "desirability of seeking."

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

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> 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: In the rules effective April 1, 2009, Rule 1.8(a) deletes the language "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" and adds language from DR 5-104(A) of the old Model Code: "if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client…." Comments 3A and 4A-4F, which have no Model Rule equivalents, describe in considerable detail the problem of business transactions with clients, including (in Comments 4D-4F) issues related to a lawyer's receipt of a client's securities. New York omits Comment 5.

Rule 1.8(d) draws, in part, on DR 5-104(B) of the old Model Code, and Comment 9 provides more guidance than the equivalent Model Rule provisions concerning a lawyer's acquisition of media or literary rights that relate to a client matter.

Finally, Rule 1.8(j) and (k) as well as Comments 17, 17A, 17B, and 18-20, all address sexual relationships with clients and provide significantly more guidance in this regard than the equivalent Model Rule provision. Comment 17B concludes that "[a] law firm's failure to educate lawyers about the restrictions on sexual relations — or a firm's failure to enforce those restrictions against lawyers who violate them — may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules."

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies "other than in class actions." North

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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 a 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.

In July 2009, an Ohio statute (R.C. §1349.55) took effect to regulate companies that make cash advances to plaintiffs in pending civil cases in exchange for the right to receive part of the proceeds of any settlement, award, or judgment. Paragraph (C) of the statute provides that if a plaintiff gets into a dispute concerning the contract for the cash advance, "the responsibilities of the attorney representing the consumer [the plaintiff] in the civil action or claim shall be no greater than the attorney's responsibilities under the Ohio Rules of Professional Conduct."

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 or 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

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

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

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

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

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Proposed Rule 1.8(i)
"Proprietary Interest in the Subject Matter of Representation"

RECOMMENDATION: NO ADOPTION

Summary: The Commission is not recommending adoption of a California version of Model Rule 1.8(i) which, with limited exceptions, prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client. See Introduction for reasons supporting this recommendation.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule rejected	☑ ABA Model Rule 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 3-300
Statute	
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule for Adoption __0___
Opposed Rule for Adoption __8___
Abstain __2___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ 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 1.8.9* Proprietary Interest in the Subject Matter of Representation

April 2010
(No rule is recommended for adoption.)

INTRODUCTION:

The Commission is not recommending adoption of a California version of Model Rule 1.8(i). As explained in the Model Rule comments, Model Rule 1.8(j) is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. California has never included the concept of maintenance and champerty in a rule of professional conduct. The Commission believes that an acquisition of an ownership interest should be governed by proposed Rule 1.8.1, the general rule governing a business transaction with a client and a lawyer's acquisitions of an adverse interest. The comments to Model Rule 1.8(j) suggest that the ABA had a specific transaction in mind when it adopted the Model Rule, but neither the Model Rule nor the Comment provides any specific information on this point. The result is a Model Rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not.

ABA Model Rule **Rule 1.8(i) Conflict Of Interest: Specific Rules: Proprietary Interest in Subject Matter of Representation**	**Commission's Proposed Rule*** **Rule 1.8.9 Proprietary Interest in Subject Matter of Representation**	**Explanation of Changes to the ABA Model Rule**
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:	~~(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and	~~(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.
(2) contract with a client for a reasonable contingent fee in a civil case.	~~(2) contract with a client for a reasonable contingent fee in a civil case.~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.

* No California version of Model Rule 1.8(i) is recommended.

ABA Model Rule **Rule 1.8(i) Conflict Of Interest: Specific Rules: Proprietary Interest in Subject Matter of Representation** **Comment**	**Commission's Proposed Rule** **Rule 1.8.9 Proprietary Interest in Subject Matter of Representation** **Comment**	**Explanation of Changes to the ABA Model Rule**
[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.	~~[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.~~	The Commission is recommending that no version of Model Rule 1.8(i) be adopted. See introduction.

Rule 1.8.9 Proprietary Interest in the Subject Matter of Representation [Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	McIntyre, Sandra K.	A			No comment. (Agrees with the recommendation to not adopt the rule).	No response required.
2	Santa Clara County Bar Association	A			We support the Rules Revision Commission recommendation to not adopt this rule.	No response required.

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

Rule 1.8(i): Conflicts of Interest - Property Interest in the Subject Matter

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8(i) is highlighted.)

Alabama. Alabama's Rule 1.8(e)(3) provides as follows:

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

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

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

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

> A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.
>
> And Rule 4-210 provides in part as follows:
>
> (A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a

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

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

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

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

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

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

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

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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**:** In the rules effective January 1, 2010, Rule 1.8(a)(2) omits the phrase ‘‘desirability of seeking.''

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

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> 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: In the rules effective April 1, 2009, Rule 1.8(a) deletes the language ''knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client'' and adds language from DR 5-104(A) of the old Model Code: ''if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client….'' Comments 3A and 4A-4F, which have no Model Rule equivalents, describe in considerable detail the problem of business transactions with clients, including (in Comments 4D-4F) issues related to a lawyer's receipt of a client's securities. New York omits Comment 5.

Rule 1.8(d) draws, in part, on DR 5-104(B) of the old Model Code, and Comment 9 provides more guidance than the equivalent Model Rule provisions concerning a lawyer's acquisition of media or literary rights that relate to a client matter.

Finally, Rule 1.8(j) and (k) as well as Comments 17, 17A, 17B, and 18-20, all address sexual relationships with clients and provide significantly more guidance in this regard than the equivalent Model Rule provision. Comment 17B concludes that ''[a] law firm's failure to educate lawyers about the restrictions on sexual relations — or a firm's failure to enforce those restrictions against lawyers who violate them — may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.''

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies ''other than in class actions.'' North

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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 a 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.

In July 2009, an Ohio statute (R.C. §1349.55) took effect to regulate companies that make cash advances to plaintiffs in pending civil cases in exchange for the right to receive part of the proceeds of any settlement, award, or judgment. Paragraph (C) of the statute provides that if a plaintiff gets into a dispute concerning the contract for the cash advance, "the responsibilities of the attorney representing the consumer [the plaintiff] in the civil action or claim shall be no greater than the attorney's responsibilities under the Ohio Rules of Professional Conduct."

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 or 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

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

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

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

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

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Proposed Rule 1.10 [n/a]
"Imputation of Conflicts: General Rule"

(**Draft #7.1, 4/25/10**)

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. The Commission recommends a modified version of the public comment draft, which does not include a provision that permits the implementation of a non-consensual screen to avoid the Rule's application.

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 __11__
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:

See the Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.10* Imputation of Conflicts: General Rule

April 2010
(Draft rule following consideration of public comment)

INTRODUCTION & EXPLANATION OF REQUEST FOR RECONSIDERATION OF DECISION NOT TO ADOPT PROPOSED RULE 1.10:

At its March 7, 2010 meeting, the Regulation and Admissions Committee of the Board of Governors voted against adoption of proposed Rule 1.10. On March 9, 2010, the Board of Governors affirmed the vote of the Board Committee. At its March 26-27, 2010 meeting, the Commission considered the Board's decision, reviewed an alternative version of proposed Rule 1.10 that did not contain a provision permitting screening of a tainted lawyer to avoid the application of the Rule, and voted unanimously to request that the Board reconsider its position on a Rule of Professional Conduct that addresses the concept of the imputation of a conflict of interest. This Introduction explains the scope of the proposed Rule and the basis for the Commission's request for reconsideration. If the Board agrees with the Commission's recommendation that an alternative version of Rule 1.10 without a screening provision be adopted, then the proposed Rule will be circulated with the Batch 6 rules for a final 30-day public comment period that will end approximately June 15, 2010.

Model Rule 1.10 addresses two concepts: (i) the imputation of a lawyer's conflict other members in the lawyer's firm on the ground that lawyer regularly share confidential information of their clients; and (ii) the availabilty of an "ethical sceen" ("ethical wall") to rebut that presumption of shared confidences between the tainted lawyer and other persons in the firm. In the public comment draft that was circulated during fall 2009, the Commission recommended adoption of a rule that closely tracked the Model Rule, but without the ethical screening provision. After the initial public comment distribution, the Commission recommended adoption of a modified version of Model Rule 1.10 that would have permitted, in limited circumstances, the screening of a lawyer who moves from one private firm to another. However, a minority of the Commission took the position that no rule providing that an ethical wall could effectively rebut the presumption of shared confidences in context of a lawyer moving from one private firm to another should be adopted. The Board of Governors Committee on

* Proposed Rule 1.10, Draft 7.1 (4/25/10).

Regulation and Admissions considered the Commission's recommendation (including the view of the Commission minority) at its March 5, 2010 meeting and the Board Committee determined not to recommend Board adoption of any part of the proposed rule, including that part of the rule that addressed the concept of imputation of one lawyer's prohibition to other members in the firm. As to the screening provision, the Board Committee observed that the concept of ethical walls, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California, and was best addressed on a case-by-case basis by the courts. As to the provisions concerning imputation, the Board Committee concluded that the rule of imputation is well-settled in California law and that a Rule of Professional Conduct was not necessary. As noted, the Board affirmed the Board Committee's vote not to adopt any imputation rule.

The Rule that the Commission now proposes for adoption by the Board is the public comment version, revised and updated to conform to changes the Board has approved in other rules since the public comment version was circulated. Although the Commission is still closely-divided on whether proposed Rule 1.10 should include a provision that explicitly permits an ethical screen in limited situations to avoid imputation of a tainted lawyer's conflicts to other lawyers and employees in a firm, the Commission is unanimous in its recommendation that the Board reconsider its decision not to adopt any version of Rule 1.10 and instead adopt the public comment version of the Rule, as revised, that would codify imputation in a Rule of Professional Conduct but not expressly provide for screening. As noted below in the section titled "Variations in Other Jurisdictions," every jurisdiction has adopted the imputation aspect of Model Rule 1.10, with approximately half adopting a provision that expressly permits screening. The Commission is concerned that, although the doctrine of imputation might be well-settled in California case law, with the adoption of set of Rules that adheres to the Model Rule format and numbering system, the absence of a rule of professional conduct that addresses the concept would cause confusion among lawyers, particularly those from other jurisdictions. Inclusion of an imputation rule would make the concept, now hidden in California case law, more accessible to a larger number of lawyers. The rule will provide broader exposure to California's adherence to the concept and can only increase client protection by putting lawyers on notice of their obligations.

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. Comments [9] and [10], which have no counterpart in the Model Rule, clarify that the Rule is not determinative of disqualification motions. The Commission determined that these comments are necessary to permit the development of case law on the issue of screening as envisioned by the Board. See Explanation of Changes to the Comment.

Variations in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 1.10. Approximately half of the jurisdictions have adopted a provision that explicitly permits screening to rebut the presumption of shared confidences among members and employees of a firm. Thirteen jurisdictions have adopted a provision that broadly permits screening (Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington). "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. Another eleven jurisdictions permit screening in limited situations (Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, and Wisconsin). "Permits screening in limited situations" means that a jurisdiction's provision permits screening only of a lawyer who did not "substantially 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.) See Selected State Variations, below.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**	**Commission's Proposed Rule**[*] **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**	**Explanation of Changes to the ABA Model Rule**
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless	(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the ~~disqualified~~ prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.	Paragraph (a) is nearly identical to the introduction to paragraph (a) and subparagraph (a)(1) of Model Rule 1.10. Because the Commission is not recommending a screening provision as is found in Model Rule 1.10(a)(2), there is no reason for a separate subparagraph (a)(1). The only other change is the substitution of "prohibited" for "disqualified" to reflect that this Rule is primarily intended as a rule of discipline.
(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 lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or~~	See Explanation of Changes for paragraph (a).
(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 lawyer's association with a prior firm, and~~	In deference to the Board's decision not to adopt a counterpart to Model Rule 1.10, in part to permit the development of the law concerning ethical screens through court decisions, the Commission does not recommend adoption of Model Rule 1.10(a)(2) or its subparagraphs. These provisions, adopted by the ABA in February 2009, broadly permits screening of lawyers who move from one private firm to another.

[*] Proposed Rule 1.10, Draft 7.1 (4/25/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	Commission's Proposed Rule* Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	Explanation of Changes to the ABA Model Rule
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;	~~(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;~~	See Explanation of Changes for paragraph (a)(2).
(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	~~(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~~	See Explanation of Changes for paragraph (a)(2).
(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) 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.~~	See Explanation of Changes for paragraph (a)(2).

ABA Model Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	Commission's Proposed Rule[*] Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	Explanation of Changes to the ABA Model Rule
(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 *Goldberg v. Warner-Chappell* (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979).
(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 as 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 in 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 Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.	Subparagraph (a)(2) is nearly identical to 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 because the term "information protected by Business and Professions Code section 6068(e)" is a defined term in the Rules. See proposed Rule 1.0.1(e-2).
(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~~prohibition under this ~~rule~~Rule may be waived by ~~the~~each 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.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**	Commission's Proposed Rule* **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**	Explanation of Changes to the ABA Model 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~~imputation of a conflict of interest to 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.

ABA Model Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Commission's Proposed Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Explanation of Changes to the ABA Model Rule
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~~for purposes of this ~~definition~~Rule can depend on the specific facts. See Rule ~~1.0~~1.0.1(c), 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. Minority. A minority of the Commission believes there is insufficient reason for proposed Comment [1] to diverge from the Model Rule.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	**Commission's Proposed Rule** **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	**Explanation of Changes to the ABA Model Rule**
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~~duties of loyalty and confidentiality owed to the client as ~~it applies~~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).	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 of 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~~prohibited from further representation.	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.

ABA Model Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Commission's Proposed Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Explanation of Changes to the ABA Model Rule
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~~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 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 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. ~~Such persons~~In both situations, however, ~~ordinarily~~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~~1.0.1(k) and 5.3. See also Comment [9].	Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity. Minority. 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. The reference to Comment [9] has been included to direct lawyers to that Comment, which addresses the relation of this Rule to disqualification motions.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	Commission's Proposed Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	Explanation of Changes to the ABA Model Rule
[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 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).	[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 ~~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 Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c), .	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).
[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) and Comments [14A] to [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.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	**Commission's Proposed Rule** **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	**Explanation of Changes to the ABA Model Rule**
[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 (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.~~	Comments [7] through [10] of Model Rule 1.10 all relate to Model Rule 1.10(a)(2), which broadly permits screening and which the Commission has recommended not be adopted. See Explanation of Changes for paragraph (a)(2).
[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)(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.~~	See Explanation of Changes for Comment [7].
[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	~~[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~~	See Explanation of Changes for Comment [7].

ABA Model Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Commission's Proposed Rule Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	Explanation of Changes to the ABA Model Rule
evaluate and comment upon the effectiveness of the screening procedures.	evaluate and comment upon the effectiveness of the screening procedures.	
[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) 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.	See Explanation of Changes for Comment [7].
[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 disqualified lawyer.	[117] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), whereWhere a lawyer represents thehas become employed by a government agency after having served clients in private practice, or other nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyerimputation is governed by Rule 1.11(e).	Comment [11] is based on Model Rule 1.10, cmt. [11], but has been revised to track the recommended changes to proposed Rule 1.11, which diverges substantially from Model Rule 1.11, the subject of this Comment.
[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	[128] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.81.8.9, paragraph (k) of that Rule 1.8.11, and not this Rule, determines whether that prohibition	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.

ABA Model Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	Commission's Proposed Rule **Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment**	Explanation of Changes to the ABA Model Rule
in a firm with the personally prohibited lawyer.	also applies to other lawyers associated in a firm with the personally prohibited lawyer.	
	Rule Not Determinative of Disqualification Motions [9] 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 Charlisse C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.	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. Citations to relevant California authority have been added.
	[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.	Comment [10] has no counterpart in the Model Rules. It has been added to effectuate the Board's intent that the law of screening be developed through court decisions. The Comment is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for screening.

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 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.

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

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

(2) any lawyer remaining in the firm has information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.

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

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

COMMENT

Definition of "Firm"

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

Principles of Imputed Conflicts of Interest

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

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not 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 [9].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c), .

[6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and Comments [14A] to [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] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, imputation is governed by Rule 1.11(e).

[8] 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.

Rule Not Determinative of Disqualification Motions

[9] 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 Charlisse C. (2008) 45 Cal.4th 145; Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.

[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

Rule 1.10: Imputation of Conflicts of Interest: General Rule

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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.

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: In the rules effective January 1, 2010, the screening provision in Rule 1.10 is substantially similar to the Model Rule, except that Illinois has not adopted the additional requirements contained in Model Rule 1.10(a)(2)(ii) and (iii).

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. . . .

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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: The screening provision in Rule 1.10(b) is substantially similar to the Model Rule, except that Michigan has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii) and omits all of the requirements contained in Model Rule 1.10(a)(2)(iii).

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)

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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: In the rules effective April 1, 2009, Rule 1.10(c), which is simply the logical extension of Rule 1.9(b), specifies that a newly hired attorney does not create an imputed conflict of interest as long as that attorney had not acquired ''any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.'' In effect, then, the New York rules do not permit non-consensual screening of lateral lawyers from private practice (i.e., screening to avoid imputation without need for consent from the lateral lawyer's former client). The former New York Code did not do so either, but the New York Court of Appeals, in *Kassis v. TIAA,* 717 N.E.2d 674 (N.Y. 1999), ruled that screening would be allowed if the lateral lawyer's information with regard to the matter is ''unlikely to be significant or material.'' It remains to be seen whether the new rules were intended to ''overrule'' *Kassis* and whether, if they were, they can.

New York adds Rule 1.10(e)-(g), which contains detailed recordkeeping requirements for new engagements. These additional requirements are described in more depth in Comments 9 and 9A-9G.

Finally, New York adds Rule 1.10(h), which provides as follows: ''A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.''

North Carolina: The screening provision in Rule 1.10(c) is substantially similar to the Model Rule, except that North Carolina omits the requirements contained in Model Rule 1.10(a)(2)(iii) and has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii).

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 has a screening procedure in Rule 1.10(c) that requires lawyers to submit affidavits confirming compliance with the screen.

Pennsylvania: The screening provision in Rule 1.10(b) is substantially similar to the Model Rule, except that Pennsylvania omits the requirements contained in Model Rule 1.10(a)(2)(iii) and has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii).

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:

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(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:

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(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.

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Proposed Rule 1.11 [N/A]
"Special Conflicts Of Interest For Former And Current Government Officers And Employees"

(**Draft #10, 3/29/10**)

Summary: Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule's topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864].

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	*Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]; *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Civil Service Comm. v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

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

D.C. Rule 1.11; N.Y. Rule 1.11.

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __7___
Opposed Rule as Recommended for Adoption __3___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

The proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer's disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the disqualified lawyer is screened.

☐ Moderately Controversial – Explanation:

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.11* Special Conflicts of Interest for Former and Current Government Officers and Employees

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service, or between different government agencies. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule's topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]. In consideration of the policy reflected in the case law, the proposed Rule departs from the Model Rule by requiring that a government lawyer's conflict that arises from either: (i) representation of a former private client; or (ii) former employment by a different government entity be imputed to other lawyers in the governmental organization that currently employs the lawyer, unless (i) the former client consents, or (ii) the personally prohibited lawyer is timely screened. See Explanation of Changes for paragraph (e) and Comments [2], [9B] and [9C]. In addition, the Commission has changed the Model Rule's standard of "consent, confirmed in writing" to California's heightened standard, "informed written consent," because the latter provides more client protection. Further, the Commission made grammar and syntax changes to Model Rule 1.11(c) to clarify its meaning.

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* Proposed Rule 1.11, Draft #10 (3/29/10).

Principal Issues. There are two principal issues concerning this Rule:

1. Imputation and Screening within a Government Agency. Whether to impose imputation within a government agency as provided in paragraph (e) and, if imputation is imposed, whether to provide for the implementation of an ethical wall to rebut the presumption of shared confidences as provided in subparagraphs (e)(1) and (2). Although the Model Rule does not provide for imputation within a government agency, the Commission's position is that there is no principled reason in light of the current case law not to do so. The Commission has considered the policy rationale in the current case law and takes the position that if there is imputation, then screening of the personally prohibited lawyer should also be permitted to avoid the prohibition on representation being extended to an entire government agency. But see Minority, ¶. 1, below.

2. Knowledge Standard for Discipline. As in other jurisdictions that have adopted imputation as a *disciplinary* standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction. See Minority, ¶. 2, below.

Minority.

1. A minority of the Commission objects to paragraph(e) to the extent that screening is permitted to rebut the presumption of shared confidences between a former private lawyer now in the employ of the government and other lawyers in the prohibited lawyer's office or agency. The minority takes the position that paragraph (e) will undermine the ability of lawyers to promote client candor, an attribute that is essential to the effective functioning of the attorney-client relationship. See Dissent A, below.

2. A second minority takes the position that the Rule is unnecessary because the subject of the rule is already covered by statutory or regulatory limitations on the lateral movement government lawyers into or out of government, or between government agencies. See Dissent B, below.

3. A third minority of the Commission objects to the recommended adoption of the Model Rule's "knowingly" standard as applied to imputation in paragraphs (b) and (e). This minority takes the position that it will immunize lawyers who fail to conduct an adequate conflicts check. See Explanation of Changes for paragraph (b).

Public Comment. Three commenters (one organization and two individuals) approved the rule without further modification. The remaining commenters (local bar committees, the Department of Justice and OCTC), approved the rule with modifications.

On the issue of "knowingly," (see Minority, above), two commenters approved the recommended (and ABA) standard of actual knowledge (COPRAC and OCBA) and two other commenters urged adoption of a "knows or reasonably should know" standard (OCTC and SDCBA). See Public Commenter Chart.

On the issue of imputation within a government agency as provided in paragraph (e), one Commenter (Department of Justice) opposed its implementation. Nevertheless, the same Commenter suggested that if the imputation provision were retained, the requirement of notice should be stricken. See Public Commenter Chart & Explanation of Changes for paragraph (e) and Comments [9A] – [9D].

Two commenters expressed concern that relegating to the comment the substance of a recently-decided Supreme Court case on private-to-government migration, *City & County of San Francisco v. Cobra Solutions, Inc*., (2006) 38 Cal. 4th 839 [43 Cal.Rptr.3d 771], would effectively overrule the case and requested its inclusion in the black letter of the rule itself. See Public Commenter Chart and Explanation of Changes for Comment [9C].

Variations in Other Jurisdictions. Every jurisdiction has adopted the concept found in Model Rule 1.11, i.e., a loosening of a strict application of conflicts principles in the government lawyer context, and all permit screening of a former government lawyer who moves to private practice. See Selected State Variations, below.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**Commission's Proposed Rule*** **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**Explanation of Changes to the ABA Model Rule**
(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	Paragraph (a) and subparagraph (a)(1) are identical to Model Rule 1.11(a) and (a)(1).
(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.	(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent~~, confirmed in writing,~~ to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).	Subparagraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed "consent, confirmed in writing" to California's heightened standard, "informed written consent" because the latter provides more client protection. The last sentence of this paragraph has been added to make clear that matters that come within the scope of proposed Rule 1.12(a), concerning former judicial officers and employees, are governed by that rule and not by Rule 1.11. Lawyers should not be confused about which rule applies in a given circumstance.
(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:	(b) When a lawyer is ~~disqualified~~prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:	Paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word "disqualified" has been changed to "prohibited." Whether a lawyer is potentially subject to discipline will be determined by this Rule, but whether a lawyer will be disqualified from representation will be a matter for decision by the tribunal before whom the lawyer appears.

* Proposed Rule 1.11, Draft 10 (3/29/10); Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule[*] Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
		Under paragraph (b), a law firm is permitted to use screening in order to avoid imputation of a conflict from one lawyer to the rest of the law firm. *Minority*. A minority of the Commission dissents from this paragraph because the use of the word "knowingly" will require actual knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. The minority believes this will immunize from discipline a lawyer who does not bother to check for conflicts of interest. The lawyer who knows or reasonably should know that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.
(1) the 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 the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.	(1) the ~~disqualified~~personally prohibited 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 the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~rule~~Rule.	Subparagraphs (a)(1) and (a)(2) track the language of the Model Rule. However, "personally prohibited" is substituted for "disqualified" for the same reasons stated in the Explanation for paragraph (b), above, and to focus attention on the individual lawyer whose conflict creates the necessity for the screen. In subparagraph (2), "rule" has been capitalized in accordance with the convention followed by the Commission in referring to these Rules.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.	(c) Except as law may otherwise expressly permit, a lawyer ~~having~~who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person ~~acquired when the lawyer was a public officer or employee~~, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority ~~and which~~, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and ~~which~~that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the ~~disqualified~~personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.	Paragraph (c) largely tracks the wording of Model Rule 1.11(c). However, the first sentence has been reordered to clarify its meaning in response to a comment received from the Office of Trial Counsel. Also, the subordinate clauses in the second sentence have been broken up by commas , and the word "that" is used for clarity and for correct parallel construction. In the third sentence, "prohibited" has been substituted for the word "disqualified" because this Rule will be applied in disciplinary matters, while whether a law firm will or will not be disqualified is a matter for decision by the tribunal before which the law firm is appearing.
(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	Paragraph (d) and its subparagraphs are nearly identical to Model Rule 1.11(d).

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
(1) is subject to Rules 1.7 and 1.9; and	(1) is subject to Rules 1.7 and 1.9; and	
(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or	(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent, ~~confirmed in writing~~; or	In subparagraph (d)(2)(i), California's heightened standard, "informed written consent," has been substituted for "consent confirmed in writing" because the phrase "informed written consent," which is used throughout the proposed Rules, provides greater client protection than the Model Rule formulation.
(ii) negotiate for private 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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	(ii) negotiate for private 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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	The phrase "or with a law firm for a party" has been added to broaden the scope of the prohibition on negotiation to encompass not only negotiating with the particular lawyer who is representing the party, but also that lawyer's law firm.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
	(e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government agency as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:	Paragraph (e) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (e) and its subparagraphs because it reflects current California law and policy that fosters the important duties of confidentiality and loyalty to clients. Under the introductory clause to paragraph (e), when a former private lawyer who is now working for the government is personally prohibited from being involved in a law suit, that lawyer's prohibition is imputed to all other lawyers in the same government agency. Unlike California, e.g., *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403], the Model Rule does not impute a former private lawyer's prohibition to other lawyers in government. The Commission has determined that the policy underlying imputation in these situations is sound, whether the private lawyer moves to another private firm (see Explanation of Changes for proposed Rule 1.10) or moves to government employment. In either situation, the lawyer's former private clients have a reasonable expectation that the lawyers they have retained will not switch sides and work in the same firm or office as their opponents. Nevertheless, the imputation of the former private lawyer's prohibition to other lawyers in the government agency is not irrebuttable. Other lawyers in the office will be permitted to continue the representation so long as the requirements of subparagraphs (1) and (2) are satisfied, i.e., the prohibited lawyer is timely screened and, where practicable, appropriate notice is given to the former private client to enable that client to monitor the screen and ensure it retains its effectiveness.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Commission's Proposed Rule* **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Explanation of Changes to the ABA Model Rule
	(1) the personally prohibited lawyer is timely screened from any participation in the matter; and	See Explanation of Changes for paragraph (a).
	(2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements.	See Explanation of Changes for paragraph (a). The first two clauses of paragraph subparagraph (a)(2) have been added to avoid creating a situation where requiring notice might unduly prejudice the public interest, for example, where an ongoing criminal investigation might be compromised by prompt provision of notice to the former client. However, because of concerns with due process rights of an accused, the exception to giving notice is available only to the extent that giving notice would not be practicable under the circumstances (see Comment [9C] for elaboration on this point), or if there is law prohibiting the notice or a court has ordered that notice not be given. Otherwise, the responsible government lawyers will be in violation of the subparagraph if notice is not given.
(e) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and	(~~e~~f) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and	Proposed paragraph (f) and its subparagraphs are identical to Model Rule 1.1(e) and its subparagraphs. That paragraph has been re-lettered because of the addition of new paragraph (e), which does not have a counterpart in the Model Rule.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Commission's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
(2) any other matter covered by the conflict of interest rules of the appropriate government agency.	(2) any other matter covered by the conflict of interest rules of the appropriate government agency.	

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.	[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to thethese Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.01.0.1(e) for the definition of "informed written consent."	Proposed Comment [1] is substantially the same as Model Rule 1.11, cmt. [1]. However, the reference to the Rules of Professional Conduct has been changed to "these Rules" to conform with the drafting convention the Commission is following. The reference to Rule 1.9 has been added because a lawyer who served or who is currently serving as a public officer or employee is subject to both Rule 1.7 and Rule 1.9. "Informed consent" has been changed to "informed written consent" in the last sentence because it affords greater protection to the government agency. Following public comment, a reference to Bus. & Prof. Code § 6131 was added as an example of a statute governing the subject matter of this Rule.
[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government	[2] Paragraphs (a)(1), and (a)(2) and (d)(1) restate the obligations of an individual lawyer who has servedtoward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government toward a former government or private client. [Rule 1.10 is not applicable to the conflicts	Although generally based on Model Rule 1.11, cmt. [2], Comment [2] has been substantially revised to clarify when the various provisions are applicable. The first sentence clarifies that paragraph (a) applies not only to lawyers who move from government employment to private practice or other nongovernmental employment, but also to lawyers who move from employment by one government agency to another. The second sentence clarifies that paragraph (d)(1) applies when a lawyer has moved from private practice or nongovernmental employment to governmental employment.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.	of interest addressed by this Rule.] Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. ~~Because of the special problems raised by imputation within a government agency~~ Similarly, paragraph (~~d~~e) ~~does not impute~~provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, ~~although ordinarily it will be prudent to screen such lawyers~~but also provides for screening and notice in certain situations.	The third sentence, which is identical to the Model Rule, has been placed in brackets pending resolution of the Commission's request for reconsideration of the Board's decision to reject proposed Rule 1.10. The fourth sentence has been modified to provide the exact opposite of the Model Rule, which has no counterpart to proposed paragraph (e) and, contrary to California law, does not impute the personal prohibition of a former government lawyer to other lawyers in the same office or agency as the prohibited lawyer.
[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.	[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). [As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by ~~these~~ paragraphs (a)(2) and (d)(2).]	Comment [3] is nearly identical to Model Rule 1.11, cmt. [3]. The phrase, "government or" has been added to the second sentence to reflect the fact that paragraph (a) applies whether a lawyer has left government employment for private practice or to work for a different government agency. The last sentence has been placed in brackets pending resolution of the Commission's request for reconsideration of the Board's decision to reject proposed Rule 1.10. The references to specific paragraphs of Rule 1.11 in that sentence have been added for clarity.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment**	Commission's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment**	Explanation of Changes to the ABA Model Rule
[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.	[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraphparagraphs (b) and (e) are necessary to prevent the disqualification rulethis Rule from imposing too severe a deterrentan obstacle against entering public service. The limitationlimitations of disqualificationrepresentation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or	Comment [4] is substantially the same as Model Rule 1.11, cmt. [4]. The reference to "this Rule" has been changed because this Rule does not dictate how a tribunal may rule on the subject of disqualification and because the rewording makes the next to last sentence active voice instead of passive. The word "obstacle" has been substituted for "deterrent" in the next to last sentence because paragraph (a), by addressing a lawyer's obligations and limitations on employment *after* leaving government service, acts as a deterrent to going into public service in the first instance, while paragraph (d)'s provisions more directly pose an obstacle to a lawyer being hired by the government. The last sentence has been revised because this Rule does not dictate whether a lawyer or law firm will be disqualified. Instead, the subject of disqualification will be decided by tribunals on a case by case basis. See also Comment [9C].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	parties, rather than ~~extending disqualification~~imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.	
	[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with	Comment [4A] has no counterpart in the Model Rule. The Commission recommends its addition to clarify the purposes of Rule 1.11(a)(1) and (c). This comment is nearly identical to New York Rule 1.11, cmt. [4A].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.	
[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].	[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. ~~However, because~~ Because the conflict of interest is governed by ~~paragraph~~paragraphs (~~d~~a) and (b), the latter agency is ~~not~~ required to screen the lawyer~~ as paragraph (b) requires a law firm to do~~. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [~~9~~14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].	The first sentence of proposed Comment [5] is identical with that in Comment [5] of the Model Rule. The second sentence has been amended to conform to California law. The reference in the Model Rule Comment to "paragraph (d)" has been changed to "paragraphs (a) and (b)" because the latter paragraphs govern the situation that is described. See also Explanation of Changes for Comment [2], above. In the last sentence, the citation has been changed to Comment [14] of proposed Rule 1.13 because that is the California counterpart of Comment [9] of Model Rule 1.13. A reference to *Civil Service Commission v. Superior Court* has been added to direct readers to that important case on the issue of when a government entity is the same or a different client.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment**	**Commission's Proposed Rule** **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment**	**Explanation of Changes to the ABA Model Rule**
	[5A] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.	Paragraph [5A] is identical to Model Rule [9]. It has been moved to follow Comment [5] because it logically should follow Comment [5].
[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.	**Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)** [6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule ~~1.0~~1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.	Comment [6] is nearly identical to Model Rule 1.11, cmt. [6]. The phrase, "for former government lawyers" has been added to distinguish the screening arrangement permitted by these provisions from the screening arrangement provided in paragraph (e) that may be utilized by former private lawyers who are now in government service.
[7] 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.	[7] Notice to the appropriate government agency, 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 [7] is nearly identical to Model Rule 1.11, cmt. [7]. The phrase "to the appropriate government agency" is added in order to clarify the appropriate recipient of the notice.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.	[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information~~, which means actual knowledge~~; it does not operate with respect to information that merely could be imputed to the lawyer.	Comment [7] is based on Model Rule 1.11, cmt. [8]. It has been reworded for brevity. *Minority*. A minority of the Commission disagrees with the substance of this comment because both this comment and the Model Rule permit easy evasion of the client protections of Rule 1.11 by a lawyer who does not, for example, run a conflicts of interest check and thereby evades actual knowledge of the conflict.
[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.	~~[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.~~	Model Rule 1.11, Comment [9], has been renumbered [5A] and placed after Comment [5]. See Explanation of Changes for Comment [5A].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially. [9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).	Comment [9A] has no counterpart in the Model Rule. The Commission recommends its addition to make clear precisely what consents a former government lawyer must obtain to *personally* participate in a matter. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to Rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. The Commission is concerned that without this clarifying comment, the requirement of the former client's consent will not be apparent.
	Screening of Current Government Lawyers Pursuant to Paragraph (e) [9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely screened and notice is given as soon as practicable to the former client to enable it to ensure the government's compliance with the screen. But see Comment [9D].	Comment [9B] has no counterpart in the Model Rule, in part because the Model Rule does not have paragraph (e). With Comment [9B], the Comment clarifies the applicability of paragraph (e) when a lawyer moves from private practice or other nongovernment employment into government employment. A cross-reference to Comment [9D] is provided to direct lawyers to that Comment, which explains an important limitation on the potential availability of screening.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	[9C] Paragraph (e)(2) recognizes that, in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.	Comment [9C] has no counterpart in the Model Rule. It has been added to clarify the applicability of the "practicability" exception to providing notice under paragraph (e)(2). Comment [9C] responds to a comment from a representative of the Department of Justice and explains that certain extraordinary circumstances might exist where the required client notice may be delayed if the giving of such notice at an earlier time would compromise a governmental investigation.
	This Rule Not Determinative of Disqualification [9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].	Comment [9D] has no counterpart in the Model Rule. It has been added in order to clarify that, although this Rule affects discipline, whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule. The reference to *Hollywood v. Superior Court* has been added because that case explains the different policies concerning discipline and disqualification. The Comment also calls the reader's attention to important California decisional law, including *Cobra Solutions* and *Younger*, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Commission's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
		actually handling the matter. The Commission determined that rather than codify these cases in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a comment to provide notice to lawyers of the potential applicability of this case in the civil disqualification context.
[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	**Matter** [10] For purposes of paragraph (~~e~~f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	Comment [10] is substantively identical to Model Rule 1.11, cmt. [10].

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
Dissent to Recommendation to Adopt Paragraph (e) of Proposed Rule 1.11

Minority Dissent A

A minority of the Commission dissents from the inclusion of screening in Rule 1.11(e), which allows screening, without a former client's knowledge or consent, when a lawyer, possessing a former client's confidential information, becomes employed by a government agency. The screening procedure in Rule 1.11(e) differs from other screening proposals in that it deletes any requirement that the former client be informed of the conflict of interest, or the screening measures the government agency has adopted.

For example, a lawyer representing a client with respect to matters that are the subject of a governmental investigation, may, while the investigation is ongoing, become employed by that agency. Under Rule 1.11(e) the agency could continue to pursue the investigation without informing the former client. The Rule allows the agency to screen the client's former lawyer without client consent and without affording the former client any means to verify compliance. The former client, who is aware that his or her former lawyer is now employed by the government agency, must live in fear that he or she has revealed information to the lawyer that could further the investigation against the former client. The former client who learns long after the fact that the lawyer was employed by the government is left with a sense of betrayal. The legal profession cannot expect to promote client trust and candor when such situations are allowed to occur. A client cannot trust that he or she can communicate with a lawyer in confidence when a government agency erects a screen without notice to the client, and when the client can never verify compliance.

The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. ***The duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence.*** This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)

The legal profession invites client candor by imposing an austere duty of confidentiality on lawyers. Through the strict application of this duty, a client never has to worry about revealing confidential information to a lawyer and never has to question their decision to do so. Rule 1.9 extends that purpose by preventing lawyers from putting themselves in a position where they would be tempted to reveal or use against a former client information that the former client imparted in confidence. These Rules are designed to promote client trust in the client's ability to communicate with a lawyer without fear of consequence.

When the lawyer is employed by a government law office, Rule 1.11 imputes the conflict to the other lawyers in the agency in order to assure former clients that the lawyer will not be tempted by the agency's interests to reveal or use the former client's confidential information. California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because the client has no means to assure that information in the possession of a firm representing the

client's adversary will not be shared and used or disclosed against the client's interests. The legal profession cannot assure clients that they can communicate with lawyers in confidence when the client cannot verify that a government agency employing the client's former lawyer is not using the information in circumstances where the agency would be tempted to use it against the client's interests.

As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

> The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's 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."*** (*Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125 [45 Cal.Rptr.2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients because it cannot be verified by a client. A client who has not expressed confidence in a screen by consenting to it should not be forced to accept screening by fiat. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn after the representation has ended that information the client expected would be held in confidence is in the possession of a government agency that is now prosecuting a matter against the former client. These considerations apply with equal force when a lawyer armed with a former client's confidential information becomes employed by a government agency. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a government agency can harbor that confidential information behind an undisclosed, unconsented and unverifiable screen while the agency pursues a course of action against the former client in a situation where the information would advance the agency's position.

Commission members have not objected to screening in Rule 1.11(b), which applies to lawyers moving from public agencies to private practice or between public agencies. Screening in this context facilitates government service without jeopardizing the interests of private clients. Furthermore, the governmental legal community has participated actively in the Commission's deliberations and has not raised any concerns or objections to screening in this limited context. However, there are very difference considerations when the former client is a member of the public. In such situations, screening is not appropriate because it undermines public trust in the ability to communicate with a lawyer in confidence.

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Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
Dissent to Recommendation to Adopt Proposed Rule 1.11

Minority Dissent B

Rule 1.11 deals with conflicts of interest for government employees – those entering the government, leaving the government, or moving from one government entity to another.

This rule is both extraordinarily detailed and at the same time quite unnecessary. For those leaving the government, most government organizations have their own standards of ethics which greatly limit the right of departing employees (not just lawyers) to interact for a stated period of time with the agency they just left, and which prohibit the use of internal government materials for private purposes. These rules vary from one government entity to another, but it can fairly be said that all of them are more specific, more protective of the government, and more precise in their penal sanctions than anything generic which the State Bar could recommend to the Supreme Court, including the proposed Rule.

The same thing is largely true with respect to inter-government moves and transfers, where any event is likely to be so specific that it needs no generic, universal regulation by the legal profession. And when it comes to protecting the confidences of private parties in the hands of attorneys entering the government, case law has been generally trusting of screens imposed by the government. When a high government supervisor, or even the head of a government office is involved, case law has been very specific (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839), and it is continuously evolving as shown by the recent case of *In re Charlisse C.* (2008) 45 Cal.4th 145.

The Rule is thus unnecessary for guidance, and as in the case of most conflict tools, discipline is virtually nonexistent. The Rules Revision Commission found this subject incredibly theoretical. Its debate, and the lengthy comments to the Commission by the United States Attorney's Office and others, show the difficulty inherent in any effort to include in a single rule a set of variations which account for the infinite variety of government functions. The Commission found the subject so difficult, and so hard to follow, that it is proposing the insertion of subheadings for easier comprehension.

The subject of lawyers entering into government service is certainly one which needs to be addressed. The courts have been protective of mobility of government lawyers, as in *Chambers v. Superior Court* [citation], and at the same time have seen to the maintenance of attorney independence, as in *Charlisse C., supra,* and to the avoidance of potential prejudice or partisanship, as in *Cobra Solutions, Inc., supra*.

It is certain that future cases will present further varieties of issues, which the Commission's draft will have missed despite its diligent efforts. Why, then, burden the profession and the public with an effort to encompass every solution within an impossible framework, where we can be certain that new variations will go in different directions and challenge the courts and counsel? The existence of a rule which did not contemplate such variations will only make such delicate situations more difficult to resolve.

The dissenters can understand the historical reason why writers would wish to address this subject – primarily to flag it for attention and to make sure that it is approached with the sensitivity it deserves. But those days are behind us, and efforts to standardize this hydra-headed subject are more likely to rigidify it than to provide it with the infinite flexibility it requires.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Commission's Proposed Rule – Draft 10 (3/29/10) – CLEAN)

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the personally prohibited 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 the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent; or

(ii) negotiate for private 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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government agency as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter; and

(2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements.

(f) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e) for the definition of "informed written consent."

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. [Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.] Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect

the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). [As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).]

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraphs (b) and (e) are necessary to prevent this Rule from imposing too severe an obstacle against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

[5A] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice to the appropriate government agency, 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.

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.

[9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

Screening of Current Government Lawyers Pursuant to Paragraph (e)

[9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely screened and notice is given as soon as practicable to the former client to enable it to ensure the government's compliance with the screen. But see Comment [9D]

[9C] Paragraph (e)(2) recognizes that, in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would

pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.

This Rule Not Determinative of Disqualification

[9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].

Matter

[10] For purposes of paragraph (f) of this Rule, a “matter” may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Cardona, George S. U.S. Attorney's Office, Central Dist. California	M			For the following reasons, we do not believe that proposed subsection (e) and its accompanying comments should be adopted:	
				1.11(e)	1. As applied to prosecuting offices, proposed subsection (e) appears contrary to California law. In *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006), which involved a city attorney's office engaged in civil litigation, the court relied in part on the decision in *Younger v. Superior Court*, 77 Cal. App. 3d 892 (1978), in which the Court of Appeal upheld an order disqualifying the entire Los Angeles County District Attorney's Office from prosecuting a defendant because that defendant had previously been represented by the recently appointed Assistant D.A. (Johnie Cochran), "notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm." *Cobra*	1. The Commission disagrees with the commenter's reading of *Younger* and *Cobra Solutions* that limits their applicability, at least in the disciplinary context. The commenter is conflating the law concerning disqualification with the law related to discipline. The Supreme Court recognizes the difference: Putting aside for the moment the absence of any trial court finding that [the prosecutor] committed misconduct, *we emphasize that recusal motions are not disciplinary proceedings against the prosecutor*. The ultimate focus of the section 1424 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor. *Thus, in some cases a prosecutor may have committed misconduct but not be subject to recusal* because the misconduct does not impair the defendant's right to a fair

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Solutions, 38 Cal. 4th at 850. As *Cobra Solutions* recognized, however, its continued reliance on *Younger* was appropriate only because the disqualification issue before it did not involve a prosecuting agency, for which Penal Code § 1424 governs. * * * We recognize that discipline and disqualification/recusal are different matters. By essentially returning to the *Younger* standard for disciplinary purposes, however, proposed subsection (e) would, as applied to prosecuting offices, effectively requiring those offices and their attorneys, as a means of avoiding discipline, to apply the *Younger* standard as the basis for recusal, a result that would run directly contrary to the supercession of *Younger* by the legislature's enactment of Penal Code Section 1424. It would also run contrary to the policy underlying Penal Code Section 1424, which was "a legislative response to a substantial increase in the number of unnecessary prosecutorial recusals" under the earlier standard. See *Jenan*, 140 Cal. App. 4th at 791. As a result, if the Commission adopts proposed subsection (e) as drafted, it will, as applied to prosecuting offices, run contrary to California law.	proceeding; *in other cases, a prosecutor may commit no misconduct but nevertheless be subject to recusal* because a conflict, through no fault of the prosecutor's, jeopardizes the defendant's rights. *Hollywood v. Superior Court* (2008) 43 Cal. 4th 721, 731 [emphasis added]. The Commission does not believe that paragraph (e), which provides for imputation within a government office, is at odds with California law.

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

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					2. Even for government and public offices engaged in activities other than criminal prosecution, California law generally permits screening, and requires judicial consideration of the effectiveness of the screening and a multitude of other factors in assessing whether vicarious disqualification of a government or public office is required based on an individual attorney's personal conflict, even if that individual attorney is a senior supervisor. See *Cobra Solutions*, 38 Cal. 4th at 850 n.2.	2. As already noted, the Rule is not determinative of disqualification. In fact, the Commission has included Comment [9D], which provides: [9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., Hollywood v. Superior Court (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839 [43 Cal.Rptr.3d 771]; *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. The foregoing comment was revised following public comment to provide citations to case law that should provide further guidance on the application of the Rule.
					2a. California cases have not adopted a bright line, inflexible rule of the type included in proposed subsection (e) that would require notice to the former client to render screening effective. The California cases' placement of the burden of establishing the effectiveness of screening on the government or public office defending against a disqualification motion	2a. The Commission recognizes the commenter's concerns with the notice requirement under paragraph (e)(2) and has revised that provision to address the commenter's concerns: (2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					appears to be in part based on recognition that the party seeking disqualification will not have had notice or an opportunity to obtain advance access to the relevant information relating to screening. See *In re Charlisse C.*, 35 Cal. 4th at 166. We appreciate the Commission's apparent recognition, as evidenced by its addition to proposed subsection (e)(2) of a sentence recognizing that such notice need not be given where "prohibited by law or a court order," that there are instances where other laws (for example, Federal Rule of Criminal Procedure 6(e)'s secrecy limitations prohibiting disclosure of grand jury information, or Proposed Rule 1.6's prohibitions on the disclosure of confidential client information) may preclude such notice. But this does not address all the situations in which notice may be impossible. For example, the very nature of an ongoing investigation may require that the existence of the investigation remain confidential. In such circumstances, notice to the target of the investigation of screening, which would be notice of the investigation's existence, would render the investigation impossible to complete.	circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. In addition, the Commission has added Comment [9C] to further clarify the "practicability" exception to the notice requirement: [9C] Paragraph (e)(2) recognizes that in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.

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

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					3. The decisions in which California courts have relied on policy considerations to impute and require vicarious disqualification based on personal conflicts of the head of a government or public office have arisen in situations involving relatively localized government or public offices. The policy concerns underlying these decisions do not apply to large, complex government offices of the size and scope of the Department of Justice, which has approximately 11,000 lawyers operating through a number of distinct divisions and offices. Yet, proposed subsection (e) has no limitation on the scope of the "office, agency or department" to which it would apply its requirements, posing the possibility of absurd results. For example, it would make no sense to require that the entire United States Department of Justice, including the local United States Attorney's Office handling the matter, be recused from an ongoing undercover investigation of a relatively small defense procurement fraud in California simply because current Attorney General Eric Holder happened to be involved in that matter before he was appointed to his position. All that should be required is that the Attorney General, who typically is not involved in local	3. The Commission disagrees with the commenter's position that including a comment in a disciplinary rule that puts government lawyers and the government on notice of the potential civil disqualification that might result regardless of whether the government has implemented a screen will result in the absurd results described. Imputation of a government lawyer's personal conflict is appropriate, especially when the source of the personal disqualification is the government lawyer's former representation of a private client. The Commission also notes that paragraph (e), which recognizes this principle of imputation, also provides the government with a means to avoid the disqualification of the government agency based on that imputation: a timely screen.

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					investigations in any event, be screened from participating in or supervising the investigation in any way. * * * What this demonstrates is that issues of this type are far better dealt with, as they have been by both California and Federal courts, on a case by case basis that can take into account the multitude of factors that must be assessed based to determine whether screening is timely and effective, factors that include the relative position of the individual with the personal conflict, the mechanics of the screening implemented, and the likelihood that the individual's position would influence the handling of the case regardless of these screening efforts. 4. The policy factors cited by California and Federal courts in their discussion of vicarious disqualification of government and public offices also weigh in favor of leaving imputation of conflicts to the disqualification arena, and not addressing them in a disciplinary rule. In particular, California courts have recognized the "heavy" "burdens" imposed by vicarious disqualification of government legal offices. *Cobra Solutions*, 35 Cal. 4th at 852, and also recognized that incentives to breach client confidences are less in a public office	 4. The Commission agrees that California courts have recognized certain policy factors that arguably weigh against vicarious disqualification of government offices. However, the "heavy" "burdens" that might be imposed on the government and the purported lack of a financial interest of public sector lawyers are arguments that weigh in favor of affording government entities the remedy of implementing an ethical screen to avoid vicarious disqualification. They are not relied upon to justify not recognizing the principle of imputation within government agencies. Although tracking conflicts of its lawyers might pose some challenges to the

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

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]

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					because "public sector lawyers do not have a financial interest in the matters on 6 which they work." *In re Charlisse C.*, 45 Cal. 4th at 163 (quoting *City of Santa Barbara v. Superior Court*, 122 Cal. App. 4th 17, 24-25 (2004)). * * * In addition to the effectiveness of screening, California courts consider other policy-based factors in assessing whether conflicts should be imputed to justify vicarious disqualification, including in particular, the likelihood of whether the overall circumstances concerning the individually conflicted attorney are "likely to cast doubt on the integrity of the governmental law office's continued participation in the matter." *In re Charlisse C.*, 45 Cal. 4th at 165 (quoting Cobra Solutions, 38 Cal 4th at 850 n.2). Neither the actual effectiveness of screening nor these other policy-based factors are readily amenable to ex ante evaluation. By forcing government and public office attorneys to run the risk of discipline based on their ex ante evaluation of these factors, however, proposed subsection (e) will likely lead these attorneys to err on the side of disqualification, a result that will cause more disqualifications of government and	government and the implementation of a screen might prove inconvenient, neither the challenges nor inconvenience are greater than those faced by private firms. As already noted, (see ¶. 3 response, above), imputation of a government lawyer's personal conflict is appropriate, especially when the source of the personal disqualification is the government lawyer's former representation of a private client.

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

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					public offices, and a result thus at odds with the very policy considerations that have led California courts to recognize the general validity of screening as a means of avoiding disqualification of government and public offices.	
3	Committee on Professional Responsibility and Conduct ("COPRAC")	M		1.11(b) Cmt. [8]	1. Paragraph (b): COPRAC respectfully disagrees with the Minority position objecting to the inclusion of the Model Rule's "knowingly" standard in paragraph (b) of this Rule. It is our belief that a lawyer should not be subject to discipline for taking on a representation where he or she is not aware of the conflict. Our belief is no less applicable with respect to former government lawyers, especially since it may be likely that the conflict database system for government lawyers is often not as thorough or effective as that used by law firms, perhaps making it difficult for the former government lawyer to properly input all potential conflicts into a law firm's conflict system. 2. Similarly, COPRAC respectfully disagrees with the Minority position to Comment [8], in which the Minority objects to the inclusion to the Model Rule's "actual knowledge" standard applying to paragraph (c) of the Rule. We believe that the former	1. The Commission agrees with the commenter's position and has retained the "knowingly" standard in paragraphs (b), (c) and (e) of the Rule. 2. The Commission agrees with the commenter's position and has retained the "knowingly" standard in Comment [8].

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					government lawyer should not be subject to discipline for representing a client who could benefit from such information unless the lawyer in fact has actual knowledge of such information.	
				1.11(e) & Cmt. [9B]	3. Paragraph (e) and Comment [9B]: COPRAC believes that the head of the office exception to screening addressed in the *Cobra* case is too important to be relegated to a Comment [see second sentence of Comment [9B]], and that the exception should be included in the Rule itself.	3. The Commission disagrees that the holding of the *Cobra Solutions* case should be placed in the black letter of the Rule. The Commission determined that rather than codify these cases in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a comment to provide notice to lawyers of the potential applicability of this case in the civil disqualification context.
					4. That said, however, we believe the wording of the second sentence of Comment [9B] [which summarizes the exception] misstates the law, and in that sense is not supported by the cases referenced at the end of the Comment. Specifically, we agree that, where the personally prohibited lawyer is the head of the office, agency or department (or a lawyer with comparable managerial authority), it may be appropriate to prohibit other lawyers in such office, agency or department from working on such matter. However, where the personally prohibited	4. Similarly, the Commission determined that providing a citation to the cases in the Comment would serve as well to put lawyers on notice of the potential ramifications of these cases as would a description of the cases' holdings. Accordingly, the Commission did not implement the commenter's suggested revision of the Comment.

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyer only has supervisory authority over other lawyers, only those lawyers – and **not** the entire office, agency or department – should be prohibited. Also, we note that for consistency the term "disqualified" as used in this sentence should be changed to "prohibited from participating;" and in the second instance in clause (ii), the incomplete reference to "office" should be replaced with the full reference to "office, agency or department." Accordingly, we recommend that the second sentence of Comment [9B] be deleted and the following sentence be added to paragraph (e) of the rule: "However, (i) if the lawyer personally prohibited from participation in a matter is a lawyer with direct supervisory authority over other lawyers, then such prohibited lawyer and such other supervised lawyers (but not necessarily the entire office, agency or department) may be prohibited from participating in the matter, and (ii) if the lawyer personally prohibited from participation in a matter is the head of the office, agency or department, or a lawyer with comparable managerial authority, then both such prohibited lawyer and the	

					TOTAL = 8 Agree = 3 Disagree = 0 Modify = 5 NI = 0	
Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					office, agency, or department may be prohibited from participating in the matter."	
				Cmt. [9C]	5. Comment [9C]: For consistency and in order to maintain the parallel references in the two sentences of this Comment, we recommend inserting "lawyer of" in front of "law firm" in the first sentence of this Comment.	5. The Commission agrees and has made the suggested change.
4	McIntyre, Sandra K.	A			No comment.	No response required.
5	Office of the Chief Trial Counsel ("OCTC")	M		1.11(a)	1. Paragraph (a) is incomplete and confusing. B&P Code section 6131 prohibits a former prosecutor from representing or receiving valuable consideration from a defendant he or she formerly prosecuted. Unlike paragraph (a) of Proposed Rule 1.11, section 6131 does not permit the government agency to waive this conflict. In OCTC's opinion, the Rule must be harmonized with section 6131 regarding the waiver issue.	1. The Commission agrees with the commenter and has added a citation to Bus. & Prof. Code § 6131 in Comment [1].
				1.11(b)	2. OCTC agrees with the Commission minority view that use of the term "*knowingly*" would inappropriately immunize attorneys who do not bother to check for conflicts. The Commission minority suggests using the term "knows or	2. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					reasonably should know;" this appears to be the correct standard, and OCTC supports this language.	without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.
				1.11(c)	3. OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.	3. The Commission agrees and has made some syntax and grammar changes to clarify paragraph (c)'s applicability.
				1.11(d)(2)(ii)	4. Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.	4. The Commission disagrees. If the prosecutor is prosecuting a criminal case against a client of the public defender's office, he or she should not be negotiating for employment by defense counsel. See *Stanley v. Richmond* (1995) 35 Cal App. 4th 1070.
				1.11(e)	5. OCTC notes that paragraph (e) has no comparable provision in the ABA Rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies' ability to handle matters. Further, there is the issue of when disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying	5. OCTC correctly points out that paragraph (e) is not in the Model Rule. However, the Commission disagrees with OCTC's concerns, which appear to confuse disciplinary liability with disqualification. The screening exception can immunize lawyers in the office from the risk of discipline. Government agencies do deal with the disqualification issue. For example, a district attorney can call in the Attorney general. A United States Attorney can also resolve similar situations by appointment of an acting U.S. Attorney. See, e.g., *United States v. Nosal*, 2009

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.	WL 482236 (N.D.Cal. 2009). Regarding OCTC's concerns with providing notice to a former client, the Commission has revised subparagraph (e)(2) to require notice "as soon as practicable after the need for screening arises, and unless prohibited by law or a court order," which should assuage the concerns expressed by OCTC.
				1.11(f)	6. Paragraph (f) unnecessarily repeats the definition used in Proposed Rule 1.1(e). [NOTE: the correct reference is to proposed Rule 1.9, cmt. [4].]	6. The Commission disagrees. The definition of "matter" in paragraph (f) and the definition of "matter" .in Rule 1.9, cmt. [4], have different emphases. The description in Rule 1.9, cmt. [4] is generally applicable to all lawyers; the definition of matter in paragraph (f) is more specific to the kinds of practice in which government lawyers are regularly involved.
				Comments generally	7. As a general observation, there are too many Comments and most do not appear to serve any purpose. For example, Comments [1] – [5], [7] – [9], [9C], and [10] explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the Rule itself. Comment [9B] has some value, but it provides no real guidance as to when the entire office should be disqualified.	7. The Commission disagrees with OCTC's assessment that the Comments do not appear to serve any purpose. Proposed Rule 1.11 and Model Rule 1.11, on which the proposed rule is based, are complex rules involving lawyers duties in several distinct situations: moving from government employment to private practice or other non-governmental employment; moving from one government agency to another; and moving from private practice or other non-govenrmental employment into government service. Each situation requires a nuanced analysis of both facts and policy considerations. The comments cited to by OCTC provide clarification on the applicability of the rule to different circumstances.

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Orange County Bar Association ("OCBA")	M			Disagrees with minority position opposing screening in the private to government context.	No response required.
					Supports use of "knowingly" in paragraphs (b) and (e).	See response to COPRAC, ¶. 1.
					Agrees with proposed changes from Model Rule in paragraphs (b), (1), and (e) using "prohibited" instead of "disqualified."	No response required.
				Comment [9B]	The head of the office exception to screening addressed in the *Cobra* case seems too important a concept to be relegated to a Comment. We suggest that the principle should be incorporated into the Rule itself, rather than Comment [9B].	See response to COPRAC, ¶. 3.
				Comment [9C]	Comment [9C] indicates the Rule does not address whether a "law firm" will be disqualified. While we see that the proposed definition of the term "law firm" will include a government agency, we respectfully suggest that because this Rule necessarily differentiates between a "firm" (as opposed to a "law firm") and a "government agency," the reference to a "law firm" in Comment [9C] easily could be misread or misinterpreted to exclude government agencies, that is, to suggest	The Commission agrees in general with the commenter and has revised the rule to use "government agency" consistently. A corresponding change to the definition of "law firm" has also been made.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that the Rule ***does*** address the disqualification of a government agency. Given that the definition of "law firm" in proposed Rule 1.0.1 includes an office of a government entity, to avoid confusion, it would be appropriate to make this clearer, perhaps by referencing proposed Rule 1.0.1 in Comment [9C]. Alternatively, the Commission could use the undefined terminology from proposed Rule 1.11 itself, that is, "firm" and "government agency" to clarify that the Rule does not address disqualification of a firm or government agency. We note that the Commission has chosen not to include the term "firm" in the terminology rule, proposed Rule 1.0.1, and instead opted to define only the term "law firm." We are concerned that this approach will create confusion and/or arguments concerning the definition of the term "firm" as used in this proposed Rule.	 The Commission agrees. The definition in the Rule 1.0.1 now refers to both "firm" and "law firm" to remove confusion about what the terms might mean.
7	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M		(e) (e)(2)	1. The commenter notes the minority objection to screening in the private to government context. 2. Commenter agrees with the proposed wording of paragraph (e)(2) but expresses	1. No response required. See also response to OCTC, ¶. 5. 2. The Commission recognizes that monitoring a screen to determine its effectiveness presents

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					concern about how the client could monitor the screen and ensure it retains its effectiveness.	challenges, but policy considerations outweigh those concerns, at least in this context. The Commission also notes that it has revised paragraph (e)(2) to require notice "as soon as practicable after the need for screening arises, and unless prohibited by law or a court order."
				(e)	3. Commenter points out that paragraph (e) does not address the head of office and supervisory lawyer situation and thereby is *de facto* overruling *Cobra Solutions.*	3. The Commission disagrees with the commenter's opinion that, by not addressing the head of the office situation in paragraph (e), the Rule in effect overrules *Cobra Solutions*. Instead, the case is cited to in a comment. The Commission determined that rather than codify *Cobra Solutions* in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a comment to provide notice to lawyers of the potential applicability of this case in the civil disqualification context. Thus, neither the black letter rule nor the comment suggests the holding in Cobra Solutions would no longer apply in the disqualification context.
				(b) & (c)	4. San Diego County Bar Association agrees with the Commission minority that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who "know or reasonably should know" that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing representation in such a matter	4. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be

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

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					unless the screening is conducted and notice given as set forth in 1.11(b)(1) and (2).	subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.
8	Santa Clara County Bar Association ("SCCBA")	A			No comment.	No response required.

Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, ***Connecticut***, ***and Florida*** omit the law clerk exception to ABA Model Rule 1.11(d)(2).

California has no provision comparable to ABA Model Rule 1.11.

Colorado: Rule 1.11(b)(2) requires the written notice to contain "a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed." Colorado also adds a subparagraph (b)(3) prohibiting other lawyers in the firm from undertaking or continuing representation unless the personally disqualified lawyer and the partners of the firm "reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client."

District of Columbia: Rule 1.11 tracks the basic provisions of ABA Model Rule 1.11, but D.C. requires a personally disqualified former government lawyer and another lawyer in the firm to file certain documents with the disqualified lawyer's former agency or department. As an alternative, the rule permits the former government lawyer to file those documents with bar counsel under seal if the firm's client requests it.

Georgia has adopted a Rule 9.5 that provides as follows:

Rule 9.5 Lawyer as a Public Official

> (a) A lawyer who is a public official and represents the State, a municipal corporation in the State, the United States government, their agencies or officials, is bound by the provisions of these Rules.
>
> (b) No provision of these Rules shall be construed to prohibit such a lawyer from taking a legal position adverse to the State, a municipal corporation in the State, the United States government, their agencies or officials, when such action is authorized or required by the U.S. Constitution, the Georgia Constitution or statutes of the United States or Georgia.

Illinois: In the rules effective January 1, 2010, Rule 1.11(a) does not require consent to be confirmed in writing.

Iowa adds the following paragraph to Rule 1.11 relating to part-time prosecutors serving as criminal defense counsel:

> (f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities.

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> However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Massachusetts: The law clerk exception in Model Rule 1.11(d)(2)(ii) is extended to law clerks working for mediators.

Missouri: Rule 1.11(e) provides as follows:

> (1) A lawyer who also holds public office, whether full or part-time, shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties or responsibilities. . . .
>
> (2) No lawyer in a firm in which a lawyer holding a public office is associated may undertake or continue representation in a matter in which the lawyer who holds public office would be disqualified, unless the lawyer holding public office is screened in the manner set forth in Rule 4-1.11(a).

New Hampshire adds a detailed provision regarding the responsibilities of "lawyer-officials," who are defined as lawyers who are "actively engaged in the practice of law" and who are members of a "governmental body."

New Jersey: Rules 1.11(a), (b), and (d) deviate from the Model Rules as follows:

> (a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:
>
> (1) in which the lawyer participated personally and substantially as a public officer or employee; or
>
> (2) for which the lawyer had substantial responsibility as a public officer or employee; or
>
> (3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.
>
> (b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:
>
> (1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and
>
> (2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party. . . .

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(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment.

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate 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 or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12 (c). . . .

New York: In the rules effective April 1, 2009, Rule 1.11(b) amplifies the procedures necessary to avoid the imputation of a conflict, including that a law firm must "notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client," and that "there are no other circumstances in the particular representation that create an appearance of impropriety." Several new comments offer further guidance regarding these procedures. Rule 1.11(e) specifies that the term "matter" does "not include or apply to agency rulemaking functions." Rule 1.11(f) is a nearly verbatim adoption of DR 8-101 of the old Model Code.

Oregon expands the "law clerk" exception to include a lawyer who is a "staff lawyer to or otherwise assisting in the official duties of" a judge, other adjudicative officer or arbitrator. Oregon Rule 1.11(d) adds language drawn partly from DR 8-101 of the ABA Model Code of Professional Responsibility providing that, except as law otherwise expressly permits, a lawyer shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

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(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

Oregon also deletes ABA Model Rule 1.11(e) and adds these paragraphs to Rule 1.11:

(e) Notwithstanding any Rule of Professional Conduct, and consistent with the "debate" clause, Article IV, section 9, of the Oregon Constitution, or the "speech or debate" clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.

(f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:

(1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10(c) (the required affidavits shall be served on the Attorney General); and

(2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Pennsylvania: Rule 1.11(a)(2) does not require that client consent be "confirmed in writing."

Texas: Rule 1.10(f) specifically excludes "regulation-making" and "rule-making" from the definition of "matter."

Virginia adheres mostly to the original 1983 version of ABA Model Rule 1.11, except that Virginia adds the following language drawn from DR 8-101 of the ABA Model Code of Professional Responsibility as Rule 1.11(a):

(a) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

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Proposed Rule 1.17 [2-300]
"Purchase and Sale of a Law Practice"

(**Draft #8, 4/21/10**)

Summary: Proposed Rule 1.17 regulates the sale of a law practice. It includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection. See Introduction and Explanation of Changes below.

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 2-300.
Statute	Bus. & Prof. Code section 16600
Case law	

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

At least 16 states have adopted a version of Model Rule 1.17, some based on the 1990 version and others on the Ethics 2000 version, with substantive or no changes. The Commission decided to preserve the notice requirements of the current California rule.

☑ Other Primary Factor(s)

The memorandum from Judy Johnson to the Board of Governors and members of the Board Committee on Member Oversight dated June 18, 2008, regarding Appointment of a Career Transition Planning Taskforce, recommended that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice, to offer greater options for a lawyer to make a smooth transition to retirement.

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 __4___
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

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

Adopting the Model Rule provision that permits lawyers to sell a geographic area of practice or a substantive field of practice is viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law. See Introduction and Minority Dissent, attached.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.17[*] Purchase and Sale of a Law Practice

April 2010
(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.17 regulates the sale of a law practice. California was the first state in the nation to adopt a rule permitting the purchase and sale of a law practice. The American Bar Association copied some of California's rule by amendment to its Model Rules prior to 2002. The 2002 amendments to Model Rule 1.17 permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This proposed Rule substantially adopts those changes. See (1), below. However, the Model Rule provisions concerning the notice required to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current Rule 2-300 to provide better protection for the interests of the clients. Further protections have been added to promote protection of the clients of the selling lawyer. For example, (1) the sale of the practice, or of a substantive field of practice, or of a geographic area of practice must include all of substantially all of the practice or all of substantially all of the field or area of practice; lawyers will not be permitted to "cherry pick" lucrative matters and leave clients with less lucrative matters to fend for themselves; (2) the selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold; (3) although the use of brokers to facilitate a sale is permitted, a lawyer may only sell the practice to a lawyer, not to a broker or other intermediary, ensuring continuity of representation and protection of the seller's clients; (4) fees may not be increased solely by reason of the sale, and clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and (5) appropriate protections for confidentiality of the clients have been made part of the rule.

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[*] Proposed Rule 1.17, Draft 8 (4/21/10).

Originally, the Commission circulated two proposed rules for public comment, namely Rule 1.17.1 and Rule 1.17.2. They, respectively, would have dealt with sale of an entire practice and sale of a geographic area of practice or of a substantive area of practice. Those proposals received substantial criticism. In addition, there was substantial dissent within the Commission about those proposals. The current proposal is a single rule, dealing with the purchase and sale of an entire law practice, of a geographic area of a law practice, or of a substantive field of practice. This Rule moots many of the criticisms of the earlier proposals. In addition, it addresses one of the recommendations of the Executive Director of the Bar, Judy Johnson, to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memorandum, Ms. Johnson suggested that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The proposed Rule addresses that subject.

Minority. A minority of the Commission strongly disagrees with proposed Rule 1.17, taking the position that adoption of the proposed Rule will unnecessarily add to the commercialization of the legal profession. The proposed Rule is unlike current California rule 2-300, which is narrowly drafted to permit a solo practitioner upon retirement to recoup through a one-time sale of his or her practice the good will developed in the practice over the practitioner's professional lifetime. By permitting the sale of a practice under strictly controlled conditions, the current rule both (i) avoids the former use of sham associations of lawyers to facilitate transfer of a practice, and (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters. In addition, the current rule levels the playing field for solo practitioners and lawyers practicing in firms, the latter have been able before the current rule to realize upon retirement the value of the good will developed by the law firm of which they were members. The proposed Rule, on the other hand, while purporting to carry forward the client protections of current rule 2-300, permits not just the sale of a practice by a lawyer upon retirement, but also the sale of a practice by a law firm, or the sale of a "substantive field of practice" or a "geographic area of practice" by either a lawyer or a law firm. As discussed more fully in the Minority's Dissent, below, the minority sees great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships. The vagueness of the terms "geographic area" and "substantive field" practically invite clever lawyers to use the rule in ways that will benefit them and risk injury to their clients. Unlike the current rule, which was created to address a genuine concern, no compelling reason for this change has been advanced by its proponents, other than that there might be situations where there could be a genuine special need to carve out some part of an established practice and to sell it. The minority urges that the proposed Rule not be adopted. See full Minority Dissent, below.

Variations in Other Jurisdictions. Twenty-nine states have adopted a rule identical to, or substantially similar to, the Ethics 2000 version of Model Rule 1.17 (2002), which permits the sale of an area of a law practice. Seventeen states (including California) currently have rules that only permit the sale of an entire law practice. Five states have no counterpart to either the 1990 (entire practice) or the 2002 (area of practice) version of the Model Rule, (Alabama, Kansas, Louisiana, Mississippi and Texas). Of the 17 states that require sales of the entire practice, three (Michigan, Tennessee and West Virginia) have recommended the adoption of the 2002 version Model Rule, and two others (Georgia and Hawaii) have not yet concluded their review of the Ethics 2000 rules. A number of states (e.g., Florida, Illinois, New York, Ohio and Pennsylvania) diverge substantially from the Model Rule and include additional provisions intended to protect the clients of the selling lawyer.

ABA Model Rule **Rule 1.17 Sale Of Law Practice**	**Commission's Proposed Rule**[*] **Rule 1.17 Purchase and Sale of a Law Practice**	**Explanation of Changes to the ABA Model Rule**
A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:	A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or ana geographic area of law practice, including good will, only if the following conditions set forth in paragraphs (a) through (g) are satisfied:	The introductory paragraph of proposed Rule 1.17 is based on the introductory paragraph of Model Rule 1.17. However, the proposed paragraph makes it explicit that a lawyer or law firm may sell or purchase a substantive aspect of a practice or a geographic area of practice, and not just an entire practice, so that permission to do so is not merely inferred. In addition, the proposed paragraph adds the word "only," to make explicit that a sale other than in accordance with the provisions of the Rule is not permissible. The Commission voted to adopt the approach of the Model Rule to permit sale of a geographic area of practice or of a substantive practice area. When lawyers or law firms need to adapt their practices in anticipation of retirement, for economic reasons, for client needs, or for other reasons, allowing them to be flexible regarding what aspects of the law practice are sold gives them greater options. For example, if a lawyer finds himself or herself no longer able to practice litigation effectively, he or she could sell the litigation aspect of his or her practice and continue to practice law in non-litigation areas. Similarly, if a lawyer has a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to commute to different parts of the state. As stated in the Introduction and below, a minority of the Commission disagrees with the proposed Rule's provisions to permit the sale of a substantive field or geographic area of practice. See full dissent, below.

[*] Proposed Rule 1.17, Draft 8 (4/21/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;	(a) The seller ceases to engage in the private practice of law entirely, or in the area of practice that has been sold, [in the substantive field or geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been seller conducted; the portion of the practice being sold.	Paragraph (a) is based on Model Rule 1.17(a). The Commission recommends adopting both of the Model Rule's alternatives – a sale of a substantive aspect of the practice and of a geographic area of a practice. Wording changes have been made to clarify the options available to a lawyer or law firm under the proposed Rule.
(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;	(b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, is sold available for sale to one or more lawyers or law firms;.	Paragraph (b) is based on Model Rule 1.17(b). However, the Commission recognizes that a sale of an entire practice or entire area of practice may not be possible. For example, a purchaser may have conflicts of interest that preclude the purchaser from representing some of the seller's clients. Thus, as with current Rule 2-300, the Commission recommends that the Rule only require the seller to make the entire practice, or entire substantive field or geographic area of the practice, *available for sale*, and recommends that the *actual transaction* include all or substantially all of the practice. As reflected in proposed Comment [2], if not all of the seller's clients are willing to retain the purchaser, that does not destroy the validity of the transaction. See also Explanation of Changes for paragraph (c). Paragraph (b) has also been reworded to clarify that the transaction may encompass the entire practice, the entire substantive field of practice, or the entire geographic area of the practice, consistent with the introductory paragraph and with paragraph (a).
	(c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.	Proposed paragraph (c) has no counterpart in the Model Rule. It has been added to complement proposed paragraph (b) and emphasize that not only must the seller make available the entire practice, or field or area of practice, but the actual transfer must include all or

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
		substantially all of the practice. This requirement is necessary to prevent a lawyer from making "available for sale" his or her practice, but selling only the most lucrative client files.
(c) The seller gives written notice to each of the seller's clients regarding:	~~(c) The seller gives written notice to each of the seller's clients regarding:~~ (d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:	Paragraph (d) contains the same concepts as Model Rule 1.17(c), but goes much further in providing protection for the seller's clients. Model Rule 1.17(c) merely requires notice from the seller of the proposed sale, the client's right to other counsel or to take possession of the file, and the presumption that client consent to the transfer will be presumed if the client does not object within ninety days. Proposed paragraph (d), on the other hand, carries forward current California Rule 2-300, which is far more protective of client rights and contains a more robust explanation of the contents of the notice that must be given to clients. For example, current rule 2-300 recognizes that, if the seller is deceased or incapacitated, he or she may not be able to give the required notice. Proposed paragraph (d) and its subparagraphs continue the substance of the notice requirements under current Rule 2-300, spelling out in more detail what the notice must contain and distinguishing between the circumstance in which the seller is deceased or incapacitated (in which case the purchaser gives the required notice) and all other sales (in which the case the seller gives the required notice). The Commission concluded that the California approach gives more protection for the clients of the seller.
(1) the proposed sale;	~~(1) the proposed sale;~~ (1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer	See Explanation of Changes for paragraph (d).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:	
	(i) shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and	See Explanation of Changes for paragraph (d).
	(ii) shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise	See Explanation of Changes for paragraph (d).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	notified by the client if the purchaser receives no response to the paragraph (d)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.	
(2) the client's right to retain other counsel or to take possession of the file; and	(2) ~~the client's right to retain other counsel or to take possession of the file; and~~ In all other circumstances, not less than 90 days prior to the transfer:	See Explanation of Changes for paragraph (d).
(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.	~~(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.~~	See Explanation of Changes for paragraph (d).
	(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being	See Explanation of Changes for paragraph (d).

ABA Model Rule Rule 1.17 Sale Of Law Practice	Commission's Proposed Rule* Rule 1.17 Purchase and Sale of a Law Practice	Explanation of Changes to the ABA Model Rule
	transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and	
	(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of each of the seller's clients whose matters are included in the sale, prior to the transfer, provided that the client's consent shall be presumed if neither the seller nor the purchaser receives a response to the paragraph (d)(2)(i) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by	See Explanation of Changes for paragraph (d).

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	a failure of the purchaser to act during the 90 day period, unless either the seller or the purchaser is otherwise notified by the client.	
If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.	~~If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.~~	The final, unnumbered subparagraph of Model Rule 1.17(c) has been deleted because it is substantively incorrect. See Explanation of Changes for Comment [8], below. The problem it is intended to resolve, inability to notify a client of the selling lawyer, is addressed by subparagraphs (c)(1) and (2) of the proposed Rule.
(d) The fees charged clients shall not be increased by reason of the sale.	(e) ~~The fees charged clients shall not be increased by reason of the sale.~~ Fees charged to clients shall not be increased solely by reason of the purchase, and, unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.	Paragraph (e) is based on Model Rule 1.17(d), but adds a requirement that the purchaser must assume the seller's obligations under existing client agreements regarding fees and the scope of work unless the client otherwise gives informed consent. Therefore, a client will not be confronted with an increase in fees or fee rate solely by virtue of the sale.
	(f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.	Paragraph (f) has no counterpart in the Model Rule. It carries forward current rule 2-300(C), and is intended to provide further protection for the seller's clients by requiring adherence to the requirements of tribunals that permit withdrawal and substitution of lawyers. The Commission concluded that this requirement should be continued in the black letter of the rule.

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	(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.	Paragraph (g) has no counterpart in the Model Rule. It carries forward current rule 2-300(E). The Commission concluded assuring that confidentiality is protected is an essential aspect of client protection if a practice is sold.
	(h) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.	Paragraph (h) is based on Model Rule 1.17, cmt. [14] and current rule 2-300(F), both of which provide that the Rule does not apply to admission to or retirement from a law partnership or law corporation, retirement plans, or similar arrangements nor to the sale of tangible assets of a practice. The Commission concluded that this exclusion from the scope of the Rule should be in the black letter of the rule.

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[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.	[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the ~~reasonable value of the~~ practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.	Comment [1] is nearly identical to Model Rule 1.17, cmt. [1], except that the phrase "reasonable value of the" has been deleted. The black letter rule does not require that the price for which the practice is sold be "reasonable," and the Comment should not do so either.
	[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.	Comment [1A] has no counterpart in the Model Rule. The Commission concluded that this Rule should permit and apply to sales of practices by certain fiduciaries acting for a lawyer or lawyer's estate. Current California Rule 2-300 expressly applies to sales by such fiduciaries. Rather than including an enumeration of all such fiduciaries in the introductory paragraph of the proposed Rule, the Commission elected to include them by defining the word "lawyer" in this Comment. This comment adds clarity to the proposed Rule that is not found in the Model Rule. In addition, by spelling out the types of fiduciaries who may act on behalf of the lawyer or his or her estate, this Comment avoids the risk that a generic word such as "fiduciary" could be interpreted to include purchases and sales of law practices by brokers, which is not permitted under this Rule. See Comment [12A] and Explanation of Changes thereto.

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Termination of Practice by the Seller [2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.	**Termination of Practice by the Seller** [2] The requirement that all of the private practice, or all of an substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.	Comments [2] and [2A] are based on Model Rule 1.17, cmt. [2]. However, the Model Rule comment has been divided into two parts for clarity. Proposed Comment [2] is substantially the same as the first part of the Model Rule comment. The phrase "substantive field or geographic" has been added to modify the phrase "area of practice" to make explicit that the comment applies to the sale of the entire practice or to sales of substantive fields of practice or to sales of geographic areas of practice. In addition, proposed Comment [2] recognizes that clients have the right to refuse to discharge the selling lawyer, by adding that concept to the second sentence. The last sentence has been added to highlight that the selling lawyer is not relieved from responsibility unless he or she is substituted out, or has permission to withdraw, in accordance with Rule 1.16.
	[2A] Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a	Comment [2A] is the second half of Model Rule Comment [2], which addresses the kinds of situations under which a return to private practice is permitted after a lawyer has availed himself or herself of the benefits of the Rule. The word "the" has been changed to the word "a," because, in the second sentence, a sale of a specific practice is not at issue. The added clause in the first sentence clarifies that a lawyer may also return to a substantive field or geographic area of practice in the event of unanticipated changes in circumstances.

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	retention election for the office or resigns or retires from a ~~judiciary~~judicial position.	The phrase "or retires" has been added in the last sentence at the suggestion of public comment received from COPRAC because a judge may elect to retire and return to private practice. The word "judiciary" has been changed to "judicial" because that is the appropriate adjective to modify "position."
[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.	[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.	Comment [3] is identical to Model Rule 1.17, cmt. [3].
	[3A] An agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.	Comment [3A] has no counterpart in the Model 'Rule. The Comment was added following public comment to permit the described situation, which would protect clients by facilitating a smooth transition of their matters from one lawyer to another.
[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so	[4] ~~The~~This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. ~~the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has~~	Comment [4] is based on Model Rule 1.17, cmt. [4], but has been revised extensively to provide guidance on the application of the Rule. Much of the Model Rule Comment [4] is a form of "use note" for guidance to states that choose to follow the Model Rule. Irrelevant parts of that "use note" have been deleted and explicit language added to explain the rights of a seller who sells a part of a practice located in a defined geographic area. Once this Rule is adopted in California, much of the use note would not be needed, but guidance about the rights of a seller in a sale of a

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situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).	~~engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17.~~A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser. An agreement for the sale of the geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.	geographic aspect of a practice would be appropriate. The last sentence has been added at COPRAC's suggestion to emphasize the importance of precisely defining the scope of the geographic area of practice being sold.
[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters.	[5] This Rule also permits a lawyer or law firm to sell ~~an area~~<u>a substantive field</u> of practice. If ~~an area~~<u>a substantive field</u> of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the ~~area~~<u>substantive field</u> of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule ~~1.5(e)~~<u>1.5.1</u>. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner	Comment [5] is substantially the same as Model Rule 1.17, cmt. [5]. "Substantive field" has been substituted for the word "area" because the Commission concluded that there could be confusion between the word "area" in reference to a geographic location of the practice and the word "area" in the sense of a substantive aspect of the practice. As a result, the Commission concluded that the recommended wording provides greater clarity. The reference to Rule 1.5(e) has been changed to Rule 1.5.1 because that is the number of the counterpart to Model Rule 1.5(e) in the proposed new California Rules. The Commission revised the third sentence for clarity and to conform it with the California approach to this Rule. If a lawyer makes the entire practice in this state or in a geographic area available for purchase, he or she will have complied with this

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Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.	may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographicallaw firm that sells the practice in this state or in a geographic area typically would sellof this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the lawyerseller to limit the sale to one or more areassubstantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.	Rule, even if purchasers cannot be found for the entire practice or entire practice in this state or in a geographic area. See also Explanation of Changes for paragraph (c).
Sale of Entire Practice or Entire Area of Practice [6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.	**Sale of Entire Practice or Entire Area of Practice** [6] TheThis Rule requires that all or substantially all of the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than substantially all of an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice or practice, geographic area of practice, or substantive field of practice, subject to client consent or other contingencies. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matters because of a conflict of interest because, for example, the purchaser has a	Comment [6] is based on Model Rule 1.17, cmt. [6]. However, sentences within it have been expanded to clarify that it applies regardless of whether the sale is of an entire practice, of an entire geographic area of practice, or of an entire substantive field of practice. The last phrase has been added to the fourth sentence of this Comment because a conflict of interest is not the only circumstance under which the purchaser may not be able to undertake a particular client matter. Clients always have the option to refuse to retain the purchaser. The last two sentences have been added at COPRAC's suggestion to provide guidance on the meaning of "all of substantially all," a phrase not found in the Model Rule.

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	conflict of interest, a client decides not to retain the purchaser, or the purchaser lacks the ability to undertake a matter. Whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with these Rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy this Rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.	
Client Confidences, Consent and Notice [7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the	**Client Confidences, Consent and Notice** [7] ~~Negotiations~~Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser ~~prior to disclosure~~ for the purpose of ~~information relating to a specific representation~~ascertaining actual or potential conflicts of ~~an identifiable client~~interest no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific confidential information relating to the	Comment [7] is based on Model Rule 1.17, cmt. [7]. However, the first sentence has been reworded for clarity. Not all aspects of negotiations between seller and prospective purchaser are necessarily confidential. In preliminary discussions, the seller should be able to disclose in confidence client identities and matters, so the purchaser has an understanding of the scope of the practice and can check for conflicts of interest. However, the seller should not at that stage disclose specific confidential information relating to the representation nor give the purchaser access to the file. That information and access should only be provided by the seller with the consent of the client. The first sentence has been reworded to make those concepts explicit,

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seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.	representation andor to the file, however, requires client consent. The This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchaserpurchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.	and the word "confidential" has been added to the second sentence for that same reason. The third sentence has been modified – "purchaser" deleted and "purchasing lawyer or law firm" substituted for it – in order to make explicit that the concept applies regardless of whether the purchaser is an individual lawyer or law firm. In an emergency situation, it may be necessary for the seller to disclose confidential information to the purchaser, in order for the purchaser to protect a client from harm, damage, or loss of rights. The last sentence has been added to this Comment in order to permit a purchaser to obtain access to confidential information if necessary to protect a client in such an emergency.
[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the	[8] [RESERVED] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the	The Commission recommends that Model Rule Comment [8] not be adopted because it is substantively wrong. Under California law and rules, a seller may not withdraw from representation unless he, she, or it has first complied with Rule 1.16 or the client has agreed to the discharge or has substituted the seller with new counsel. In addition, a lawyer may not disclose confidential information to a tribunal, even *in camera*, because that may waive confidentiality of the information.

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purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).	~~purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).~~	
[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.	[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice ~~or~~, a geographic area of the practice, or a substantive field of practice.	Comment [9] is based on Model Rule 1.17, cmt. [9]. The revisions are intended to make explicit that clients have autonomy in choosing their lawyer regardless of whether the sale is a sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.
Fee Arrangements Between Client and Purchaser [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.	**Fee Arrangements Between Client and Purchaser** [10] ~~The~~Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser unless precluded by conflicts of interest, or unless the scope of work is changed with client consent. The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 & 6148.	Comment [10] is based on Model Rule 1.17, cmt. [10]. However, the first sentence has been modified so that it expressly calls the reader's attention to paragraph (e). The word "solely" has been added because that is contained in the black letter rule. The word "law" has been added to make explicit that this Rule applies to the sale of a law practice, not to the sale of other lines of business. The "unless" clause in the second sentence has been added to conform to the language of paragraph (e). See Explanation of Changes for paragraph (e). The last sentence has been added to the Model Rule comment to remind purchasers that under this Rule, they must comply with California requirements regarding fee agreements, such as Business & Professions Code sections 6147 and 6148.

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Other Applicable Ethical Standards [11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).	**Other Applicable Ethical Standards** [11] ~~Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).~~ Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, *e.g.*, Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business & Professions Code section 6068(e)(1)) and to avoid new representations that are in conflict with continuing duties to former clients (see Rule 1.9).	Comment [11] is based on Model Rule 1.17, cmt. [11], but has been substantially revised to correct an apparent error in the Model Rule comment. The examples in the Model Rule comment focus on the seller's ethical duties in connection with the sale of a law practice. The Commission concluded, however, that most of the examples described duties that a purchaser incurs in connection with a sale. The Commission has clarified which duties a purchaser has and which duties a seller has in its revision of the Comment.

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[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).	[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, ~~such approval must be obtained before~~ the matter ~~can~~may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. (See Rule 1.16).	Comment [12] is based on Model Rule 1.17, cmt. [12]. However, it has been revised to clarify the contractual realities of selling a practice and obtaining a tribunal's permission to withdraw. A sale may contemplate including a given matter within the scope of the sale, and the parties will have to enter into a contract for sale before they can implement it. Nevertheless, if the approval of a tribunal is required before the purchaser may be substituted for the seller, both paragraph (f) of this proposed Rule and this comment now make explicit that the tribunal's approval must be obtained before the seller is relieved of responsibility for the matter.
	[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, *e.g.*, Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).	Comment [12A] has no counterpart in the Model Rule. The Commission concluded that a sale to a broker should not be permitted. A seller or a purchaser may utilize the services of a broker, if permitted by other law. However, this Rule does not permit a sale to a broker or other intermediary. In addition, other rules and other law govern whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice or any aspect of it. For example, proposed Rule 5.4(a) prohibits sharing legal fees with a nonlawyer, and proposed Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. Lawyers and the public should be made aware of these restrictions. Therefore, they are spelled out in this Comment.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
Applicability of the Rule [13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.	**Applicability of the Rule** [13] This Rule applies to the sale of a law practice of a deceased, disabledimpaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however,or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may participateassist in a sale of a law practice whichthat does not conform to the requirements ofcomply with this Rule, the representatives of the seller as well asa nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer can be expected to see to it that they are metmust all comply with this Rule. See, *e.g.*, Rule 8.4(a).	Comment [13] is based on Model Rule 1.17, cmt. [13]. The word "impaired" has been substituted for "disabled" because the selling lawyer may be physically disabled but still able to participate in the sale, and the intent is to apply this Rule to a sale on behalf of a selling lawyer who is incapacitated. In addition, the phrase "or by a trustee" has been added because a lawyer, for estate and tax planning purposes, may hold the ownership of his or her practice in a trust. In the second sentence, the alternative of a seller being a lawyer acting in a fiduciary capacity has been added because a lawyer may be the attorney-in-fact, conservator, or trustee for another lawyer. In the third sentence, the word "because" has been substituted for "since, however," to rectify the temporal implication. The phrase "assist in" has been substituted for "participate in" in order to clarify that a lawyer need not be a purchaser or seller in order to violate this Rule. A lawyer for a purchaser or seller must assure that the sale of the practice complies with this Rule. Accordingly, the balance of the third sentence has been revised to make these concepts explicit.
[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.	[14] [RESERVED] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.	Model Rule 1.17, cmt. [14] has been deleted because the substance of it has been moved into paragraph (h) of the black letter rule. An exception to a rule should appear in the rule itself. Because this exception appears in the proposed Rule, repeating it in the comment is not necessary.

ABA Model Rule Rule 1.17 Sale of Law Practice Comment	Commission's Proposed Rule Rule 1.17 Purchase and Sale of a Law Practice Comment	Explanation of Changes to the ABA Model Rule
[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.	[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an, a geographic area of practice, or a substantive field of practice.	Comment [15] is based on Model Rule 1.17, cmt. [15]. Language has been added to clarify that the Rule only applies to the sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.
	[15A]The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b).	Comment [15A] has no counterpart in the Model Rule. This Comment has been added to clarify that the sale of law practice in compliance with this Rule does not violate Rule 7.2(b).
	[15B]Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.	Comment [15B] has no counterpart in the Model Rule. This Comment has been added to help assure that lawyers who engage in a transaction under this Rule are alerted to the requirement of complying with proposed Rules 1.5.1 and 5.4.
	[15C]If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.	Comment [15C] has no counterpart in the Model Rule. The Commission recommends addition of this Comment so that people who endeavor to conduct a sale of a practice of a deceased lawyer are alerted of the necessity of complying with the State Bar Act.

Proposed Rule 1.17 Purchase and Sale of a Law Practice
Minority Dissent

A minority of the Commission strongly disagrees with this proposed Rule. The adoption of the proposed rule would create a sea change in the practice of law, commercializing it beyond anyone's prior imagination.

The current rule was created by this Commission in the 1980s and adopted by the Supreme Court of California on recommendation of the Board of Governors for the specific purpose of allowing senior lawyers in solo practice, facing retirement or appointment to a public position such as a judgeship, or their estates after their deaths, to realize the value of their practices by the sale of those practices without the use of transparent devices such as pretended last minute "partnerships;" see *Geffen v. Moss* (1975) 53 Cal.App.3d 215. To avoid the use of these pretend relationships and to give single practitioners an opportunity to realize the value of what they created over a lifetime - as exists in larger law firms (see *Howard v. Babcock* (1993) 6 Cal.4th 409), the State Bar proposed the current rule. It was the first authority ever that allowed the one-time sale of such a practice, and it does so only under stringent conditions that protect clients through provisions for confidentiality during the sale negotiations and against fee increases by reason of the transfer.

The American Bar Association later adopted a version of this Rule at the instance of the California State Bar delegation. It was promoted on the floor of the ABA House of Delegates by the then President of the State Bar, Terry Anderlini.

But the current proposal has transformed this modest and reasonable provision into one that would permit and cause the commercial exploitation of a law practice in ways heretofore undreamed of. Under the proposed rule, a lawyer (and thus, a law firm as well) may sell a substantive field of practice or a geographic area of practice. And unlike the current rule, there is the anticipation that the selling lawyer may even return to the practice he or she has merchandised. See proposed Comment [2A]: "Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation." The concept of "extraordinary circumstances in not defined by the Rule, which gives the lawyer the ability to make a business of selling some or all of a law practice rather than fulfilling commitments made to the clients.

The dissenters can see a sea change in the practice if this rule is adopted. Since the rule contains no definition of either the concept of "geographic area" or "substantive field" of practice and since probably no limiting definition is possible, an imaginative or greedy lawyer can sell a case or matter, or a set of a few cases or matters, by describing the sales package in a way which excludes

the lawyer's other cases in the field, or in other geographic areas of the state or nation.

As some examples, suppose that a lawyer is consulted about a major personal injury case, beyond the lawyer's normal skills and capacities. Can the lawyer sell his or her "major personal injuries" practice instead of handling the case him- or herself or associating a more skilled lawyer with client consent per current rule 2-200? Suppose that the lawyer has no background in intellectual property law but is consulted by a current client about a major patent infringement case which may well produce a contingent fee in 7 or even 8 figures? Instead of finding a lawyer competent in the field and referring the matter to that lawyer, can the lawyer now sell his or her "intellectual property practice," consisting of a single matter, to the highest bidder, as long as the confidentiality provisions of this proposed rule are observed? Why would the temptation to sell be any less if the "big winner" case was one of several, where the seller might be quite willing to give up the others in order to cash in on the one "big deal"?

Or consider the case of a "national" law firm that opened a California office with considerable fanfare, spent a fair amount on the facility, on recruitment of lawyers and on promotion of the practice, but found the branch unprofitable. There have been such instances in the past, and the offices were simply closed. If this rule is adopted, the law firm could hire a marketer and would probably succeed in selling the unprofitable practice to another law firm, since its days in California were numbered in any event.

One argument made in favor of the gross expansion of California's current, narrowly-drawn rule is that the buying and selling of law practices should be permitted because a law practice is simply an asset. The minority rejects this crass view of the trust that a client invests in a lawyer when placing a matter in the lawyer's hands. A second defense of the expansion is that it would entirely eliminate practice sales in the guise of short-term partnerships. The minority also rejects this argument, which amounts to saying that everyone should be permitted to do a bad thing because some people do it. Finally, it has been argued that the current rule discriminates against sole practitioners because all other private practice lawyers have law firm buy-out or retirement arrangements. This claim is false. The minority is unaware of such plans in the vast number of smaller law firm, except in some smaller firms arrangements for the return of original buy-in payments or for payment of a departing partner's share of accrued receivables. Finally, it bears repeating that, although most of the arguments in favor of this expansion are directed to the position of sole practitioners, the proposed rule explicitly permits law firms to engage in the business of buying and selling all or part of law practices. The minority believes there is no compelling reason to expand the current rule, and that its consequences should be rejected firmly.

Rule 1.17: Purchase and Sale of a Law Practice

(Commission's Proposed Rule – Clean Version

A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or a geographic area of practice, including good will, only if the conditions set forth in paragraphs (a) through (g) are satisfied:

(a) The seller ceases to engage in the private practice of law entirely, or in the substantive field or geographic area in which the seller conducted the portion of the practice being sold.

(b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, available for sale to one or more lawyers or law firms.

(c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.

(d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:

(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:

(i) shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and

(ii) shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (d)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.

(2) In all other circumstances, not less than 90 days prior to the transfer:

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in

his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of each of the seller's clients whose matters are included in the sale, prior to the transfer, provided that the client's consent shall be presumed if neither the seller nor the purchaser receives a response to the paragraph (d)(2)(i) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless either the seller or the purchaser is otherwise notified by the client.

(e) Fees charged to clients shall not be increased solely by reason of the purchase, and, unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

(f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.

(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.

(h) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of a substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is

not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.

[2A] Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns or retires from a judicial position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[3A] An agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.

[4] This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser. An agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.

[5] This Rule also permits a lawyer or law firm to sell a substantive field of practice. If a substantive field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the substantive field of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5.1. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer or law firm that sells the practice in this state or in a geographic area of this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the seller to limit the sale to one or more substantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] This Rule requires that all or substantially all of the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than substantially all of an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice, geographic area of practice, or substantive field of practice, subject to client consent or other contingencies. This requirement is satisfied, however, even if a purchaser is unable to undertake particular client matters because, for example, the purchaser has a

conflict of interest, a client decides not to retain the purchaser, or the purchaser lacks the ability to undertake a matter. Whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with these Rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy this Rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.

Client Confidences, Consent and Notice

[7] Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser for the purpose of ascertaining actual or potential conflicts of interest no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific confidential information relating to the representation or to the file, however, requires client consent. This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.

[8] [RESERVED]

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice, a geographic area of the practice, or a substantive field of practice.

Fee Arrangements Between Client and Purchaser

[10] Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser unless precluded by conflicts of interest, or unless the scope of work is changed with client consent. The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 and 6148.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, e.g., Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business and Professions Code section 6068(e)(1)) and to avoid new

representations that are in conflict with continuing duties to former clients (see Rule 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, the matter may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. See Rule 1.16.

[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, e.g., Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, impaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules, or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may assist in a sale of a law practice that does not comply with this Rule, a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer must all comply with this Rule. See, e.g., Rule 8.4(a).

[14] [RESERVED]

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, a geographic area of practice, or a substantive field of practice.

[15A] The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b).

[15B] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.

[15C] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.

						TOTAL = 7 Agree = 2 Disagree = 2 Modify = 3 NI = 0
Rule 1.17 Sale of a Law Practice [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	COPRAC	M			Supports the concept of the rule and disagrees with the minority dissent.	No response required.
				1.17(c) & Cmt. [6]	In accordance with proposed paragraph (c), the sale must include "all or substantially all" of the practice (or of the substantive field or geographic area). While seller and purchaser should endeavor to transfer the entirety of the law practice, as the proposed rule acknowledges there are instances where portions of the practice simply cannot be transferred. For example: (i) as noted in the Explanation to paragraph (b), a purchaser may have conflicts of interest and might not be able to take on certain clients and/or matters; (ii) as acknowledged in paragraphs (d)(1)(A) and (d)(2)(A), the client has the right to retain other counsel; and (iii) as contemplated by Comment [3], when a seller moves to a position as in-house counsel to a business that was a client, the seller may in effect retain that client (with the result that matters for that client are not necessarily	The Commission agrees and has added the suggested phrase and sentence to Comment [6] with conforming changes.

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

TOTAL = 7 Agree = 2
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					available to be transferred to the purchaser). These possible exclusions, when taken in the aggregate, may result in an inability to satisfy the requirement to include in the sale "substantially all" of the practice. We do not think that is an appropriate result, nor perhaps what the Commission intended here. Comment [6], which partially addresses this concern, misstates the language of paragraph (c) of the rule (i.e., by not referencing "substantially all"), and doesn't go far enough to expressly acknowledge the foregoing exclusions. In order to address these concerns and clarify the intent of paragraph (c), We recommend modifying Comment [6]: (1) to conform the comment to the rule (by using the rule's terminology of "all or substantially all" in place of "entire" or "all"); and (2) by adding a sentence.	
				Paragraphs (d)(1)(A), (d)(1)(B), (d)(2)(A) and (d)(2)(B):	The notice requirement contained in these provisions reference the imprecise term "the client." For clarity (since the law practice will often not entail only one specific client, and since no notice should be required for clients who are not part of the sale), COPRAC recommends that the term "the client" be replaced with "each of the seller's clients whose matters are included in the sale."	The Commission agrees and has made the suggested change, except in paragraph (d)(1)(B) for brevity.

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 7 Agree = 2
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Paragraph (d)(2)(B)	The first and third references to "the purchaser" in this paragraph appear to be incorrect. Since it is the seller providing the notice prior to transfer, it is likely that the seller (and not the purchaser) will receive a response from the client. As a result, consent to the transfer should not be presumed if the purchaser does not receive a timely response, when in fact the seller may have received the response. COPRAC recommends modifying the language in the first instance to state that "consent shall be presumed if neither the seller nor the purchaser receives a response," and in the third instance to state "unless the seller or the purchaser is otherwise notified."	The Commission agrees with the recommendation and has made the suggested changes with stylistic changes.
				1.17(e) & Cmt. [10]	This paragraph and related comment obligate the purchaser to assume the seller's obligations under existing client agreements regarding scope of work. However, there may be instances where the transferred scope of work may need to be narrowed: e.g., where the purchaser may have a conflict of interest with respect to certain matters, or where the purchaser is not qualified or admitted to practice in certain jurisdictions or courts. To address this concern, COPRAC recommends using the language of the Model Rule in paragraph (e) and deleting the second sentence of the proposed Comment [10].	The observations about scope of work are well taken, but the Model Rule paragraph (d) does not provide adequate client protection, and the client may engage the buyer to perform expanded, not contracted, services. The Commission has amended paragraph (e) and Comment [10] with these considerations in mind.

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [1]	COPRAC recommends deleting "the reasonable value of" in the second sentence of this comment. The language implies that a law practice may only be sold for its "reasonable value" – a concept not found in the rule itself. We believe that the seller and purchaser should not be so constrained in their negotiation over the price for the sale of the law practice.	The Commission agrees with this comment and has deleted the phrase. The black letter rule does not require that the price for which the practice is sold be reasonable, and the Comment should not do so either. The State Bar should not regulate the sales price of a practice.
				Cmt. [2]	We believe that this comment blurs the distinction between paragraph (b) of the rule (which addresses what the seller makes available for sale) and paragraph (c) of the rule (which addresses what is actually sold), and, in so doing, misstates both rules. Because of the subheadings within the comment portion of the proposed rule, it appears that Comment [2] is intended to provide commentary on paragraph (b), and Comment [5] is intended to provide commentary on paragraph (c). We recommend that Comment [2] be corrected by deleting the first sentence (which, in addition to being incorrect, is unnecessary).	The Commission disagrees. The first sentence provides necessary guidance on application of the Rule and is part of the explanation contained in the balance of the Comment.
				Cmt. [2A]	Paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. The language of	The Commission agrees and has made the recommended change.

TOTAL = 7 Agree = 2
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the paragraph does not preclude the possibility that the seller could return to the practice, or the substantive field or geographic area, at some time in the future following the sale. In fact, Comment [2A] acknowledges that "a return to private practice" after an unanticipated change in circumstance doesn't violate the rule. However, the use of the word "return" in Comment [2A] is more limiting than the language of paragraph (a) because it fails to recognize that the seller may continue to practice law in a different substantive or geographic area (and therefore would not be returning to the practice of law). To fix this inconsistency, COPRAC recommends revising the first sentence of Comment [2A] to read: "Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation."	
				Cmt. [3]	As noted above, paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. Comment [2] states that if a number of the seller's clients refuse to discharge the seller,	The Commission agrees and has added the recommended sentence. However, the subject of the new sentence does not fit with the subject of the existing sentence in Comment [3]. Therefore, it has been made new proposed Comment [3A], with a conforming change.

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					there is no violation, and the seller can continue representing such clients until the seller can withdraw. There is, however, no express provision for a transition period following the sale of the law practice, where the seller attorney continues to represent such clients and works with such clients and the purchaser attorney to transition the law practice. The rule and comments do not seem to allow that to occur: the lawyer must quit the relevant practice, and can stay on only if clients refuse to allow withdrawal. Clients, the seller, and the purchaser might be better served by explicitly recognizing that an agreement to allow a reasonable transition period does not violate the rule. COPRAC therefore recommends adding the following sentence to the end of Comment [3]: "In addition, an agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser."	
				Cmt. [4]	COPRAC shares the Minority's concern regarding the ambiguity of the term "geographic area," especially in a state as	The Commission agrees with these remarks and has made the recommended addition.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disparate as California. The example set forth in the second paragraph of the Explanation of Changes to the introductory paragraph of the rule provides some guidance: "if a lawyer had a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to commute to different parts of the state." However, the example suggests an impractical and broad definition of the term "geographic area," and might be read to imply that, for example, San Francisco and Sacramento (because they are both in northern California) are in the same geographic area (likewise with San Diego, Los Angeles and Santa Barbara in southern California). We agree with the Minority that it is probably not possible to provide an appropriate limiting definition of the term, but we are not of the view that this constitutes a fatal flaw in the proposal. Rather, we believe sufficient clarity can and should be provided by agreement between the seller and purchaser of the law practice. We recommend that the commentary provide that any sale of a geographic area of a law practice specifically define the geographic area in question. We therefore recommend that the following sentence be added to Comment [4]: "The agreement for the sale of a	

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 7 **Agree = 2**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold."	
				Comment [5]	Similar to our concern raised with respect to Comment [2A] above, the example in Comment [5] goes further than the requirement of paragraph (a) of the rule by stating that the "practitioner may not thereafter accept [any such] matters." This language is unduly restrictive and misstates the language of paragraph (a). COPRAC recommends that the last clause of the third sentence of this comment be conformed to the language of the rule, by changing "however, that practitioner may not thereafter accept any estate planning matters" to "however, that practitioner must cease practicing on estate planning matters."	The Commission disagrees. The change proposed would change the intent of the rule. If, because of conflicts of interest or otherwise, the buyer cannot accept all of the seller's estate planning matters, and the seller is not discharged from some of the matters, the seller must continue to serve the clients that do not retain the buyer. However, the intent of the majority of the commission is that the seller not accept new estate planning matters.
				Comment [15]	We note that proposed rule 7.2(b) [prohibiting the payment of value to a person for recommending the lawyer's services] includes a cross reference to this rule to clarify that the payment for a law practice in accordance with rule 1.17 does not constitute an impermissible referral fee in violation of 7.2(b) [see 7.2(b)(3)]. For clarity, COPRAC suggests that a similar cross reference be contained in this rule, and recommends the following be added	The Commission agrees with this comment and has added the suggested language to Comment [15]. In sales of businesses, buyers often agree to pay the sellers a percentage of income received from the sellers' clients who retain the buyers, under formulae that they negotiate. However, this new sentence does not directly relate to the sentence in existing Comment [15]. Therefore, in the new draft it has been made a separate paragraph and is numbered [15A].

TOTAL = 7 Agree = 2
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					either to Comment [15] or as a new comment: "The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b)."	
3	McIntyre, Sandra K.	D			No comment.	The commenter disagrees with the rule but does not state why. Because there is no explanation for the commenter's position, no response is possible.
4	Office of the Chief Trial Counsel ("OCTC")	M			Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some Comments regarding this, but OCTC believes that is should be stated in the Rule itself.) Comment [2] says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with Rule 1.16.	The Commission disagrees. The requirement of substitution and withdrawal are adequately addressed in the Rule and the Comment. See, e.g., paragraph (f). In addition, in the case of a deceased or incapacitated lawyer, requiring him or her to continue of record would not make sense, and a universal requirement of substitution might impair the buyer's ability to act to protect the client in an emergency. The Commission disagrees. Rule 1.16 already states when a lawyer may withdraw. If the seller withdraws in violation of Rule 1.16, that fact should not also be chargeable as an offense under this Rule.

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [1A] defines "selling lawyer," this definition should be in the Rule, not a Comment.	The Commission disagrees. Comment [1A] does not define "selling lawyer." It explains that the seller as used in the rule is a concept more than the lawyer whose practice is sold. Explaining the concept is a function of the Comment and does not have to be stated in the black letter rule.
					Comment [4] is completely repetitive of the Rule itself and thus unnecessary.	The Commission disagrees. Comment [4] explains the scope of the rule and its limitations in terms not stated in the rule, itself.
					Comments [5] – [6] and [13] also serve no purpose.	The Commission disagrees. These Comments explain and expand upon concepts suggested but not explicit in the black letter rule. That is a proper purpose of a Comment.
					Comment [12], which provides information regarding the withdrawal requirement, should be in the Rule, not a Comment. Comments [15A] (that lawyers must comply with Rules 1.5.1 and 1.5.4) and [15B] (requiring compliance with B&P Code section 6180) also belong in the Rule, not a Comment.	The Commission disagrees. These Comments [now numbered Comments [15B] and [15C], respectively] The Comment cautions lawyers and others about nuances of the rule and calls their attention to other rules that might apply. The other rules may not always apply. In addition, placing them in this rule would make this rule unnecessarily prolix and create the improper opportunity for charging a violation of this rule and of the other rules for a single act. The Commission has endeavored to avoid the risk of unnecessary double charging for an act that violates a primary rule by incorporating that rule into other rules.

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association ("OCBA")	D			The proposed rule would permit sale of a "geographic area" or "substantive area of practice," but it fails to define those terms, allowing for varying interpretations of those terms and a great likelihood for abuse.	The comment submitted by this commenter tracks many of the criticisms of the minority dissent to this Rule. The Commission disagrees with them.
					While we recognize that the intent of the proposed Rule is to avoid "cherry picking" cases in the sale of less than all of a practice, we are concerned that the vagueness creates more problems than it solves.	California was the first state to adopt a rule permitting sale of a practice, i.e., current rule 2-300. The ABA adopted Model Rule 1.17 by copying the concept of the California rule, but it deleted some of the client protections that are in Rule 2-300. The ABA has now modified Model Rule 1.17 to allow lawyers or law firms to sell all or segments of their practices. In addition to selling all their practices, they may sell a geographic area of a practice or a substantive area of practice. If adapted into the California rule without deleting California's client protections, those changes will allow lawyers more flexibility in transitions of their practices without sacrificing client needs. If a lawyer has a general practice, such as both personal injury litigation and criminal defense litigation, the executor of his will may not be able to find a single buyer who wants to practice in both areas. Then, the lawyer's clients will have to fend for themselves and find new counsel. A lawyer who has a litigation practice and an estate planning/probate/trust practice may decide that he or she cannot handle the pressures of litigation and wants to withdraw from litigation. However, under current Rule 2-300, unless he or she can find

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						another general practitioner willing to buy the entire practice, the lawyer cannot sell and, under the current California rule, cannot both sell the litigation practice and continue to practice in nonlitigation matters. The lawyer either has to retire *in toto* or has to form a partnership or some similar guise for not selling under the current rule. Similarly, if a lawyer has a practice in both Sacramento and Susanville and wants to limit her practice to Susanville, she cannot now sell the Sacramento practice and continue to serve clients in Susanville. If the lawyer is forced to retire, his or her clients who might have continued to retain the lawyer in the limited practice are not well served. If the lawyer forms a partnership in order to dispose of part of the practice without falling under the restrictions of Rule 2-300, her clients are not given as extensive protections, such as notice of their rights, as under the proposed rule. By conforming with the permissible guidelines of the proposed new rule and Model Rule 1.17, the aging lawyer, or the law firm that wants to get out of one aspect of its practice, can sell an aspect of it to a willing buyer and not be forced into unnecessary retirement or dissolution. Neither clients nor the bar are as well served by the current rule as they will be under the new rule. The proposed new rule affords greater protections for clients than forcing lawyers not to sell their practices but use other means for disposing of them. The Commission endeavored to draft definitions of

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						"geographic area" and "substantive area" of practice. However, we were not able to develop succinct, pragmatic definitions. The majority concluded that the scope of the areas of practice to be sold is best left to negotiations between buyer and seller.
					There is a likely potential for abuse in the ability of an attorney to build a practice area just for the purpose of selling it, which is not addressed by the proposed Rule.	The professed fear of abuse by an attorney building a practice just to sell it under the proposed rule is not realistic. Lawyers cannot develop marketable practices in the short term. The lawyer or law firm that develops a lucrative practice will find it easier to merge with a law firm than to sell under either the current rule or the proposed rule. If a lawyer has a single lucrative case and wants to transfer it to another lawyer or law firm, he or she is not likely to sell his or her practice. Instead, he or she is more likely to introduce the client to new counsel and take a referral fee, or to associate new counsel and enter into a novation of the fee agreement to provide for fee sharing. Both are easier to do than a sale under either the current California rule or the proposed new rule. Neither a referral fee nor association of counsel require as many formalities as complying with the current or the proposed rules on sale of a practice. Conversely, if a lawyer is able to develop a lucrative practice, then he or she does not commit an inherent wrong by finding a willing buyer for the practice. If a lawyer works hard and develops a

TOTAL = 7	Agree = 2 Disagree = 2 Modify = 3 NI = 0

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						practice sufficiently lucrative to be salable, the desire to sell all or part of it is neither illegal nor unethical. Surely, the commenter would not advocate that all lawyers are practicing merely to die in the harness. On the other hand, large firms will not use proposed Rule 1.17 because they have easier ways to spin off aspects of their practices than a sale under the proposed rule. For example, a large firm that wants to dispose of its probate or estate planning practice can dissolve by spinning off that aspect of its practice to its probate and estate planning lawyers, and both sides of the firm go their separate ways without giving the clients the notices of their rights under the proposed rule. If a corporate rainmaker wants to move to a different firm, he or she becomes a lateral hire, the move is announced and the new firm solicits clients without the formal notice of rights required under existing Rule 2-300 and the proposed new Rule 1.17. That will be easier and faster than complying with the rules on sale of a practice.
					The proposed Rule also allows the wholesale auctioning of cases through a broker, further leading to the degradation of the public perception of the profession.	The Commission does not agree that use of a broker to market a law practice is wrongful. As long as client rights, such as confidentiality, are protected, lawyers and law firms should be allowed to sell their practices effectively. Although a lawyer or law firm can utilize the services of a broker to find a buyer, the proposed rule requires that all *sales* be to lawyers or law firms, not to a business broker. It

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 7 **Agree = 2**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						also does not allow sales of cases or of clients. If a practice, or part of it, is sold, then that does not mean that a case or client is sold. Instead, the buyer will have purchased a business opportunity. If he, she or it is not accepted by clients of the seller, so they will not enter into fee agreements with the buyer, the buyer purchases nothing.
					Further, the proposed Rule would presume consent on the part of the client once notified of the sale, by operation of the passage of time and client silence. Current Rule 2-300 permits only a single sale of all or substantially all of a practice. This better serves the legal profession and protects clients from being treated as commercial property.	The presumption of client consent if the client does not respond to the notice is not unique to the proposed new rule. The presumption is in both Model Rule 1.17 and current Rule 2-300. It provides client protection rather than permitting or requiring abandonment of the nonresponsive client. The commenter would not prefer that the nonresponsive client be abandoned when a lawyer dies. In this respect, the current rule and the proposed new rule provide for client protection.
6	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	A			Approve the rule in its entirety.	No response required.
7	Santa Clara County Bar Association ("SCCBA")	M			We support this rule with the exception of the 90-day rule. We believe that the 90-day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the	This Rule authorizes a purchaser of all or an authorized portion of a law practice to begin acting on behalf of a client following a 90-day notice to the client, or earlier if needed to protect a client's interest. The Commission previously considered this comment, but the majority disagreed with it. Shortening the 90 day notice requirement could be reasonable, particularly in the case of the sale of the practice of a deceased or impaired lawyer. However, the majority of the Commission concluded that 90 days' notice to clients allows

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 7 Agree = 2
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client's confidential information and the previous attorney's work product), the purchaser might not be able to determine whether the client's rights are in fact in jeopardy.	reasonable time for clients to decide whether to retain the buyer of the seller's practice. The rule permits the purchaser to act in an emergency to protect the client. If, absent an emergency, the purchaser wants to act sooner, or the client wants the purchaser to take over sooner, the client and the purchaser can speak directly, and, if the client decides to retain the purchaser sooner than 90 days, the client can execute written consent and a retainer agreement with the purchaser in less than 90 days. The S.C.B.A. comment assumes that the purchaser will not have access to a client's confidential information until after the 90-day period, so that the purchaser would be unable to act on behalf to the client. This supposition is not correct. Neither this nor any other Rule prevents a seller from disclosing confidential client information to a purchaser once the purchaser has checked for potential conflicts of interest. As a result, the Commission disagrees with the stated concern and did not make the requested change. In addition, the ninety day notice provision reduces the likelihood that a lawyer or law firm will be likelihood that a seller will develop a practice merely for the purpose of resale or that the purchaser will "cherry pick" the practice, which are concerns expressed in the minority dissent. In the 90 day notice period, the seller who is not deceased will retain responsibility for serving the clients competently and will not be able to avoid performing duties owed to the client, and the quantum of work required in the potentially more lucrative cases will likely be greater during the 90 days than in a shorter period.

Rule 1.17: Purchase and Sale of a Law Practice

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arkansas adds Rule 1.17(e), which requires the seller to file a detailed and timely affidavit with the Committee on Professional Conduct showing that the seller has complied with the notice provisions of Rule 1.17.

California: Rule 2-300, using different language, addresses the same policy issues as Rule 1.17 and provides that ''fees shall not be increased solely by reason of'' the sale. ''All or substantially all'' of a practice may be sold.

Colorado: Rule 1.17(a) is satisfied only if the seller ceases to engage in the private practice of law ''in Colorado,'' or in the area of practice ''in Colorado'' that has been sold.

Florida omits the requirement in ABA Model Rule 1.17(a) that the seller cease practicing law, and adds or modifies several provisions, including the following:

> (c) *Court Approval Required*. If a representation involves pending litigation, there shall be no substitution of counsel or termination of representation unless authorized by the court. . . .
>
> (d) Client Objections. If a client objects to the proposed substitution of counsel, the seller shall comply with the requirements of rule 4-1.16(d) [which governs withdrawal]. . . .
>
> (e) *Existing Fee Contracts Controlling*. The purchaser shall honor the fee agreements that were entered into between the seller and the seller's clients. The fees charged clients shall not be increased by reason of the sale.

Florida's Comment to subparagraph (f) provides as follows:

> The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. This obligation of the purchaser is a factor that can be taken into account by seller and purchaser when negotiating the sale price of the practice.

Georgia: Rule 1.17 tracks the 1990 version of ABA Model Rule 1.17 verbatim except that Georgia deletes paragraph (a) (requiring that the seller stop practicing law).

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Illinois: In the rules effective January 1, 2010, Rule 1.17 also applies to "the estate of a deceased lawyer or the guardian or authorized representative of a disabled lawyer…."

Kansas: Kansas omits ABA Model Rule 1.17 entirely.

Maryland: Rule 1.17 differs significantly from ABA Model Rule 1.17. Maryland Rule 1.17(a)(1) permits the sale of a law practice, upon appropriate notice, if "(1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale" and "(2) The practice is sold as an entirety to another lawyer or law firm."

Michigan: Rule 1.17(a) provides that a "lawyer or a law firm may sell or purchase a private law practice, including good will, according to this rule." Michigan adds Rule 1.17(e), which permits the "sale of the good will of a law practice . . . conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice has been conducted."

Minnesota: Rule 1.17(b), which is based on the 1990 version of ABA Model Rule 1.17, provides as follows:

> (b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.

Rule 1.17(d) provides that the notice to clients must include a "summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buyer lawyer or members of the buying law firm has been in practice." Minnesota also adds four paragraphs, including Rule 1.17(f), which permits the selling lawyer to promise that he or she "will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time," and Rule 1.17(g), which provides that the selling lawyer "shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice."

Missouri: Rule 1.17(d) adopts the ABA mandate that fees charged to clients shall not be increased by reason of the sale of the practice, but adds that the purchaser may "refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations."

New Jersey: Rule 1.17 permits a lawyer or firm to sell or purchase a law practice, including goodwill, if the seller is

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ceasing to engage in private law practice in New Jersey, the practice is sold as an entirety and certain notices are given to the clients of the seller and by publication in the New Jersey Law Journal and the New Jersey Lawyer at least 30 days in advance of the sale.

New York: In the rules effective April 1, 2009, Rule 1.17 allows for the sale of a "law practice, including goodwill, to one or more lawyers or law firms." The parties may agree "on reasonable restrictions on the seller's private practice of law." Provisions are made for protecting confidential information and checking for conflicts.

North Carolina: Rule 1.17(d) provides that if a conflict of interest disqualifies the purchaser from representing a client, then "the seller's notice to the client shall advise the client to retain substitute counsel." In addition, Rule 1.17(g) permits the purchaser to pay the seller in installments — but the seller "shall have no say regarding the purchaser's conduct of the law practice."

Ohio: Rule 1.17 incorporates most of the substantive provisions of the Model Rule, but uses different language and adds many different provisions. For example, Ohio Rule 1.17(a) requires that a law practice must be sold "in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients." In addition, Rule 1.17(a) prohibits the sale or purchase of a law practice "where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or law firm," and Rule 1.17(d)(1) requires the sale agreement to include a statement that "the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services."

Ohio Rule 1.17(d)(2) requires the sale agreement to provide that "the purchasing lawyer will honor any fee agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale," but the purchasing lawyer "may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale." Rule 1.17(d)(3) generally permits the sale agreement to include terms that "reasonably limit the ability of the selling lawyer to reenter the practice of law," but prohibits such limitations "if the selling lawyer is selling his or her law practice to enter academic, government, or public service or to serve as in-house counsel to a business."

Ohio Rule 1.17(e) specifies in considerable detail what the notice to clients must contain, and a Rule 1.17(g) allows the selling lawyer and purchasing lawyer to give notice of the sale to a missing client by publishing notice of the sale in a newspaper. A Rule 1.17(i) provides as follows:

(i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or law firm from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

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Oklahoma: Rule 1.17(a) requires the selling lawyer to cease practice only ''in the geographic area in Oklahoma in which the practice has been conducted,'' not in the entire state. Rule 1.17(b)(2) provides that matters shall not be transferred to a purchaser ''unless the seller has reasonable basis to believe that the purchaser has the requisite knowledge and skill to handle such matters, or reasonable assurances are obtained that such purchaser will either acquire such knowledge and skill or associate with another lawyer having such competence.'' Rule 1.17(c) requires the ''signed written consent of each client whose representation is proposed to be transferred'' unless the client takes no action within 90 days of the notice. Rule 1.17(d) permits the purchaser to ''refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.''

Pennsylvania: Rule 1.17 differs significantly from ABA Model Rule 1.17. For example, Pennsylvania Rule 1.17(b) requires that the seller must sell the practice ''as an entirety to a single lawyer,'' and explains that a practice is sold as an entirety ''if the purchasing lawyer assumes responsibility for all of the active files'' except those specified in Rule 1.17(g). Rule 1.17(d) adds the following: ''Existing agreements between the seller and the client concerning fees and the scope of work must be honored by the purchaser, unless the client gives informed consent confirmed in writing.'' Pennsylvania also adds Rules 1.17(e) and (g), which provide as follows:

> (e) The agreement of sale shall include a clear statement of the respective responsibilities of the parties to maintain and preserve the records and files of the seller's practice, including client files.
>
> (g) The sale shall not be effective as to any client for whom the proposed sale would create a conflict of interest for the purchaser or who cannot be represented by the purchaser because of other requirements of the Pennsylvania Rules of Professional Conduct or rules of the Pennsylvania Supreme Court governing the practice of law in Pennsylvania, unless such conflict, requirement or rule can be waived by the client and the client gives informed consent.

Virginia: Virginia requires the selling lawyer, in notifying clients about the proposed sale, to disclose ''any proposed change in the terms of the future representation including the fee arrangement.'' Nonetheless, Virginia also adopts ABA Model Rule 1.17(d).

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Proposed Rule 1.18 [N/A]
"Duties to Prospective Client"

RECOMMENDATION: NO ADOPTION

Summary: The Commission does not recommend the adoption of Model Rule 1.18. Please see the Introduction for an explanation of the Commission's recommendation. In addition, see a separate statement from Commission members concurring in this recommendation, and also two separate dissents from other Commission members who oppose the recommendation to not adopt a rule.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule rejected	☑ ABA Model Rule 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	Evid. Code § 951
Case law	*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

☐ 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 ___4__
Opposed Rule as Recommended for Adoption __5___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Concurring and Dissenting Positions, Known Stakeholders and Level of Controversy

Concurring and Dissenting Position Included. (See Introduction): ☑ Yes ☐ No (There is one concurring statement and two separate dissenting statements)

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

A number of lawyers believe that the absence of this Rule, which has been adopted in some form in every jurisdiction that has completed its Ethics 2000 review, could lead to confusion over a lawyer's duties to prospective clients. In addition, a number of lawyers reject the concept of non-consensual screening, which is provided for in Model Rule 1.18(d)(2), in the private law firm context. See Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.18[*] Duties to Prospective Client*

April 2010
(No rule is recommended for adoption)

INTRODUCTION:
Following public comment, the Commission voted not to recommend the adoption of a rule or comment counterpart to Model Rule 1.18. Model Rule 1.18 is intended to clarify the duties a lawyer owes to prospective clients who consult with the lawyer to seek legal services or advice. Model Rule 1.18 is a new Rule that the ABA approved in 2002 to address the "concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period." See Model Rule 1.18, Reporter's Explanation of Changes, ¶. 1, available at http://www.abanet.org/cpr/e2k/e2k-rule118rem.html (last visited 4/9/10).[1/]

Although there is no California Rule counterpart, the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Cal. Evid. Code § 951, which does not require the formation of a lawyer-client relationship but instead defines "client" as a person who "consults" with a lawyer in the lawyer's capacity as a lawyer "for the purpose of securing legal service or advice." Section 951 is discussed at length in Cal. State Bar Formal Opn. 2003-161, available at http://www.calbar.ca.gov/calbar/pdfs/ethics/OPN_2003_161.pdf [last visited 4/9/10]. The Commission determined that the complexities involved in determining whether a lawyer-client relationship was formed, or whether an ethical screen should be permitted to enable a law firm to rebut the presumption of shared confidences when a firm lawyer was exposed to confidential information during a consultation, is better left to the sound discretion of the courts.

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[*] No rule or comment counterpart to Model Rule 1.18 is being recommended by the Commission.

[1/] The Reporter's Explanation of Changes for each of the Model Rules, as recommended by the Ethics 2000 Commission, is available at http://www.abanet.org/cpr/e2k/e2k-report_home.html [last visited 4/9/10].

Concurring Statement. Some members of the Commission have specially concurred in the Commission's decision not to recommend a counterpart to Model Rule 1.18. See Concurrence, below.

Dissenting Positions. There are two separate dissenting positions against the Commission's recommendation not to adopt a rule counterpart to Model Rule 1.18. Both groups of dissenters agree that Model Rule 1.18 is an important rule that addresses the duties of a lawyer to persons seeking legal services when no client-lawyer relationship ensues. Prospective clients are like clients in that they may disclose confidential information that a lawyer is obligated to protect. At the same time, prospective clients do not have all of the protections afforded clients because the lawyer's interactions with a prospective client are often limited in time and substance and leave both the prospective client and the lawyer free to proceed no further. Therefore, Rule 1.18 provides important guidance for lawyers and protection for prospective clients. The dissenting groups, however, disagree in an important respect.

Dissent A. Members of the Commission who support this position believe a rule substantially similar to the Model Rule, including the Model Rule's provision for an ethical screen in limited circumstances, should be adopted. See Dissent A, following the Rule & Comment Comparison Chart, below.

Dissent B. Members of the Commission who support this position agree with the importance of having a counterpart to Model Rule 1.18 but believe that there should be no ethical screen provision in the Rule. See Dissent B, immediately following Dissent A, below.

Public Comment. Although there was some disagreement among the commenters on whether non-consented screening should be included in the proposed Rule that was circulated for public comment, none of the public comment received objected to the adoption of a rule patterned on Model Rule 1.18.

Variations in Other Jurisdictions. Every jurisdiction that has completed it Ethics 2000 review (41 have completed their review) of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. Two of those jurisdictions (D.C., Idaho) do not permit non-consensual screening. Although North Dakota does not provide for screening, representation against the prospective client by the lawyer is permitted if "the lawyer who received the information took reasonable measures to avoid exposure to more significantly harmful information than was reasonably necessary to determine whether to represent the potential client and notice is promptly given to the potential client." See N.D. Rule 1.18(d)(2). Several jurisdictions do not require that the consulted lawyer take "reasonable measures" to avoid exposure to information not necessary to decide whether to accept the representation. (E.g., Maryland, Montana, New Jersey, North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

ABA Model Rule Rule 1.18 Duties to Prospective Client	Commission's Proposed Rule* [NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]	Explanation of Changes to the ABA Model Rule
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.	~~(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.~~	See Introduction.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.	~~(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.~~	See Introduction.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).	~~(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).~~	See Introduction.

* No rule or comment counterpart to Model Rule 1.18 is being recommended by the Commission. Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 1.18 Duties to Prospective Client**	**Commission's Proposed Rule*** **[NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]**	**Explanation of Changes to the ABA Model Rule**
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:	~~(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:~~	See Introduction.
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:	~~(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:~~	See Introduction.
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and	~~(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and~~	See Introduction.
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and	~~(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and~~	See Introduction.
(ii) written notice is promptly given to the prospective client.	~~(ii) written notice is promptly given to the prospective client.~~	See Introduction.

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule [NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]	Explanation of Changes to the ABA Model Rule
[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.	~~[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.~~	See Introduction.
[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).	~~[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).~~	See Introduction.
[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as	~~[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as~~	See Introduction.

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule [NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]	Explanation of Changes to the ABA Model Rule
permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.	~~permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.~~	
[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.	~~[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.~~	See Introduction.
[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.	~~[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.~~	See Introduction.

ABA Model Rule **Rule 1.18 Duties to Prospective Client** **Comment**	**Commission's Proposed Rule** **[NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]**	**Explanation of Changes to the ABA Model Rule**
[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.	~~[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.~~	See Introduction.
[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(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.	~~[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(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.~~	See Introduction.
[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as	~~[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as~~	See Introduction.

ABA Model Rule Rule 1.18 Duties to Prospective Client Comment	Commission's Proposed Rule [NO RULE OR COMMENT RECOMMENDED BY THE COMMISSION]	Explanation of Changes to the ABA Model Rule
practicable after the need for screening becomes apparent.	~~practicable after the need for screening becomes apparent.~~	
[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.	~~[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.~~	See Introduction.

Concurrence

Concurring Statement in Support of Commission's Recommendation Not to Adopt Proposed Rule 1.18

The members of the Commission who voted against the adoption of a counterpart to Model Rule 1.18 did so for divergent reasons. Several members requested that their specific reasons for their vote be stated. This is their explanation.

Conflicts concerning prospective clients are already well encompassed in the case law. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] (formation of attorney-client relationship assumed); *Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132] (no duties incurred by lawyer during a brief, preliminary consultation).

When a lawyer is in a law firm, the name of the opposing party may mean nothing to the listening lawyer when he or she first hears it. However, when a formal conflict check is undertaken, the conflict that will result if representation is accepted can become apparent. The concurring members of the Commission believe that the possible permutations that can arise from talking with a potential client are so infinite and various that a rule which attempts to create a rigid framework for such communications is bound to fail in practice. Further, the concept of advance or after-the-fact written consent to such a conflict is unrealistic for at least two reasons. First, the contact with the caller may be a single telephone call in which no address or other means of communication is obtained. Second, the caller may have been speaking to many lawyers during the search for counsel, and thus will have no interest in accommodating a lawyer with whom he or she spoke only briefly, and who turned the caller down – perhaps for reasons that struck the caller as very technical and bureaucratic, generating ill will if any feeling at all. In light of the foregoing considerations, the concurring members of the Commission join in the Commission's recommendation that a counterpart to Model Rule 1.18 not be adopted. They believe that the complexities involved in determining whether a lawyer-client relationship was formed, or whether an ethical screen should be permitted to enable a law firm to rebut the presumption of shared confidences when a firm lawyer was exposed to confidential information during a consultation, are better left to the sound discretion of the courts.

Dissent A
Dissent to Recommendation Not to Adopt Proposed Rule 1.18 and in Favor of Proposed Rule 1.18 With Unconsented Screening
Proposed Rule 1.18 – ALT-A, Attached

1. Proposed Rule 1.18 is an important rule that addresses the duties of a lawyer to persons seeking legal services when no client-lawyer relationship ensues. Most jurisdictions have adopted a version of ABA Model Rule 1.18 because important events occur during the period when a lawyer and a prospective client are considering whether to form a professional relationship. For the most part, other rules do not address this pre-retention period. Prospective clients are like clients in that they may disclose confidential information that a lawyer is obligated to protect. At the same time, prospective clients do not have all of the protections afforded clients because the lawyer's interactions with a prospective client are often limited in time and substance and leave both the prospective client and the lawyer free to proceed no further. Therefore, Rule 1.18 provides important guidance for lawyers and protection for prospective clients.

2. Paragraph (a) of the proposed rule defines the limited circumstances in which the rule applies by defining who qualifies as a "prospective client." Paragraph (b) reinforces the duty found in case law that all confidential information of a prospective client is treated as confidential even if the lawyer is not retained. This well settled obligation is not technically covered by proposal Rules 1.6 or 1.9 which deal with confidential client information.

3. Paragraph (c) extends the protection of Rule 1.9(a) to prohibit representations adverse to a prospective client in the same or substantially related matter. Unlike Rule 1.9(a), however, the rule applies only if the lawyer receives confidential information from a prospective client that is material in the later representation. The prospective client situation justifies this treatment because in the period prior to deciding whether to represent a prospective client, it is in the prospective client's interest to share enough information with the lawyer to determine if there is a conflict of interest or whether the parties are willing to enter into a professional relationship. The lawyer may learn early in the consultation that the lawyer or the lawyer's firm has a conflict of interest or there are other reasons for not accepting the engagement. If the discussion stops before significantly harmful information is shared, the lawyer's regular clients should not be denied counsel of their choice if a substantially related matter arises in the future.

4. Paragraph (d) provides two ways in which other lawyers in the firm can avoid imputation of a conflict based on receipt of information by the lawyer who consulted with the prospective client and protect against a former prospective client seeking to prohibit the firm from undertaking a subsequent adverse representation.

The first is where the affected client and the former prospective client provide informed written consent. The second is where the lawyer who received the prospective client's information took reasonable measures to avoid exposure to more information that was reasonably necessary to determine whether to represent the prospective client and that lawyer is timely screened from any participation in the subsequent matter, and receives no part of the fee therefrom, and the prospective client is promptly given written notice.

5. Paragraph (d) strikes a proper balance between the interests of the lawyer's existing clients and the interests of prospective clients where no professional relationship ensues and the burden on the lawyer to justify the circumstances in which the limited screening provision in paragraph (d)(2) is permitted. The Commission, by a four-five vote, recommend against adopting Rule 1.18. Several members who voted against adoption of the rule favored a rule, but without a limited screening provision in paragraph (d)(2). The result of this narrow vote is not in the best interests of lawyers or the public and should not defeat this rule. Proposal Rule 1.18 is consistent not only with the Model Rule and the rule in many jurisdictions but also with Restatement (3d) The Law Governing Lawyers §15. Lawyers and clients in California deserve the protections provided by Rule 1.18.

RULE 1.18 DISSENTERS' DRAFT RULE – ALT-A

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, although the range of a prospective client's information that is protected is the same as that of a client, a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject matter of the consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. In addition, a person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-

arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client. See also Comment [7].

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers [as provided in Rule 1.10,] but, under paragraph (d)(1), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0.1(k) (requirements for screening procedures). In some instances, for example when the prospective client is a person who is not experienced in the use of legal services, it may be appropriate at the beginning of the consultation for the lawyer to explain to the prospective client that the lawyer's firm might subsequently screen the lawyer in the event the lawyer declines the representation and the firm accepts representation of the client's adversary. Paragraph (d)(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] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given to the prospective client as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Dissent B
Dissenting Position in Favor of Rule 1.18 Without Unconsented Screening
Proposed Rule 1.18 – ALT-B, Attached

The drafters of this Dissent join in the first paragraph of Dissent A favoring the adoption of a rule counterpart to ABA Model Rule 1.18, but disagree with the recommendation in Dissent A for the adoption of the unconsented screening provisions in paragraph (d)(2) of proposed Draft ALTA. The reasons for opposing the inclusion of paragraph (d)(2) or any provision that would permit unconsented screening are:

1. While a majority of the Commission voted to not adopt Rule 1.18, some members who voted with the majority would support the Rule if it did not allow law firms to use screening without client consent. Because a majority of the Commission did not favor deletion of paragraph (d)(2), which provided for unconsented screening, Commission members opposed to screening without client consent voted against the Rule on the final vote. Those Commission members opposed to unconsented screening would prefer to see no Rule than have a Rule with unconsented screening in paragraph (d)(2).

2. Commission members who subscribe to this view would support a version of Rule 1.18 attached to this statement. The attached version would delete paragraph (d)(2) and related Comments.

3. Paragraph (d)(2) would allow screening in situations where the law in California is still evolving and in which California courts are in disagreement. (See *Kirk v. First American Title* (2010) __ Cal.App.4th ___.) In the most recent case to address this issue, the court did not adopt a broad rule permitting screening in all cases. Instead, the court adopted a standard that is highly circumstantial and would not allow for screening in many cases. The court endorsed the Board's decision not to provide for screening in Rule 1.10, stating, "We agree with the Board of Governors that the issue of whether attorney screening can overcome vicarious disqualification in the context of an attorney moving between private law firms is not clearly settled in California." (Slip Opn at p. 35.) The same can be said for not adopting screening in this Rule, particularly since this Rule involves the very circumstance that was involved in the recent case. The courts should be free to develop the law in this area based on experience without having the issue prejudged in a Rule as additional case law precedence would aid in the State Bar's future consideration of whether there should be screening and, if so, its parameters.

4. Commission members oppose allowing ethical screens without client consent in this Rule because it would permit a law firm that has received a prospective client's confidential information to adopt an ethical screen unilaterally and without the prospective client's consent. Allowing screening without a prospective client's consent

undermines the extremely important role of confidentiality and trust in a prospective lawyer-client relationship.

5. The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. The duty extends to prospective clients, who communicate with lawyers for the purpose of retention, even if it does not result. ***The duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of consequence***. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)

6. The legal profession invites prospective client candor by imposing an austere duty of confidentiality on lawyers. Through the strict application of this duty, a prospective client never has to worry about revealing confidential information to a lawyer and never has to question their decision to do so. Rule 1.9 extends that purpose by preventing lawyers from putting themselves in a position where they would be tempted to reveal or use against the prospective client information that the prospective client imparted in confidence.

Rule 1.18 imputes the conflict to the lawyer's firm in order to assure prospective clients that the lawyer will not be tempted by the interest of the lawyer's firm to reveal information the prospective client imparted to the lawyer in confidence. Imputation is necessary because the prospective client has no means to assure that information in the possession of a firm representing the prospective client's adversary will not be shared and used or disclosed against the prospective client's interests. Imputation does not turn on whether lawyers in large firms are presumed to share information. It turns on the firm's interest as an advocate for an adversary, the availability of the information within the law firm and the prospective client's inability to know whether a screen has been violated.

7. The legal profession cannot assure prospective clients that they can communicate with lawyers in confidence when the prospective client cannot verify that the law firm is not using the information in circumstances where the law firm would be tempted to use it against the prospective client. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

> The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to

the current controversy would otherwise be permitted to represent the former client's 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."*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

8. Screening without client consent does not protect prospective clients and undermines prospective clients' ability to communicate with lawyers without fear of consequence because a prospective client cannot be verify compliance. A prospective client who has not expressed confidence in a law firm by consenting to the use of an ethical screen should not be forced to accept screening by law firm fiat. A prospective client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn that information the prospective client expected would be held in confidence is in the possession of the law firm that now represents the prospective client's adversary in a situation where that information could benefit that adversary.

9. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a law firm can harbor that confidential information behind an unconsented and unverifiable screen while the firm represents the prospective client's adversary.

RULE 1.18 DISSENTERS' DRAFT RULE – ALT-B

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a

substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, although the range of a prospective client's information that is protected is the same as that of a client, a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject matter of the consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. In addition, a person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney

encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of “materially adverse” as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of “substantially related” as used in paragraph (c), see Rule 1.9, comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers [as provided in Rule 1.10,] but, under paragraph (d)(1), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

[8] [RESERVED]

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.18 Duties to Prospective Client [Sorted by Commenter]						TOTAL = 8 Agree = 1 Disagree = 7 Modify = 0 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.
2	Bar Association of San Francisco, Legal Ethics Committee ("BASF")	M			Our committee opposes the provision of this rule permitting "non-consensual" screening. The Proposed Rule would significantly depart from existing law and policy concerns. Except in the limited context of government lawyers, California courts have not generally approved the concept of non-consensual screening, despite numerous opportunities to do so (See *Sharp v. New Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 438 fn. 11). No principled reason has been articulated for affording less protection to prospective clients that provide confidential information to lawyers than former clients. Why is a prospective client who consults with a lawyer for the purpose of retaining the lawyer, and provides material confidential information, but does not end up retaining the lawyer, entitled to less protection of his or her confidential information than the prospective client who ends up retaining the lawyer? California case law acknowledges that, in	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					addition to a client's or prospective client's interest in confidential information, other important policies are implicated when considering conflicts and appropriate methods for resolving them. Those policies include the need to maintain the public's trust and confidence in the legal system, to preserve a client's or prospective client's trust in the lawyer he or she consults with and to preserve trust in their ability to communicate freely with the lawyer in confidence. (See People ex. rel. Dept. of Corporations v. *SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145; *Adams v. Aerojet-General Corp*. (2001) 86 Cal.App.4th 1324, 1334-1335.) We see no reason why these concerns are less important in the context of a "prospective client" who has provided information to the lawyer, as opposed to a former client who has done so. The requirement that the lawyer take "reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client" does not justify non-consensual screening. It is not clear that this provides meaningful protection to a prospective client who has given material confidential information to the lawyer. As the Commission noted in its	

						TOTAL = 8 Agree = 1 Disagree = 7 Modify = 0 NI = 0
			Rule 1.18 Duties to Prospective Client [Sorted by Commenter]			
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					materials, California has long recognized a duty to protect confidential information of a prospective client even where no attorney-client relationship exists. That concept is codified in Cal. Ev. Code section 951. Allowing non-consensual screening could impair the flow of information between attorney and client. Under the rule as currently drafted, a law firm contacted by a prospective client that receives the prospective client's material confidential information is not required to provide any notice to the prospective client of the potential consequences of the consultation. The law firm may later appear against the prospective client in the same matter in which the prospective client sought the law firm's advice by unilaterally imposing a screen. Such a proposition risks chilling the free-flow of information between the lawyer and potential client. The written notice requirement does not enable the prospective client to verify that its confidences are being appropriately protected.	
3	Committee on Professional Responsibility and Competence ("COPRAC")	M		1.18(d)	1. We generally support adoption of this proposed rule. In particular, we support the inclusion of non-consensual screening in paragraph (d)(2)(i), a concept that apparently	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.

TOTAL = 8	Agree = 1 Disagree = 7 Modify = 0 NI = 0

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					split your committee 5-5. 2. The language of paragraph (d) is confusing in that it does not specify who can represent the affected client. Commenter recommends changing (d) to read: (d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client by another lawyer at such lawyer's firm is permissible if:" (added language underscored) 3. The use of the phrase "prohibited lawyer" in subparagraph (d)(2)(i) is awkward. Commenter recommends the phrase be changed to "the lawyer who received the information." 4. Commenter recommends deletion of the sentence, "Hence, prospective clients are entitled to some but not all of the protection afforded clients," in Comment [1]. Commenter believes that this sentence may suggest inappropriately that a lawyer owes a duty of confidentiality to prospective clients that is different than the duty of confidentiality owed to current or past clients. The Commenter sees no difference under existing California law.	

						TOTAL = 8 Agree = 1 Disagree = 7 Modify = 0 NI = 0

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("LACBA")	M		(d)(2)	We recommend that an additional provision be added, as a subsection to (d)(2), requiring notice to the prospective client, prior to the receipt of confidential information, of the possibility of non-consensual screening. (We agree, as provided in Comment [2], that no screening whatever is necessary where the communication is unilateral and without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship). We recommend that the Commission also provide a Comment to the new, proposed subsection that, where practicable, the required notice to the prospective client of the possibility of non-consensual screening be confirmed in writing.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.
				Comment [1]	Comment [1] states, among other matters, that "prospective clients are entitled to some but not all of the protection afforded clients." This sentence appears to add nothing to the understanding of Rule 1.18. Moreover, in the absence of further extensive explication to what protections are not afforded prospective clients, the sentence inadequately summarizes existing California law. See,	

TOTAL = 8 Agree = 1
Disagree = 7
Modify = 0
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					California State Bar Formal Opinion No. 2003-161. Because the comment concerning "some but not all of the protection afforded clients" is both gratuitous and inadequate as a summary of existing law, we recommend that this single sentence be deleted.	
5	Office of the Chief Trial Counsel ("OCTC")	M			The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.
				1.18(c), (d)	OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflicts rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflicts rules should be in a separate rule which clearly deals with all related issues.	
				Cmts. [6]-[8]	Like the Rule itself, Comments [6] – [8] are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in Comment [9] to the competence rules and the client's property rules.	

TOTAL = 8	Agree = 1 Disagree = 7 Modify = 0 NI = 0

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Orange County Bar Association	M		(c) and (d) (d)(2)	1. It is unclear from the use of the word "client" in the first sentence of paragraph (c) whether this provision (along with paragraph (d)) is intended to deal solely with current clients, as opposed to future clients, that have interests materially adverse to those of a prospective client. The language of Comment [6] seems to suggest that it applies to both current and future clients (i.e. "continuing or accepting the representation of a client"). We recommend that this be clarified in paragraphs (c) and (d). 2. Paragraph (d)(2) permits representation of an affected client despite receipt of information that would prohibit the representation under paragraph (c) if, *inter alia*, "the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client . . . ." However, neither the proposed Rule nor the Comments provide guidance as to what would constitute "reasonable measures to avoid exposure." We recommend that examples of reasonable measures be added after the first sentence in Comment [4]. 3. Subpart (i) of paragraph (d)(2) refers to the	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.

TOTAL = 8	Agree = 1 Disagree = 7 Modify = 0 NI = 0

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyer being "timely and effectively screened." The Commission added the words "and effectively" to the ABA Model Rule language here and in Comment [7]. However, this language is not consistent with the definition of "screened" in proposed Rule 1.0.1, which refers to "adequate" procedures. We recommend that the wording used to describe the screening procedures in paragraph (d)(2) and Comment [7] of proposed Rule 1.18 be consistent with the definition ultimately used in proposed Rule 1.0.1, as well as in proposed Rule 1.10 if a screening provision is added to that Rule, which we support.	
				Comment [2]	4. We agree with the inclusion of the limitations contained in Comment [2] regarding who may constitute a "prospective client," but we do not believe that the Comment addresses the situation in which a person contacts a lawyer for the purpose of confliction him or her out of the representation of an adversary (without a good faith intention to retain the lawyer in the matter at hand). In this regard, we suggest that the Commission incorporate language in the Comment similar to that adopted by Nevada, such as: "A person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the	

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					subject matter of the consultation is not a 'prospective client' within the meaning of the Rule." 5. We suggest that the reference to "disqualifying information" in Comment [4] be changed to "information that prohibits representation as defined in paragraph (c)," which is consistent with the Commission's modification to the language in paragraph (d).	
				Comment [5]	6. Comment [5] states that "a lawyer may condition conversations with a prospective client on the person's ***informed consent*** that the information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter." (Emphasis added.) We recommend that this be changed to "informed written consent" to be consistent with the language and requirement of paragraph (d)(2) and to ensure that any such agreement be documented for avoidance of doubt.	
				Comment [6]	7. We recommend that the word "materially" be added between "interests" and "adverse" in the first sentence of Comment [6] to accurately reflect the language of paragraph (c).	

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL = 8 Agree = 1
Disagree = 7
Modify = 0
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	San Diego County Bar Association Legal Ethics Committee	M			Delete paragraph (d)(2). We agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very mater in which representation was sought without their consent. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.
8	Santa Clara County Bar Association	M			We recommend that subsection (d)(2)(ii) be deleted. This subsection requires that the attorney give written notice to the prospective client, which in many instances creates too onerous an obligation for an attorney or law firm, in particular, for government attorneys.	Following the public comment period, the Commission voted not to recommend adoption of a rule counterpart to Model Rule 1.18.

Rule 1.18: Duties to Prospective Client

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Connecticut: Rule 1.18(a) defines a "prospective client" as a person who discusses "or communicates" with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter.

District of Columbia adopts the essence of Rule 1.18 except that it omits Model Rule 1.18(d)(2) and (2)(ii) while retaining the language in (2)(i).

Florida omits the words "significantly harmful" from paragraph (c), so a lawyer is personally disqualified if he or she received information "that could be used to the disadvantage" of the prospective client.

Illinois: In the rules effective January 1, 2010, Rule 1.18(d) does not require that a prospective client receive notice when a firm employs a screen to avoid a conflict of interest.

Maryland deletes the introductory language in ABA Model Rule 1.18(d)(2) and all of Rule 1.18(d)(2)(ii). Thus, Maryland Rule 1.18(d) is a single sentence permitting representation if either "both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

Missouri: Rule 1.18(d)(2) deletes the ABA Model Rule requirements that the lawyer who received the disqualifying information be apportioned no part of the fee and that written notice be promptly given to the prospective client.

Nevada: Nevada adds the following new paragraphs to Rule 1.18:

> (e) A person who communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a "prospective client" within the meaning of this Rule.
>
> (f) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
>
> (g) Whenever a prospective client shall request information regarding a lawyer or law firm for the

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purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in Rule 1.4(c).

(2) The lawyer or law firm may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.

(3) If the information furnished to the client includes a fee contract, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

New York: In the rules effective April 1, 2009, Rule 1.18(d) describes in more detail the procedures necessary to avoid a conflict as a result of consultations with prospective clients. Comments 7A-7C offer further guidance regarding these procedures. New York adds Rule 1.18(e), which provides (in language copied partly from Comment 2 to Model Rule 1.18) that a "prospective client" does not include a person who "(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship" or "(2) communicates with a lawyer for the purpose of disqualifying the lawyer…."

North Carolina omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information. North Carolina does not require that a disqualified lawyer be denied part of the fee.

Oregon omits the language in Rule 1.18(d)(2) requiring "reasonable measures to avoid exposure" to unnecessary confidential information.

South Carolina: Rule 1.18(a) provides that a person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client "only when there is a reasonable expectation that the lawyer is likely to form the relationship."

Vermont: In the rules effective September 1, 2009, Rule 1.18(a) extends prospective client status only to those people who are "in good faith" seeking to hire that attorney.

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Proposed Rule 3.9 [N/A]
"Advocate In Nonadjudicative Proceedings"

(Draft #3, (3/27/10))

Summary: This rule addresses a lawyer's role as a client's advocate before a legislative body or administrative agency in a nonadjudicative proceeding. It requires a lawyer to disclose that the lawyer's appearance is in a representative capacity. The proposed Rule is derived primarily from N.Y. Rule 3.9.

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

Statutes: Government Code sections 11440.60, 82002(a),(b),(c)

Case law

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

New York Rule 3.9

☐ 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 ___5__
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. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

A minority of the Commission is concerned that limiting the scope of this Rule as recommended by the Commission, together with the definition of "tribunal" in proposed Rule 1.0.1 and the Commission's rejection of Model Rule 4.1(a), will create a regulatory gap in the Rules and cause confusion among lawyers. See Minority Dissent.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 3.9 Advocate in Nonadjudicative Proceedings*

April 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.9 regulates a lawyer's conduct as a client advocate in a nonadjudicative proceeding, such as a proceeding before a legislative body or an administrative agency. The Rule, which is derived verbatim from New York Rule 3.9, requires a lawyer to disclose that his or her appearance is in a representative capacity, except when the lawyer is simply seeking from an agency information that is available to the public. The Commission recommends that the Model Rule's requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct before a tribunal not be adopted. The Commission believes this departure from the Model Rule approach is necessary because the provisions referenced in the Model Rule include concepts that are meaningful in representations before adjudicative tribunals, such as the concept of "evidence," but these same concepts are confusing, or outright incorrect, for setting clear standards in a non-adjudicative proceeding. The Commission concluded that there are material differences between the functioning of law courts and of legislative and administrative bodies that reflect on a lawyer's role in representing clients in these different settings. Moreover, First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits, but do not similarly apply to court proceedings. For these reasons, the Commission recommends that proposed Rule 3.9 be more limited in scope and application than the corresponding Model Rule.

Minority. A minority of the Commission dissents from (i) the Commission's rejection of the public comment version of the Rule and adoption of New York Rule 3.9, and (ii) the Commission's concomitant rejection of proposed Rule 4.1, which would have imposed a duty of honesty in circumstances governed by Rule 3.9. See full Minority Dissent, below.

Variations in Other Jurisdictions. Every state except for North Carolina and Virginia have adopted some version of Model Rule 3.9. Nearly every state that has adopted the Rule has adopted the Model Rule verbatim. Only New York substantively diverges from the Model Rule by limiting the lawyer's duties under the Rule to disclosing the fact of the lawyer's representative capacity.

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* Proposed Rule 3.9, Draft 3 (3/27/10).

ABA Model Rule **Rule 3.9 Advocate in Nonadjudicative Proceedings**	**Commission's Proposed Rule**[*] **Rule 3.9 Advocate in Nonadjudicative Proceedings**	**Explanation of Changes to the ABA Model Rule**
A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.	A lawyer ~~representing~~communicating in a ~~client before~~representative capacity with a legislative body or administrative agency in connection with a ~~nonadjudicative~~pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public ~~and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5~~.	Proposed Rule 3.9 is taken verbatim from New York Rule 3.9, which is a substantial revision of Model Rule 3.9. After the initial public comment period, the Commission voted against recommending the public comment version of proposed Rule 3.9, which more closely tracked Model Rule 3.9. The public comment version of the Rule had substituted a requirement that lawyers appearing as an advocate in non-adjudicative proceedings were required to conform their conduct to Rule 4.1 for the Model Rule's references to "Rules 3.3(a) through (c), and 3.5" because a standard requiring conformance to Rule 4.1 was more appropriate for conduct governed by the proposed Rule. With the Commission's recommendation not to adopt a rule counterpart to Model Rule 4.1, that reference is no longer accurate. Moreover, the Commission determined that the New York Rule more clearly stated when a lawyer is required to disclose that the lawyer's appearance is in a representative capacity.

[*] Proposed Rule 3.9, Draft 3 (03/27/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Commission's Proposed Rule* Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Explanation of Changes to the ABA Model Rule
[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.	[1] In representation before non-judicial bodies such as legislatures, ~~municipal~~city councils, ~~and executive~~boards of supervisors, commissions, and administrative agencies acting in a ~~rule~~legislative, administrative or ministerial capacity (including without limitation a quasi-judicial proceeding, an administrative action, a rate-making ~~or policy-making capacity~~proceeding, and a quasi-legislative proceeding, see Government Code sections 11440.60, 82002(a),(b),(c)), lawyers present facts, formulate issues and advance ~~argument in~~arguments regarding the matters under consideration. ~~The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure.~~ These governmental bodies are entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. ~~See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.~~	Proposed Comment [1] similarly is taken from New York Rule 3.9, cmt. [1], but is revised to provide better guidance on the kinds of proceedings to which the Rule is applicable in California, and the rationale underlying the Rule's disclosure requirement. The references in the Model Rule to Rules 3.3 and 3.5 have been deleted because those Rules are not applicable following the revisions to the black letter. See Explanation of Changes for the black letter of the rule, above.

* Proposed Rule 3.9, Draft 3 (03/27/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Commission's Proposed Rule* Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Explanation of Changes to the ABA Model Rule
	[1A]Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.	Comment [1A], which is also derived from New York Rule 3.9, has no counterpart in the Model Rule. It has been added to clarify that a lawyer's conduct will be governed by the specific rules of a tribunal when appearing before such a body.
[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.	~~[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~	The Commission recommends that Model Rule 3.9, cmt. [2], not be adopted because it neither explains nor clarifies the application of the Rule.
[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs	~~[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs~~	The Commission recommends that Model Rule 3.9, cmt. [3], not be adopted because it neither explains nor clarifies the application of the Rule.

ABA Model Rule Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Commission's Proposed Rule* Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	Explanation of Changes to the ABA Model Rule
conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.	~~conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.~~	

Rule 3.9 Advocate in Nonadjudicative Proceedings
Dissent To Recommendation Not To Adopt Proposed Rule 3.9 and Rule 4.1

The public comment version of Rule 3.9 required lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to do so would be dishonest), and to comply with Rule 4.1. The public comment version of Rule 4.1, in turn, generally required that lawyers may not make false statements to others (because doing so would be dishonest). The requirement of lawyer honesty is long-standing and currently is found in Bus. & Prof. C. section 6106. That section subjects a lawyer to discipline for any "... act involving moral turpitude, dishonesty or corruption ...."

The Commission finally decided to recommend against adoption of Rule 4.1 and to modify Rule 3.9 to eliminate the duty of honesty previously found in its cross-reference to Rule 4.1. A minority of the Commission dissents from both decisions. While the minority hopes that the lawyer's section 6106 duty of honesty remains in the circumstances described in Rules 3.9 and 4.1, the Commission's vote will make this unclear to many readers. The complete absence of any Rule 4.1 naturally will lead readers to think that the Commission intended to say that lawyers have no such duty of honesty. If that duty does remain, it will be hidden in the Business & Professions Code, outside the easier reference of the Rules and therefore less likely to be known to lawyers.

We want to note that the Commission's Rule 3.9 recommendation was to adopt the N.Y. version of Rule 3.9, but the Commission has substantively strayed from N.Y. Although N.Y. Rule 3.9 does not refer to Rule 4.1, N.Y. did adopt Model Rule 4.1(a) (the prohibition on making any false statement of material fact or law to others). Thus, the crucial duty of honesty is absent from the Commission's proposal but is found in N.Y. Rule 4.1, and N.Y. Rule 4.1 by its terms would cover the Rule 3.9 circumstances. While the Rule 3.9 minority differs as to how stringent its requirements should be, it is unanimous that it should at the very least expressly require compliance with the duty of honesty found in Model Rule 4.1(a).

Rule 3.9 Advocate in Nonadjudicative Proceedings

(Commission's Proposed Rule – Clean Version)

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

[1] In representation before non-judicial bodies such as legislatures, city councils, boards of supervisors, commissions, and administrative agencies acting in a legislative, administrative or ministerial capacity (including without limitation a quasi-judicial proceeding, an administrative action, a rate-making proceeding, and a quasi-legislative proceeding, see Government Code sections 11440.60, 82002(a),(b),(c)), lawyers present facts, formulate issues and advance arguments regarding the matters under consideration. These governmental bodies are entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Brownstein Hyatt Farber Schreck, LLP	M		Comment [3]	Comment [3] does not specify whether the Rule would apply when a lawyer represents a client in a "quasi-legislative" or "quasi-judicial proceeding." (Section 11440.60 of the Government Code defines "quasi-judicial proceeding"). As written, the Rule is unclear as to whether this Rule would apply to a lawyer representing a client in connection with obtaining a land use permit, proposed ordinance or local policy matter being considered by a planning commission. These hearings are in the nature of legislative or adjudicative hearings, conducted by a local agency as to local matters. The Rule expressly states that it applies to a non-adjudicatory proceeding. We respectfully request that the Commission revise proposed Rule 3.9 Comment [3] so that it clearly states whether or not it applies to lawyers representing clients in "quasi-judicial proceedings." Members of our firm maintain the highest ethical standards in our presentations before any decision makers, but	Comment [1] has been revised to include references to quasi-legislative and quasi-judicial proceeding within the scope of the Rule. In light of the comments the Commission has received, the Commission concurs that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. The Commission believes that the revision addresses the commenter's concern by eliminating the reference to compliance with Rule 4.1.

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

TOTAL = 12	Agree = 3 Disagree = 6 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					we concur with commentators who have noted that holding lawyers to the strict standard proposed can place attorneys at a distinct disadvantage because, in these kind of proceedings, different witnesses have differing versions of what is and is not a falsehood.	
3	California Building Industry Association	D			We are opposed to Proposed Rule 3.9 because we believe that the net effect of the rule will be to chill the role of lawyers who represent clients in non-adjudicative proceedings without any resulting improvement to the integrity, honesty or candor in such proceedings. Before the Legislature enacted California's SLAPP statutes, California had a history of litigation arising out of advocacy for or against a pending project. That litigation was frequently without merit, but was used to chill speech...Our experience prior to the SLAPP statutes is that victory consists in either quieting or restraining the target by the claim. It is not likely to matter whether the suit or State Bar complaint is successful. Indeed, the case or complaint probably will not be resolved until long after the proceedings before the agency are over. Rule 3.9 would single out lawyers for potential prosecution for their statements before a	The Commission agrees with this Comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

TOTAL = 12	Agree = 3 Disagree = 6 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					legislative or executive branch of government. Our experience suggests that it will open the door to largely groundless claims and complaints that will be motivated by the desire to silence lawyers representing clients before the agency. Further complicating Proposed Rule 3.9 is its reference to Rule 4.1. Rule 4.1, Comment [1] appears to prohibit a lawyer from incorporating or affirming another person's statement that the lawyer knows is false. Would this mean that merely repeating what another says, not adopting it as her or his own statement, would place a lawyer in jeopardy of violating the Proposed Rule? Rule 4.1 Comment [1] also prohibits making a partially true but misleading material statement. Unfortunately the Comment does not specify that the statement must be made knowingly. Many statements may be misleading without any knowledge on the part of the speaker. This seems inappropriate in this context.	
4	Committee on Professional Responsibility and Conduct ("COPRAC")	M			COPRAC generally supports the Rule.	Based on other comments it is has received, the Commission recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					COPRAC recommends replacing the word "all" with "any" in the last sentence of Comment [1]. The use of the word "all" implies or allows for the possibility that some of such obligations might apply in a non-adjudicative proceeding. However, since none of such obligations are applicable, COPRAC recommends changing "all" to "any" to clarify that the lawyer does not have "any" such obligations. COPRAC recommends deletion of Comment [3]. This Comment, which tracks Comment [3] of the Model Rule, is no longer applicable as a result of the modification of the Rule itself.	The Commission deleted the last sentence of Comment [1]. No further action is required. Comment [3] has been deleted.
5	Herum/Crabtree [Jolley, Brett]	D			Opposes the proposed Rule "which imposes requirements upon attorneys during administrative hearings and exposes those attorneys to potential liability to which no other class of participant or representative would be subject. Proposed Rule 3.9 is unsettling as it will eliminate certain protections that facilitate open communication between the public and governmental agencies. To this end, we agree with the minority dissent and urge the Commission to <u>not</u> adopt the Rule.	The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

TOTAL = 12 Agree = 3
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Rule 3.9 could open the door for individuals who do not agree with an attorney's statements made during a public hearing to retaliate by filing a complaint against that attorney with the State Bar… This Rules goes far beyond the issue of truthfulness and clearly eliminates the level playing field currently enjoyed by all who participate in administrative proceedings. While such a rule may properly apply in court, the same cannot be said of administrative proceedings. Unlike court proceedings, parties to land use proceedings are often represented by lawyers, as well as political and environmental consultants, architects, engineers and even themselves. Formal rules of evidence and procedure do not apply. The decision makers in land use proceedings – whether quasi-legislative or quasi-judicial are not judicial officers and instead are often laypeople. The Rule places an unfair burden on lawyers that may discourage clients from using attorneys in heated situations. California's SLAPP statute was enacted to eliminate threats discouraging individuals from exercising their rights of petition and free speech in connection with public issues. The comment attaches the 1991 Senate	

						TOTAL = 12 Agree = 3 Disagree = 6 Modify = 3 NI = 0

Rule 3.9 Advocate in Nonadjudicative Proceedings [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Committee on Judiciary analysis of SB 10, which enacted the SLAPP statute, which states, among other things: "[SLAPP] suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits...are filed for the sole purpose of intimidation." Rule 3.9 has the potential to counteract the purpose for enacting the SLAPP statute; subjecting attorneys to standards and discipline during public hearings to which no other participants are held and will discourage lawyers from engaging in open discussion with government officials. The mere threat of Rule 3.9 sanctions may be inappropriately used to chill attorney participation in administrative proceedings, just as SLAPP suits chilled public participation. The comment provides an example of how use of Rule 3.9 during an administrative proceeding by an adverse party could adversely affect the lawyer's representation of a client in the proceeding.	
6	Ivester, David	D			Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay	The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

TOTAL = 12	Agree = 3 Disagree = 6 Modify = 3 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves. I note that several states that have rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. for the reason noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.	
7	Latham & Watkins, LLP	D			We have only recently become aware of Proposed Rule 3.9 and are concerned that other members of the State Bar may likewise not be aware of the proposed rule. We are concerned that Proposed Rule 3.9, and the minority dissent of the proposed rule, raise significant and complicated issues, the implications of which may not be fully understood by members of the State Bar who	The Commission recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 . The commenter will have an opportunity to comment on a revised draft of the Rule.

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					practice before legislative and administrative bodies. We respectfully request that the Commission provide additional time for public comment prior to taking action on Proposed Rule 3.9.	
8	Office of the Chief Trial Counsel	M			OCTC is concerned with the Commission's departure from the language in ABA Rule 3.9, which requires the attorney to comply with Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA Rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's Rule.	The Commission does not agree that it should be revised as proposed. There are differences between adjudicative and nonadjudicative proceedings that justify treating nonadjudicative proceedings differently. The sections of Rules 3.3, 3.4 and 3.5 to which the Model Rule refers relate to a process that is very different from what occurs in a nonadjudicative proceeding in California. Formal rules of evidence and procedure do not apply to these proceedings...The decision makers in these proceedings - whether quasi-legislative or quasi-judicial - are not judicial officers and instead are often lay people in the eyes of the law. There are no rules of discovery in these types of proceedings. Participants are permitted to withhold information and frequently do. The evidentiary standard of review is substantial evidence, which does not require a full resolution of the facts. The decision is upheld based on whether there is credible evidence in the record to support the decision, even if the preponderance of the evidence is to the contrary. The focus is not on truth seeking, as in an adjudicatory proceeding, but on presentation of information to justify an agency decision. Nonadjudicative decision makers do not make

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						judicial decisions, are not bound by stare decisis and, therefore, are not required to consider all of the legal authority on an issue in making a decision. Subject to campaign contribution rules, lawyers and everyone else who participates in the process are permitted to make political contributions to decision makers. The OCTC comment does not present a rationale that would justify treating nonadjudicative proceedings the same as adjudicatory proceedings.
					Comments [1] – [2] are too general.	Comments [1] and [2] have been revised to conform to the revised Rule the Commission adopted. Comment [1] contains a modified version of the first sentence of Comment [1] in the public comment draft. Its describes the type of proceedings to which the Rule applies. The Commission believes the Comment language should be retained for that purpose. The OCTC comment does not suggest how the Comment [1] language should be revised to be more specific. The Commission is not able to envision a revision that would respond to the comment.
					OCTC also requests a Comment that other rules may apply depending on the facts and circumstances.	The Commission does not believe the proposed change is warranted. The concerns raised in opposition to the Rule present a compelling case not only for why the Rule should not be adopted, but also for why other Rules should not be made applicable to nonadjudicative proceedings.

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Orange County Bar Association	D			The proposed Rule should not be adopted in any form because it exposes lawyers to unique risks and disciplinary measures that are not faced by others who appear before the same legislative and administrative bodies and could have the effect of chilling communications with the government. First, we believe that the first part of the proposed Rule, requiring a lawyer to disclose that his or her appearance is in a representative capacity, may occasionally conflict with the interests of his or her client and, in certain circumstances, may directly conflict with actual instructions of the client that the representation not be disclosed. Second, we oppose any specific reference to Rule 4.1 or any other reference to a lawyer's other duties. Of course, a lawyer should observe all Rules of Professional Conduct and the State Bar Act that are applicable to any particular circumstance. Moreover, like all other persons who appear before legislative bodies or administrative agencies, a lawyer should also abide by and comply with other applicable laws and rules, including rules promulgated by the specific government body that regulate conduct of persons appearing before it. However, we believe that a lawyer should not be considered	Commission agrees and has recommended adoption of a Rule based on the New York version of Model Rule 3.9 . The Commission does not agree that the disclosure requirement is a reason not to recommend adoption of the Rule. The Rule requires only that the lawyer disclose the appearance is in a representative capacity. It does not require a lawyer to disclose the identity of the client if that needs to be confidential. The Commission agrees with the second comment to the extent that it relates back to the concern that the Rule should not expose lawyers to risks not faced by others who appear in nonadjudicative proceedings. It is recommending adoption of a revised version based on the New York version of Model Rule 3.9 that would address this concern.

TOTAL = 12 Agree = 3
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					subject to additional constraints and discipline in this context simply because of the fact that he or she is a lawyer – whether acting for a client or on his or her own behalf.	
10	Renne, Louise H.	D			I write to urge the Commission not to adopt Proposed Rule 3.9. The Proposed Rule would eliminate existing statutory privileges and protections enjoyed by all speakers before Boards, Councils, and other legislative bodies, but only as to lawyers appearing before those bodies to advocate on behalf of clients. I believe that the Proposed Rule carries the unintended consequences of reducing representation of citizens at public meetings, and of chilling speech. The concerns raised by the dissent are valid. The level of discourse in the public arena has been increasingly hostile for some time…In this context, it is not difficult to imagine how one might use Rule 3.9 to punish an opponent, or restrain or chill an advocate's participation in the public process. The Legislature has long recognized the importance of open and unfettered discussion in public meetings. Since 1872, Civil Code section 47 has created a privilege for statements made in legislative or other official proceedings from prosecution. The	The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

TOTAL = 12	Agree = 3 Disagree = 6 Modify = 3 NI = 0

Rule 3.9 Advocate in Nonadjudicative Proceedings [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Legislature also established a special motion to strike to prevent lawsuits aimed a chilling public participation. These statutes reflect a recognition that all public participation should be encouraged, even if that occasionally results in untruthful statements being made to legislative bodies. Boards and councilmembers are sufficiently experienced to winnow the false from the true. Proposed Rule 3.9 would be antithetical to the goals advanced by the Legislature in these statutes, unfairly restricts only attorney-advocates, and should be rejected.	
11	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety. A minority suggests the Rule should be omitted entirely (as it has in several states) because it would take lawyers out of the protections of Civil Code section 47…However, given the proposed Rule's minimal requirements and the policy of seeking to bring California's rules in line with the ABA Model Rules…the Rule should be adopted as proposed.	In light of the comments received in opposition to the proposed Rule, the Commission believes that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. Given the empirical experience that lead to the enactment of the California SLAPP statute and the experience provided in other comments, there is a real risk that a Rule incorporating the requirements of Rule 4.1 could be misused to chill the speech of lawyers on behalf of clients. A Rule incorporating the requirements of Rule 4.1 would subject lawyers to unique risks that do not apply to anyone else who participates in nonadjudicative proceedings. As a result, such a Rule could chill lawyer speech on behalf of clients in nonadjudicative proceedings without resulting in any improvement to the honesty and integrity of such proceedings. The Commission

TOTAL = 12	Agree = 3 Disagree = 6 Modify = 3 NI = 0

Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						believes that these risks outweigh adopting the Rule incorporating the requirements of Rule 4.1
12	Santa Clara County Bar Association	A			No comment.	In light of the reasons provided by comments in opposition to the proposed Rule, the Commission has decided to adopt the Rule based on the New York version of Model Rule 3.9.

Rule 3.9: Nonadjudicative Proceedings

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to ABA Model Rule 3.9.

Colorado adds the following in lieu of the second sentence of ABA Model Rule 3.9:

> Further, in such a representation, the lawyer:
>
> (a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);
>
> (b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and
>
> (c) may engage in ex parte communications, except as prohibited by law.

District of Columbia: Rule 3.9 applies to a lawyer representing a client before a ''legislative or administrative body'' (rather than ''legislative body or administrative agency'').

Florida omits the reference to Rule 3.5.

New Jersey: Rule 3.9 tracks ABA Model Rule 3.9 essentially verbatim, but New Jersey's cross-references to Rules 3.3, 3.4, and 3.5 differ slightly due to differences in New Jersey's versions of those rules.

New York: In the rules effective April 1, 2009, Rule 3.9 is reworded as follows: ''A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.'' Comment 1A emphasizes that ''Rule 3.9 does not apply to adjudicative proceedings before a tribunal.''

North Carolina omits Rule 3.9.

Virginia omits Rule 3.9.

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Proposed Rule 4.1 [N/A]
"Truthfulness in Statements to Others"

RECOMMENDATION: NO ADOPTION

Summary: The Commission is not recommending adoption of a California version of Model Rule 4.1, which addresses a lawyer's duty of honesty owed to third persons in the course of representing a client. See Introduction for reasons supporting this recommendation. In the initial public comment draft of the Commission's proposed Rule 4.1 a new paragraph (b) was included which was based on Oregon Rule 8.4(b), provides an exception for lawful covert activity in investigating violations of civil or criminal law, or constitutional rights. The language of that exception has been moved to the comments to proposed Rule 8.4.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule rejected	☑ ABA Model Rule 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	Bus. & Prof. Code §§ 6068(d), (e); 6106; 6128.
Case law	*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208

☐ 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 __6___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

A minority of the Commission believes that a California version of Rule 4.1 should be adopted. See Introduction and separate Minority Statements A and B.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.1[*] Truthfulness in Statements to Others*

April 2010
(No rule is recommended for adoption)

INTRODUCTION:

After further consideration of this Rule following public comment, the Commission does not recommend the adoption of a counterpart to Model Rule 4.1, which addresses a lawyer's duty of honesty owed to third persons in the course of representing a client. The Commission considered such issues as what knowledge is required to establish a lawyer's "knowledge" of a statement's untruth or what constitutes "incorporation" by a lawyer of a client's untrue statement, and concluded that the subtleties of language in the Model Rule do not lend themselves to a disciplinary rule. Moreover, gross misconduct in respect of the subject of the Model Rule is already subject to discipline under Business & Professions Code §§ 6068(d) and 6106. The Commission concluded there is no need for a counterpart to Model Rule 4.1 because the concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is as old as the legal profession itself, and has been established during all this time without the need for a disciplinary rule in an area where the boundaries between permissible and impermissible conduct are often especially difficult to determine. To the extent Model Rule 4.1 is intended to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes untrue statements, is well established. See: *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

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[*] No rule is recommended for adoption.

Minority. There are two separate minority positions concerning the Commission's decision not to recommend adoption of a counterpart to Model Rule 4.1:

1. A minority of the Commission strongly disagrees with the Commission's decision because: (i) a rule counterpart to Model Rule 4.1 is an integral part of the Rules as whole by working in tandem with other rules such as Rules 3.3 and 1.2(d) to proscribe dishonest conduct; (ii) the Business & Professions Code sections cited by the Commission in support of the rejection are inadequate because they either require acts amounting to criminal conduct, section 6128, or contain the amorphous concept of "moral turpitude"; (iii) Model Rule 4.1 has been in existence for over 25 years and has been shown not to chill legitimate advocacy. See full Dissent A, below.

2. A second minority is concerned that the Commission's decision not to adopt Rule 4.1, together with the Commission's concomitant decision to limit the scope of a lawyer's duties under Rule 3.9, which governs a lawyers conduct when appearing in nonadjudicative proceedings such as legislative hearings, will confuse lawyers about their duty of honesty in such circumstances. See full Dissent B, below.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 4.1 (North Carolina is an exception). Some states require disclosure even if the information is otherwise protected under Rule 1.6 (e.g., Maryland, Massachusetts, Mississippi, New Jersey, Ohio, Virginia). Some jurisdictions omit Model Rule 4.1(b) (e.g., Michigan). Wisconsin adds paragraph (c), which states "a lawyer may advise or supervise others with respect to lawful investigative activities." See Selected State Variations, below.

ABA Model Rule **Rule 4.1 Truthfulness in Statements to Others**	**Commission's Proposed Rule** **Rule 4.1 Truthfulness in Statements to Others**	**Explanation of Changes to the ABA Model Rule**
In the course of representing a client a lawyer shall not knowingly:	~~In the course of representing a client a lawyer shall not knowingly:~~	See Introduction.
(a) make a false statement of material fact or law to a third person; or	~~(a) make a false statement of material fact or law to a third person; or~~	See Introduction.
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.	~~(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.~~	See Introduction.

ABA Model Rule **Rule 4.1 Truthfulness in Statements to Others Comment**	**Commission's Proposed Rule[*]** **Rule 4.1 Truthfulness in Statements to Others Comment**	**Explanation of Changes to the ABA Model Rule**
Misrepresentation [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.	~~**Misrepresentation**~~ ~~[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.~~	See Introduction.
Statements of Fact [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the	~~**Statements of Fact**~~ ~~[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the~~	See Introduction.

[*] Proposed Rule 4.1, Draft 2.1 (11/14/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.1 Truthfulness in Statements to Others Comment	Commission's Proposed Rule[*] Rule 4.1 Truthfulness in Statements to Others Comment	Explanation of Changes to the ABA Model Rule
existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.	~~existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~	
Crime or Fraud by Client [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.	~~**Crime or Fraud by Client**~~ ~~[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.~~	See Introduction.

Rule 4.1 Truthfulness in Statements to Others
Dissent To Recommendation Not To Adopt Proposed Rule 4.1

Dissent A

A minority strongly disagrees with the narrow vote to recommend against adoption of proposed Rule 4.1(a). Proposed Rule 4.1(a), which largely tracks Model Rule 4.1, provides important protection by prohibiting a lawyer from knowingly making a false statement of material fact or law to a third person and by failing to disclose a material fact when disclosure is necessary to avoid assisting a client's criminal or fraudulent act unless disclosure is prohibited by Rule 1.6. The rule is an important part of the Model Rules and is intended to work with other rules proscribing similar conduct in other situations, such as Rule 3.3 (candor to the tribunal) and Rule 1.2(d) (advising a client regarding criminal or fraudulent conduct). Every jurisdiction, with the exception of California and North Carolina, has Rule 4.1 with minor variations in a few states. The rule is not redundant and its absence will send the wrong message to lawyers and the public.

The argument that there are State Bar Act provisions that might apply in situations governed by Rule 4.1(a) is no more valid a reason for opposing this rule than it would be in regard to other proposed rules that overlap with one or more statutes in the B & P Code. If this argument were a valid ground for recommending against adopting a Model Rule, many rules the RRC has proposed for adoption would be eliminated, including Rule 3.3 (candor to the tribunal), Rule 8.2 (duties to judicial and legal officers), Rule 4.3 (dealing with an unrepresented person), Rule 1.2(d) (counseling or assisting unlawful or fraudulent conduct), and Rule (8.4) (misconduct). Each of these rules overlaps in one way or another with provisions in the State Bar Act; however, that has never been a ground (until now) for recommending against adoption of a particular Model Rule.

Rule 4.1(a) is a universal rule of lawyer conduct that has gained national acceptance. The rule provides lawyers in modern practice with needed guidance and the public with greater protection. Business and Professions Code §6068(d) employs 19th Century language that is hardly a model of clarity for lawyers in modern practice ("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"). Section 6128(a) is also an inadequate substitute because it is limited to acts of deceit or collusion that constitute criminal misconduct. Section 6106 employs the amorphous concept of moral turpitude, dishonesty or corruption and could apply to conduct proscribed by many of the rules the RRC has proposed. The importance of Rule 4.1(a) is that it informs lawyers in advance of specific conduct that is prohibited in understandable terms that lawyers will recognize. The proposed rule is consistent with case law in California and the rules governing lawyers in virtually every jurisdiction. California lawyers and the public deserve to have a precise rule that provides adequate notice of conduct that is prohibited in advance of a lawyer being charged with discipline.

Model Rule 4.1 has been in existence for over 25 years and has been shown not to chill legitimate advocacy. See Restatement (3d) The Law Governing Lawyers §98 and the ABA Annot. Model Rules. The purpose of proposed Rule 4.1(a) is to prohibit a lawyer from lying to a third person about a material fact or law that the lawyer knows to be false. As with other rules, the intent is to protect against fraud and assisting the client in criminal or fraudulent conduct. See the definition of "fraud" in proposed Rule 1.0.1(d). The conduct prohibited by paragraph (a) is not protected speech and does it interfere with legitimate advocacy. Other rules, aside from Rule 4.1(a), restrict what

lawyers can say or do in the course of representing clients. See, e.g., Rules 1.2(d) (advising or assisting criminal or violent conduct), Rule 3.3 (candor to the tribunal), Rule 3.5 (prohibit ex parte communications with a judge or juror), Rule 3.6 (extra-judicial communications that have a substantial likelihood of materially prejudicing an adjudicative proceedings), Rule 4.2 (communicating with represented person), and Rule 4.3 (dealing with unrepresented person). Proposal 4.1(a) is no less important or overly restrictive on legitimate advocacy than other core principles reflected in the Model Rules. For example, Comment [2] to the Model Rule explains that certain statements in negotiations are ordinarily not taken as statements of material fact under generally accepted conventions in negotiation. see ABA Formal Opinion 06-439. No valid reason exists for California not to adopt this universally accepted rule.

Rule 4.1 Truthfulness in Statements to Others
Dissent To Recommendation Not To Adopt Proposed Rule 4.1 and Rule 3.9

Dissent B

The public comment version of Rule 3.9 required lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to do so would be dishonest), and to comply with Rule 4.1. The public comment version of Rule 4.1, in turn, generally required that lawyers may not make false statements to others (because doing so would be dishonest). The requirement of lawyer honesty is long-standing and currently is found in Bus. & Prof. C. section 6106. That section subjects a lawyer to discipline for any "... act involving moral turpitude, dishonesty or corruption ...."

The Commission finally decided to recommend against adoption of Rule 4.1 and to modify Rule 3.9 to eliminate the duty of honesty previously found in its cross-reference to Rule 4.1. A minority of the Commission dissents from both decisions. While the minority hopes that the lawyer's section 6106 duty of honesty remains in the circumstances described in Rules 3.9 and 4.1, the Commission's vote will make this unclear to many readers. The complete absence of any Rule 4.1 naturally will lead readers to think that the Commission intended to say that lawyers have no such duty of honesty. If that duty does remain, it will be hidden in the Business & Professions Code, outside the easier reference of the Rules and therefore less likely to be known to lawyers.

We want to note that the Commission's Rule 3.9 recommendation was to adopt the N.Y. version of Rule 3.9, but the Commission has substantively strayed from N.Y. Although N.Y. Rule 3.9 does not refer to Rule 4.1, N.Y. did adopt Model Rule 4.1(a) (the prohibition on making any false statement of material fact or law to others). Thus, the crucial duty of honesty is absent from the Commission's proposal but is found in N.Y. Rule 4.1, and N.Y. Rule 4.1 by its terms would cover the Rule 3.9 circumstances. While the Rule 3.9 minority differs as to how stringent its requirements should be, it is unanimous that it should at the very least expressly require compliance with the duty of honesty found in Model Rule 4.1(a).

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.
2	COPRAC	A		Comment [2]	COPRAC generally supports the adoption of the rule, but is sympathetic to certain of the concerns raised by the Minority. COPRAC agrees with the Minority that the phrase "generally accepted conventions in negotiation" is abstruse and recommends that the phrase read: "In negotiations, certain types of statements ordinarily are not taken as statements of material fact."	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1, in part because of its concern with the vague language of the proposed Rule.
3	Ivester, David	D			Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Adversaries in sometimes highly charged legislative and administrative	The Commission largely agrees with the commenter and, after further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.

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

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves. I note that several states that have rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reason noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.	
4	Office of the Chief Trial Counsel	M			OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chestnut* (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282 [violation of section 6068(d) and 6106 through gross negligence]. The Comments to this rule are too general and should be eliminated.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association	D		4.1(b)	We support the minority the view that proposed Rule 4.1 should not be adopted. Multiple rules and statutes already address an attorney's duty of candor and duty not to participate in fraud, deceit or criminal activity. The proposed Rule contains a number of exceptions and vague language that do more to create ambiguity than provide clarity and guidance for attorneys. For example, Rule 4.1(b) creates an exception for covert activity that is triggered when a "lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future." Under such circumstances, the proposed Rule indicates that a lawyer may use "misrepresentation or other subterfuge" to obtain information about unlawful activity and then states "provided the lawyer's conduct is otherwise in compliance with these Rules." Clearly, the lawyer's conduct also would have to be in compliance with all other laws, and this exception does not contemplate all of the other manners in which a lawyer or someone acting at his or her direction may violate the law by use of "subterfuge" to obtain information.	The Commission largely agrees with the commenter and, after further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1, in part because of the vague language in the proposed Rule.

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	Comment [1] suggests that an attorney can violate the proposed Rule by incorporating or affirming a false statement if the attorney does so knowingly. While the language suggests that an attorney must "know" that a statement of another person or declarant is false to rise to the level of a misrepresentation by the lawyer, the Comment does not provide guidance on what is required to establish knowledge. Further, there is some suggestion that attorneys vouch for the truth of deposition testimony and statements of declarants in court filings. When juxtaposed against the following sentence (stating that, "in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client"), the language implies that a lawyer does affirm or vouch for the truthfulness of the client's statements in other situations, including court filings. Because Comment [1] states that a lawyer does not "**necessarily**" affirm or vouch for the truthfulness of the client's representations in drafting an agreement, it leaves unclear when the lawyer does affirm or vouch for the truthfulness and when he or she does not.	

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

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	Comment [2] raises similar problems, stating that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances." The circumstances are not defined in the Comment. Again, there is an entire body of case law that addresses the question: "What is a statement of fact?" Likewise, the language "[u]nder generally accepted conventions in negotiation" is too vague and provides no clear standard for attorneys to follow.	
				Comment [3]	Comment [3] merely refers to and incorporates other Rules specifically designed to address criminal and fraudulent activity, underscoring why this proposed Rule should not be adopted. Again, there is ambiguity in the language of the Comment, and the language of the exceptions is difficult to follow. For example, the Comment states that "substantive law" may require an attorney to disclose information to avoid being deemed to have assisted in the client's fraud or crime, but does not clarify the substantive law that may create such a duty. It then goes on to state that, if the lawyer can only avoid assisting in the fraud or the crime by disclosing the information, the lawyer is required to do so unless the lawyer is prohibited from doing so under Rule 1.6 or	

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

Rule 4.1 Truthfulness in Statements to Others
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					B&P Code section 6068(e). This language is confusing and should not be adopted.	
6	San Diego County Bar Association Legal Ethics Committee	A			We approve the rule in its entirety.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.
7	Santa Clara County Bar Association	A			No comment.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.
8	U.S. Attorney	A		4.1(b)	Rule 4.1(b) may create confusion and mislead private attorneys into believing they are permitted to authorize or engage in misrepresentation and deception as "covert activities" in instances beyond the narrow range of circumstances in which courts have found it legally permissible, such as compliance testing. To avoid any suggestion that Rule 4.1(b) is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions, a comment should be added to make more clear that Rule 4.1(b) applies only to certain types of compliance investigations in which private attorneys are legally permitted to supervise investigators who may engage in very limited forms of deception or misrepresentation (as circumscribed by substantive law) and is not intended to broaden the areas in which this is permitted.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1. The subject section has been moved to the Comment to proposed Rule 8.4 and the commenter's concerns will be considered following the final public comment period, which will end on approximately June 15, 2010.

Rule 4.1 Truthfulness in Statements to Others [Sorted by Commenter]						TOTAL = 9 Agree = 6 Disagree = 2 Modify = 1 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
9	Wied, Colin W.	A			Supports a rule similar to ABA Model Rule 4.1.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1.

Rule 4.1: Truthfulness in Statements to Others

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Business & Professions Code §6128(a) provides that an attorney commits a misdemeanor if the attorney is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

District of Columbia: Rule 4.1 is identical to ABA Model Rule 4.1.

Illinois: Rule 4.1(a) prohibits a lawyer from making a statement of material fact or law to a third person which the lawyer knows "or reasonably should know" is false.

Kansas: The disclosure obligation under Rule 4.1(b) applies unless disclosure is prohibited by "or made discretionary under" Rule 1.6.

Maryland adds a separate paragraph (b) providing: "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

Massachusetts: Comment 3 to Massachusetts Rule 4.1 defines "assisting" to refer "to that level of assistance which would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law."

Michigan: Rule 4.1 says only: "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Mississippi: Rule 4.1(b) omits the phrase "unless disclosure is prohibited by Rule 1.6."

New Jersey adds a separate paragraph (b) stating: "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6."

New York: In the rules effective April 1, 2009, New York omits Model Rule 4.1(b).

North Carolina omits Rule 4.1(b).

North Dakota: Rule 4.1 provides only that "[i]n the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false."

Ohio: Rule 4.1(b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts), and omits the phrase "unless disclosure is prohibited by Rule 1.6."

Pennsylvania: Rule 4.1(b) replaces the ABA word "assisting" with the phrase "aiding and abetting."

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Texas: Rule 4.01(b) provides that a lawyer shall not fail to disclose a material fact to a third person when disclosure is necessary to ''avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.''

Virginia: In both subparagraphs of Rule 4.1, Virginia deletes the words ''material'' and ''to a third person.'' At the end of Rule 4.1(b), Virginia deletes the phrase ''unless disclosure is prohibited by Rule 1.6.''

Wisconsin: Rule 4.1(c) states that notwithstanding Wisconsin Rules 5.3(c)(1) and 8.4, which address supervision of nonlegal personnel and the duty not to violate a rule through another respectively, ''a lawyer may advise or supervise others with respect to lawful investigative activities.''

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Proposed Rule 4.4 [n/a]
"Duties Concerning Inadvertently Transmitted Writings"

(Draft #5, 04/21/10)

Summary: The Commission recommends against adoption of paragraph (a) of ABA Rule 4.4 because of concerns regarding the vagueness and overbreadth of the terms "embarrass, delay, or burden a third party," and the resulting chilling effect this part of the Rule would have on legitimate litigation activities. The Commission agrees with the principles that underlie paragraph (b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807*.

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	Rule 3-200.
Statute	Bus. & Prof. Code §§ 6128(b); 6068(f).
Case law	*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption ___8__
Opposed Rule as Recommended for Adoption __2___
Abstain ___0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

Rather than following the Model Rule standard, the proposed rule codifies a Supreme Court opinion (*Rico*) concerning the issue of receipt of inadvertent documents. In addition, some Commission members and other lawyers believe that this is a complex area of law that is better left to case law development and is not amenable to a generalized rule.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.4* Duties Concerning Inadvertently Transmitted Writings

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Mode Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third person. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission recommends against adoption of Model Rule 4.4(a) because of concerns regarding the vagueness and overbreadth of the terms "embarrass, delay, or burden a third party," and the resulting chilling effect this part of the Rule would have on legitimate litigation activities.

Model Rule 4.4(b) provides that a lawyer who receives a document relating to the lawyer's representation of a client and "knows or reasonably should know" that the document was inadvertently sent shall promptly notify the sender. The Commission agrees with the principles that underlie Model Rule 4.4(b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential and where it is reasonably apparent the document was inadvertently sent, consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807. Because it has recommended that Model Rule 4.4(a) not be adopted, the Commission has recommended changing the title of the Rule to more accurately describe its scope.

Minority. The greatest danger to the practice of law in Model Rule 4.4 - paragraph (a) which forbids conduct which would "embarrass, delay or burden a third person," - has been removed. That leaves only the paragraph which deals with the receipt of inadvertently produced documents. Inadvertently produced documents received little attention until a recent spate of court decisions which addressed that matter. Although the leading California case, *Rico*, clearly involved impermissible conduct (the lawyer snatched confidential documents from his opponent's seat during a deposition recess), the subject of this proposed Rule is basically a new problem of document management in litigation, and the majority of cases have arisen from mistakes that occurred in the course of production of tens or hundreds of thousands of documents. The courts are dealing adequately with this problem, which is almost universally a by-product of the explosion of electronically stored communications. There is simply no need for a disciplinary rule for this subject.

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[*] Proposed Rule 4.4, Draft 5 (04-21-10).

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons	Commission's Proposed Rule[*] Rule 4.4 Respect for Rights of Third Persons Duties Concerning Inadvertently Transmitted Writings	Explanation of Changes to the ABA Model Rule
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.	(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.	The Commission recommends against adopting paragraph (a) because of a concern over the chilling effect it would have on legitimate advocacy since many proper litigation tactics may result in embarrassing opposing parties or delaying litigation. Where the lawyer engages in extreme delay of the client's case for personal gain, see Bus. & Prof. Code § 6128(b). In addition, the rule title has been revised to conform to the limited scope of the Commission's proposed rule which does not include a counterpart to paragraph (a) of the Model Rule.
(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.	(b) A lawyer who receives a document relatingwriting that obviously appears to be privileged or confidential or subject to the representation of the lawyer's clientwork product doctrine, and knows orwhere it is reasonably should knowapparent that the documentwriting was inadvertently sent or produced, shall promptly notify the sender.	The ABA's notification obligations under this paragraph are too broad in that they apply to all types of documents, not merely those that are privileged or confidential. The Rule should be limited to documents that obviously appear to be subject to the work product doctrine, or are privileged or confidential, consistent with the Supreme Court's decision in *Rico v. Mitsubishi Motors Corp*. (2007) 42 Cal.4th 807, 818 [addressing duties where document obviously appears to be confidential and privileged and was produced inadvertently]. The Commission's version also uses the term "writing," rather than "document," because "writing" is used throughout the Rules and is a defined term under Rule 1.0.1

[*] Proposed Rule 4.4, Draft 5 (4/21/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons Comment	Commission's Proposed Rule[*] Rule 4.4 ~~Respect for Rights of Third Persons~~ Duties Concerning Inadvertently Transmitted Writings Comment	Explanation of Changes to the ABA Model Rule
[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.	~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~	Comment [1] is deleted to conform to the deletion of paragraph (a).
	[1] The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.	This Comment clarifies the limited purpose of the Commission's proposed Rule, which does not include a counterpart to paragraph (a) of the Model Rule.
[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the	[2] Paragraph (b) recognizes that lawyers sometimes receive documents that are obviously privileged or confidential and were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or where it is reasonably ~~should know~~apparent that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law	Comment [2] is based on Model Rule 4.4, cmt. [2], but has been revised to conform to the Rule's application only to writings which obviously appear to be privileged or confidential. See Explanation of Rule. The last sentence is deleted as unnecessary given the Commission's use of the defined term "writings," which encompasses documents such as emails. See proposed Rule 1.0.1(n).

ABA Model Rule Rule 4.4 Respect for Rights of Third Persons Comment	Commission's Proposed Rule* Rule 4.4 ~~Respect for Rights of Third Persons~~ Duties Concerning Inadvertently Transmitted Writings Comment	Explanation of Changes to the ABA Model Rule
privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.	beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818 [68 Cal.Rptr.3d 758]. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. ~~For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.~~	
[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.	[3] ~~Some lawyers~~A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.	The substitution of "[a] lawyer" for "[s]ome lawyers" conforms to the stylistic preference for drafting in the singular under the Bryan A. Garner Style Manual (see General Convention 2.1).

Rule 4.4: Duties Concerning Inadvertently Transmitted Writings

(Commission's Proposed Rule – Clean Version)

A lawyer who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine, and where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender.

COMMENT

[1] The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that are obviously privileged or confidential and were inadvertently sent or produced by opposing parties or their lawyers. If a lawyer knows or where it is reasonably apparent that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818 [68 Cal.Rptr.3d 758]. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

[3] A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	M		4.4(a)	1. COPRAC generally supports the adoption of the rule. However, while COPRAC shares the Commission's concern about certain aspects of the paragraph 4.4(a) of the Model Rule, COPRAC recommends that the proposed rule include a revised paragraph (a). COPRAC agrees that the first phrase of MR paragraph (a) is vague, particularly the term "burden." COPRAC recommends that the proposed rule instead incorporate the language of Business and Professions Code section 6068(f) into the rule, to avoid uncertainty and improve consistency. COPRAC also recommends that the second phrase of paragraph (a) of the Model Rule should be included in the proposed rule. Proposed paragraph (a) would read as follows: (a) In representing a client, an attorney shall not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged, and shall	The Commission is not recommending adoption of paragraph (a) because of the chilling effect it would have on legitimate advocacy since many proper litigation tactics may result in embarrassing opposing parties or delaying litigation. Where the lawyer engages in extreme delay of the client's case for personal gain, see Bus. & Prof. Code § 6128(b). The Commission also agrees with the OCBA comment (see below) indicating that the adoption of paragraph (a) would improperly encourage litigants to bring discovery disputes out of the courtroom and into the State Bar disciplinary system. While COPRAC's suggested edits to paragraph (a) might be an improvement over the Model Rule approach, the Commission believes that repeating the substance of Bus. & Prof. Code § 6068(f) is unnecessary.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
[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
					not use methods of obtaining evidence that violate the legal rights of a party or witness.	
				4.4(b)	2. COPRAC also supports the inclusion of paragraph (b) in the rule, which will provide lawyers with guidance, although some members are reluctant to raise this issue to a disciplinary level.	No response necessary.
					3. We do have a concern with the proposed draft. The California Supreme Court in Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807, determined that "the State Fund standard applies to documents that are plainly privileged and confidential, regardless whether they are privileged under the attorney client privilege, the work product doctrine, or any other similar doctrine that would preclude discovery based on the confidential nature of the document." Id. at n. 9. Paragraph (b) as proposed omits reference to the work product doctrine, which correctly should be referred to as such rather than as a "privilege." To truly track the holding of Rico, the work product doctrine should be referred to in the rule. Although work product is referenced in Comment [2], for consistency, the text of paragraph (b) itself should also reference the work product doctrine.	The Commission agrees and added a reference to the writings protected by the work product doctrine.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					4. We note a further inconsistency between the text of the language of paragraph (b) and the text of the comment, in that, while the rule governs documents that are "obviously privileged or confidential" and "inadvertently sent," the first sentence of Comment [2] is arguably narrower, in that only such documents "sent or produced by opposing parties or their lawyers" are covered. To rectify this inconsistency, we suggest that the first sentence of Comment [2] be revised so that the last phrase reads "and were inadvertently sent to the lawyer."	In response to this concern, the Commission substituted the phrase "sent or produced" for the word "sent" in the rule itself.
					5. Finally, we are unclear what the Commission means by its use of the term "confidential" in paragraph (b) of this rule and Comment [2]. Paragraph (b) uses the term confidential without defining it. Comment [2] defines "privileged or confidential" to refer to "a writing that is subject to a statutory or common law privilege or the work product rule." Does the Commission intend to refer to confidential information, as referenced in Business and Professions Code section 6068(e) and Rule 1.6? If so, that should be made clear. The language of the Comment is misleading, since the confidentiality rule is neither a statute nor a common law	The Commission does not believe that the use of the term "confidential" is confusing in the context of this proposed rule. The term "confidential" is used to be consistent with the policy of, and language used in, *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings [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**
					"privilege." If this is not clarified, we are concerned that the use of the term "confidential" will be misunderstood.	
3	Office of the Chief Trial Counsel ("OCTC")	M		4.4(a)	OCTC is concerned that the proposed rule deviates substantially from the ABA Rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(c)); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (Rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F.2d 1190, 1197.) OCTC believes	The Commission is not recommending adoption of paragraph (a) because of the chilling effect it would have on legitimate advocacy since many proper litigation tactics may result in embarrassing opposing parties or delaying litigation. Where the lawyer engages in extreme delay of the client's case for personal gain, see Bus. & Prof. Code § 6128(b). The Commission also agrees with the OCBA comment (see below) indicating that the adoption of paragraph (a) would improperly encourage litigants to bring discovery disputes out of the courtroom and into the State Bar disciplinary system.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the ABA's paragraph (a) should be adopted. OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp*. We fine either acceptable. Comments [1] and [3] seem unnecessary as the Rule is clear and unambiguous.	The Commission disagrees that Comments [1] and [3] are not necessary. The Comments provide useful guidance on the purpose and application of the rule.
4	Orange County Bar Association ("OCBA")	A		4.4(a)	OCBA agrees with the Commission's proposal to delete the language in Model Rule 4.4(a). Including such language invites litigants to bring discovery disputes from the courtroom to the State Bar, where they will be decided by jurists with less knowledge of the underlying dispute and issues than the judge presiding over the underlying case has.	The Commission agrees and believes that OCBA's reasoning lends further support for the Commission's recommendation that paragraph (a) should not be adopted.
				4.4(b)	We agree with the adoption of the Commission's proposed version of Model Rule 4.4(b). We concur that a Rule should be adopted to reflect the recent Supreme Court decision in *Rico v. Mitsubishi Motors Corp*. We further agree with the use of the word "writing" instead of "document" for consistency with other Rules, and that paragraph (b) of the Model Rules as written is overly broad in that it applies to all types of documents, not just	The Commission believes that the proposed version of Model Rule 4.4(b) belongs in this rule where it appears in jurisdictions that have adopted the rule. This will better enable lawyers to search for the rule and compare the provisions of this Rule with the Model Rule and the rule of other jurisdiction.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					those that are privileged or confidential. However, we respectfully raise for consideration whether this provision belongs as part of Rule 4.4 or may be better positioned somewhere else, given that it applies equally to parties and to third persons and does not address merely the rights of third parties.	
5	San Diego Co. Bar Association	M			The legal ethics committee drafter recommended that the ABA Model Rule 4.4(a) be adopted verbatim. The LEC voted 7-6 in support of modified approval, but since the Commission's vote was 5-5, the LEC recommends no position be taken given the close split in hopes that further revisions will develop consensus.	No response required.
6	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 4.4: Respect for Rights of 3rd Persons

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alabama: Effective June 23, 2008, Alabama Rule 4.4(b)

to be subject to the attorney-client privilege or otherwise confidential, and who knows or reasonably should provides:

> (b) A lawyer who receives a document that on its face appears know that the document was inadvertently sent, should promptly notify the sender and
>
> (1) abide by the reasonable instructions of the sender regarding the disposition of the document; or
>
> (2) submit the issue to an appropriate tribunal for a determination of the disposition of the document.

Arizona has adopted ABA Model Rule 4.4(b) but, in addition to requiring the lawyer who receives an inadvertently transmitted document to notify the sender, Arizona Rule 4.4(b) requires the lawyer to "preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures."

California: Rule 3-200(A) provides that a member "shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." Rule 5-100 provides:

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

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been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

California Business & Professions Code §§6068(c), 6068(f), and 6068(g) provide that it is the "duty" of an attorney to do all of the following:

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense. . . .

(f)To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

Section 6128(b) provides that an attorney is guilty of a misdemeanor who "[w]illfully delays his client's suit with a view to his own gain."

Colorado adds the following additional paragraph to Rule 4.4:

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Colorado has also adopted the following Rule 4.5:

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

(A version of Rule 4.5(a) is in the ABA Code of Professional Responsibility as DR 7-105 but is limited to criminal conduct.)

District of Columbia: Rule 4.4(b) provides that a lawyer who receives a "writing" relating to the representation of a client and "knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing."

Florida: Rule 4.4(a) provides that a lawyer shall not "knowingly" use methods of obtaining evidence that violate the legal rights of a third person. Florida has adopted ABA Model Rule 4.4(b) verbatim.

Idaho: Rule 4.4 provides that a lawyer, in representing a client, shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, "including conduct intended to appeal to or engender bias

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against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.'' In subparagraphs (a)(3) and (a)(4), Idaho retains the substance of DR 7-105 of the ABA Model Code of Professional Responsibility. Idaho Rule 4.4(b) deletes the phrase ''relating to the representation of the lawyer's client.''

Kansas and ***Michigan*** omit Rule 4.4(b).

Kentucky: In the rules effective July 15, 2009, Kentucky Rule 4.4(b) provides as follows:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall:
>
> (1) refrain from reading the document,
>
> (2) promptly notify the sender, and
>
> (3) abide by the instructions of the sender regarding its disposition.

Louisiana adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Maryland adds the following paragraph (b) to Rule 4.1(a):

> (b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

New Jersey adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

> (b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

New York: In the rules effective April 1, 2009, Rule 4.4(a) substitutes ''embarrass or harm'' for ''embarrass, delay, or burden'' a third person. Rule 4.4(b) is the same as the Model Rule.

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North Carolina: Rule 4.4(b) replaces the ABA phrase ''document relating to the representation of the lawyer's client'' with the single word ''writing.''

North Dakota adds a new Rule 4.5(a) that is identical to ABA Model Rule 4.4(b), and adds a new Rule 4.5(b) providing that a lawyer who receives a document under the circumstances specified in Rule 4.5(a) ''does not violate Rule 1.2 or Rule 1.4 by not communicating to or consulting with the client regarding the receipt or the return of the document.''

Ohio: Rule 4.4(a) adds the word ''harass'' to the list of forbidden purposes.

South Carolina adds a new Rule 4.5, which says a lawyer ''shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.''

Texas: Rule 4.04(b) forbids lawyers to present or threaten disciplinary or criminal charges ''solely to gain an advantage in a civil matter'' or civil, criminal, or disciplinary charges ''solely'' to prevent participation by a complainant or witness in a disciplinary matter.

Virginia: Rule 4.4(a) deletes the word ''substantial'' before the word ''purpose.'' Virginia has not adopted Rule 4.4(b).

Wyoming adds Rule 4.4(c), which provides that a lawyer ''shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.''

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Proposed Rule 6.1 [n/a]
"Voluntary Pro Bono Publico Service"

(Draft #4, 3/27/10)

Summary: Proposed Rule 6.1, which encourages lawyers to provide *pro bono publico* services to persons of limited means, largely tracks Model Rule 6.1, except that it incorporates some language from the Board of Governors Pro Bono Resolution (2002) and includes specific references to California statutory law. See Introduction and Explanation of Changes. The Public Comment received expresses three positions: (1) Approval of the Rule as drafted; (2) Approval of the Rule in principle, but with revisions to narrow the kinds of activities that would satisfy the rule; (3) Disagreement with the principle of having an aspirational rule concerning pro bono services in California's Disciplinary Rules. See Introduction & Public Comment Chart.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(h).
Case law	

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

☑ Other Primary Factor(s)

State Bar of California Board of Governors Pro Bono Resolution (2002); Definition of "pro bono" by the Pro Bono Institute ("PBI").

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. (See Introduction): ☑ Yes ☐ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Commission on Access to Justice ("CCAJ"); Public Interest Clearinghouse ("PIC"); State Bar Standing Committee on Access to Justice ("SCDLS").

☑ Very Controversial – Explanation:

A number of public commenters and Commission members have expressed their belief that the delivery of pro bono services is not an appropriate subject for a disciplinary rule. See Introduction and Public Comment Chart. CCAJ, PIC and SCDLS believe that the definition of pro bono legal services is not sufficiently narrow.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.1[*] Voluntary Pro Bono Publico Service

April 2010
(Draft following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.1, which encourages lawyers to provide or enable the direct delivery of pro bono publico services to persons of limited means, tracks Model Rule 6.1, except that it incorporates some language from the Board of Governors Pro Bono Resolution (2002) ("Board Resolution") and includes specific references to California statutory law. Paragraph (a) primarily concerns the direct or indirect delivery of uncompensated legal services. Paragraph (b) addresses a lawyers delivery of legal services at a reduced fee to social service, medical research, etc., organizations, or to persons of limited means, or a lawyer's participation in activities to improve the law or access to justice. The Comment largely tracks the Model Rule.

Principal Issues. There are two principal issues concerning this Rule:

1. Whether to adopt any rule of professional conduct concerning the delivery of pro bono services. The Commission and most of the public commenters favor the adoption of a pro bono rule in principle, though there is disagreement on the scope of activities that would satisfy the Rule. See Public Comment and Response of the Commission, below. A minority of the Commission and several public commenters believe that the goals of the rule are commendable but that an aspirational rule concerning pro bono has no place in rules of discipline. See Minority Statement and Public Comment and Response of the Commission, below.

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[*] Proposed Rule 6.1, Draft #4 (3/27/10).

2. Whether the definition of pro bono in California should conform to the broader, Model Rule standard, or the more narrowly drafted definitions of the Pro Bono Institute and the 2002 Board of Governors Resolution. The Commission recommends adoption of the broader, Model Rule definition of pro bono, as revised by the Commission to emphasize the goal of access to justice. A number of public commenters, however, believe that a narrower definition will better accomplish the goal of providing access to justice. See Public Comment and Response of the Commission, below.

Minority. A minority of the Commission agrees that lawyers should be encouraged to provide pro bono legal services, and as the legislature stated in Business & Professions Code section 6073, this is "the tradition" of the Bar. The minority, however, takes the position that the Rule's statement of this aspiration is not intended to be the basis for discipline (this is said in Comment [12]), and thus placing the aspiration in the disciplinary rules therefore has no legal purpose. The minority further states that this Rule adds nothing meaningful to what the legislature has fully and carefully stated in section 6073, but placing the statement in the Rules muddles the disciplinary purpose of the Rules. Finally, the minority argues that while all lawyers should aspire to meet the pro bono goal, not all lawyers can do so. The current economic crisis highlights only the most obvious of the reasons for this as thousands of lawyers are unemployed and countless others struggle to pay their rent and keep the lights on. No lawyer should be subject to arm twisting or ridicule for an inability to meet the goal.

Public Comment and Response of the Commission. Many public commenters support the Commission's recommendation to adopt proposed Rule 6.1. See, e.g., public comments from COPRAC, and the San Diego County Bar Association. Other commenters, while supporting the adoption of a rule of professional conduct concerning pro bono in principle, urge the adoption of a narrower definition of pro bono that would depart from the Model Rule definition and be more closely aligned with the definition in the 2002 Board of Governors Pro Bono Resolution. See public comment from California Commission on Access to Justice (CCAJ"), Public Interest Clearinghouse ("PIC"), and the State Bar's Standing Committee on the Delivery of Legal Services ("SCDLS"). Other public commenters approve of the minority position and recommend against the Rule's adoption, including CYLA, OCTC, the Orange County Bar Association and the Santa Clara Bar Association. See Public Comment Chart.

The Commission has responded to each submitted comment. See Public Comment Chart, below. The Commission continues to recognize the overwhelming need for access to justice in California, and believes that this Rule supports a means of accomplishing it. Although the Board of Governors' Resolution expresses this policy, many members of the bar are unaware of its existence. This Rule will be a stronger policy statement if it is approved by the Supreme Court. Given the repeated statements by Presiding Justice George regarding access to justice issues, and the findings of the Commission on Access to Justice, it is likely that the Supreme Court would look favorably upon this Rule. As to the concerns expressed by CCAJ, PIC, and SCDLS that the definition is not sufficiently narrow to facilitate the access to justice goal, or will cause confusion in the profession, the Commission does not believe that encouraging a broader range of activities under the rule will either cause confusion or divert attention away from the principal goals of the Rule. See, e.g., Commission Response to SCDLS, ¶. 2, in Public Comment Chart, below.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.1. Illinois, North Carolina, Ohio, Oregon and Texas are notable exceptions, though all but North Carolina either mandate or encourage that lawyers report their pro bono activities to the bar. Of the remaining jurisdictions, there is a wide range of variation in their adoption of Model Rule 6.1, with some retaining the 1983 version, some adopting the 2002 version, and others implementing unique provisions, ranging from D.C.'s relatively short rule to Florida's rule, which establishes an elaborate pro bono framework.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service	Commission's Proposed Rule[*] Rule 6.1 Voluntary Pro Bono Publico Service	Explanation of Changes to the ABA Model Rule
Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:	Every lawyer ~~has~~, as a matter of professional responsibility ~~to~~, should provide legal services to those unable to pay. A lawyer should ~~aspire to render~~provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:	The introductory clause to proposed Rule 6.1 is based on its Model Rule counterpart. The first sentence has been revised to emphasize that the proposed Rule is hortatory, and not mandatory. The second sentence has been revised to track the language of the Board of Governors Pro Bono Resolution (2002) ("Board Resolution").
(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:	(a) provide a substantial majority of the 50 hours of legal services without ~~fee or~~ expectation of ~~fee~~compensation other than reimbursement of expenses to:	Paragraph (a) is based Model Rule 6.1(a). It has been revised to track language in the Board Resolution.
(1) persons of limited means or	(1) persons of limited means or	Subparagraph (a)(1) is identical to Model Rule 6.1(a)(1). Although paragraph (1) of the Board Resolution refers to "indigent persons," it appears that "persons of limited means" and "indigent persons" mean the same thing, see Comment [3], so the Model Rule language is used.
(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and	(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and	Subparagraph (a)(2) is identical to Model Rule 6.1(a)(2). This subparagraph incorporates the concept of Board Resolution, paragraph (1), which urges lawyers "[to provide or enable the direct delivery of legal services] to not for profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged."

[*] Proposed Rule 6.1, Draft 4 (3/27/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service**	**Explanation of Changes to the ABA Model Rule**
(b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;	(b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;	Subparagraph (b)(1) is identical to Model Rule 6.1(b)(1).
(2) delivery of legal services at a substantially reduced fee to persons of limited means; or	(2) delivery of legal services at a substantially reduced fee to persons of limited means; or	Subparagraph (b)(2) is identical to Model Rule 6.1(b)(2).
(3) participation in activities for improving the law, the legal system or the legal profession.	(3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.	Subparagraph (b)(3) is identical to Model Rule 6.1(b)(3). The additional language at the end of the subparagraph is a modification of the Board Resolution's reference to access to justice in paragraph (1) of the Resolution. See also Explanation of Changes for Comment [8], below. The modification was made, at the suggestion of a representative of the legal services community and member of the Access to Justice Commission, to emphasize this important goal of the Rule.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service	Explanation of Changes to the ABA Model Rule
In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.	In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.	The last clause of the Rule is identical to its Model Rule counterpart. A similar concept is found in paragraph (4) of the Board Resolution.

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.	[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. ~~The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in~~ In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.	Comment [1] is identical to Model Rule 6.1, cmt. [1], except that the second and third sentences have been deleted as unnecessary exposition that does not add to an understanding of the Rule.
[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the	[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the	Comment [2] is identical to Model Rule 6.1, cmt. [2].

* Proposed Rule 4.1, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Explanation of Changes to the ABA Model Rule**
disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.	disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.	
[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.	[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in ~~programs funded by the Legal Services Corporation~~a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.	Comment [3] is based on Model Rule 6.1, cmt. [3]. Rather than use the generalized Model Rule definition of individuals the Rule is intended to benefit, a more precise definition based on California law has been substituted. Language has been added to the second sentence of the Comment to clarify the scope of conduct addressed in each of the subparagraphs of paragraph (a).

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission's Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.	[4] Because service must be provided without ~~fee or expectation of fee~~compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. ~~Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.~~	Comment [4] is based on Model Rule 6.1, cmt. [4]. The word "compensation" has been substituted for "fee or expectation of fee" to conform to the proposed language of the introductory clause. See Explanation of Changes for the introductory clause. The last sentence has been deleted because the adoption of Model Rule 5.4(a)(4), which permits sharing of "court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer," has not been recommended. Thus, such fee sharing would violate proposed Rule 5.4.
[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).	[5] While it is ~~possible for~~preferable that a lawyer ~~to~~ fulfill ~~the~~his or her annual responsibility to perform pro bono services ~~exclusively~~ through activities described in paragraphs (a)(1) and (2), ~~to~~ the ~~extent that any hours of service remained unfulfilled, the remaining~~lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers ~~and judges~~ from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers ~~and judges~~ may fulfill their pro bono responsibility by performing services outlined in paragraph (b).	Comment [5] is based on Model Rule 6.1, cmt. [5], which explains that the activities describe in paragraph (b) are an alternative to providing direct legal services. The word "preferable" has been substituted for "possible" to emphasize the preference, in conformance with the Board Resolution, that a lawyer devote most of his or her 50 hours to the direct delivery of legal services. The references to judges have been stricken because judges in California are not subject to this Rule.

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Commission's Proposed Rule[*]** **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Explanation of Changes to the ABA Model Rule**
[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.	[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.	Comment [6] is based on Model Rule 6.1, cmt. [6]. A reference to claims brought under the California Fair Employment and Housing Act has been added to avoid suggesting that the services described in the Comment are limited to those arising under the U.S. Constitution or federal statutes.
[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.	[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. ~~Participation in judicare programs and acceptance~~ Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.	Comment [7] is based on Model Rule 6.1, cmt. [7]. The reference to "judicare programs" has been deleted because there are few such programs in California.
[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal	[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging	Comment [8] is based on Model Rule 6.1, cmt. [8]. The emphasis on programs designed to increase access to justice has been added because of the California's well-documented needs in this area. See also Explanation of Changes for paragraph (b)(3).

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Commission's Proposed Rule*** **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Explanation of Changes to the ABA Model Rule**
system or the profession are a few examples of the many activities that fall within this paragraph.	in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice are a few examples of the many activities that fall within this paragraph.	
[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.	[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.	Comment [9] is identical to Model Rule 6.1, cmt. [9].
[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.	[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.	Comment [10] is identical to Model Rule 6.1, cmt. [10].

ABA Model Rule **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Commission's Proposed Rule*[*]** **Rule 6.1 Voluntary Pro Bono Publico Service Comment**	**Explanation of Changes to the ABA Model Rule**
[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.	[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.	Comment [11] is identical to Model Rule 6.1, cmt. [11].
[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.	[12] The responsibility set forth in this Rule is not ~~intended to be enforced~~enforceable through disciplinary process.	Comment [12] is based on Model Rule 6.1, cmt. [12]. The word "enforceable" has been substituted for "intended to be enforced" to emphasize that a lawyer's failure to achieve the number of hours of service suggested by the Rule is not a basis for discipline.

Rule 6.1: Voluntary Pro Bono Publico Service

(Commission's Proposed Rule – Draft 4 (3/27/10) – CLEAN)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the

provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.

[5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not enforceable through disciplinary process.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
*	California Commission on Access to Justice ("CCAJ"), Public Interest Clearinghouse ("PIC"); State Bar Standing Committee on Delivery of Legal Services ("SCDLS")[2] [Toby Rothschild] *NOTE: This e-mail was not a written comment submitted in response to the Bar's official request for public comment.	A/M			In a post-public comment period e-mail sent to the Commission Chair by Toby Rothschild, the listed groups stated: The three groups that supported Rule 6.1 but raised a variety of questions about the formulation of it, particularly the definitions of pro bono, join in the following statement in response to the changes which I suggested at the meeting last Friday. I hope this will be helpful in moving the process forward. COMMISSION ON ACCESS TO JUSTICE, **<u>SCDLS AND PIC REPLY ON AMENDED PROPOSED RULE 6.1</u>**: The Commission on Access to Justice, Standing Committee on Delivery of Legal Services (SCDLS) and Public Interest	1. The Commission appreciates the groups' support of the revisions the Commission voted unanimously

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

[2] Following public comment, representatives from CAJ, PIC and SCDLS appeared before the Commission to request adoption of one of the two definitions of pro bono service currently in place in California: the 2002 BOG Resolution definition and the Pro Bono Institute definition. Following deliberations at the Commission meeting, the Commission voted unanimously to change the definition in proposed Rule 6.1 to more closely conform to the other two definitions, while at the same time retain substantial similarity with the definition in Model Rule 6.1.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 **Agree = 3**
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Clearinghouse (PIC) thank the Rule Revision Commission for this opportunity to comment on the proposed change in language on proposed Rule 6.1. All three entities agree that the proposal of adding "particularly with the goal of [increasing access to justice]" to proposed Rule 6.1, and similar language to comment 8, is a significant improvement over the initial language in section (b)(3). The new language, unanimously approved by the Commission, serves to focus the activities discussed in section (b)(3) on increasing access to justice for underserved Californians. While our organizations agree that the proposed language is an improvement, it does not address our comments regarding the potential problems inherent to having multiple definitions of pro bono in California or our comments on the proposed definition, including regarding the overbreadth of the definition. Therefore, our organizations affirm and continue the comments made in our individual letters.	to make to the definition of pro bono. 2. The Commission has responded to each of the groups' concerns, below. See Responses to CCAJ, PIC, and SCDLS, below.
2	California Commission on Access to Justice ("CCAJ")	M			The California Commission on Access to Justice strong supports proposed rule 6.1.	No response required.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					We believe that its inclusion will go a long way toward achieving the goal of establishing a fair and equitable justice system. By emphasizing the professional obligation of all lawyers, and providing a framework for pro bono service, the new rule should result in substantially increased legal assistance being made available to vulnerable individuals throughout our state.	
					There is one change that we think would strengthen this rule and avoid unnecessary confusion. As you are aware, there is more than one definition of pro bono. The one in Model Rule 6.1 is different from the one promoted by the national Pro Bono Institute, which is followed by most large firms across the country. Both of those definitions are different from the pro bono resolution adopted in California by the Board of Governors, and used in many of our State Bar activities over the past 30 years. We believe that the confusion that might exist because of these different definitions can be avoided if we eliminate part of subsection (b)(1), and recommend that everything after "civil liberties or public rights" be eliminated. In	The Commission disagrees. While large law firms play a important role in the delivery of pro bono legal services, other lawyers in smaller and solo practice also provide considerable pro bono service. The Commission specifically considered and approved this broader definition of pro bono service. One Commission member who endorsed legal services for those who cannot afford to pay, also expressed his belief that attorneys who devote their services for the social good should be included in the definition of pro bono and that their service should count. This is not intended to dilute or diminish the Commission's recognition that Access to Justice is the primary goal. The Commission that including specific activities such as Law Day, mediation, MCLE, among others, was appropriate. However, at the request of several groups, including the commenter, the Commission made the following change to paragraph (b)(3):

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					other words, section (b)(1) would now read: provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights; The deleted section offers an alternative suggestion for how the "additional" pro bono service can be provided, and the main disagreement among the various pro bono definitions has to do with how the "additional" pro bono obligation can be fulfilled. By limiting (b)(1) to legal services at no fee, or a reduced fee, and by expanding it beyond straight legal aid work to include civil rights, civil liberties and public rights, this section would offer an additional type of service that lawyers can offer while fulfilling their pro bono obligation that stays quite true to the true need for pro bono. Only lawyers can offer legal help for low-income, vulnerable Californians, and we believe that any broader definition of pro bono would undermine the important need of addressing the legal needs	(b) provide any additional services through: * * * (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of[3] increasing access to justice. Further, at the request of the same groups, the Commission revised Comment [8] as follows: [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[3] **RRC Action**: At the 3/26-27/10 meeting, the RRC voted 12-0-0 to approve Rule 6.1, with changes to paragraph (b)(3) and Comment [8], as proposed by Toby Rothschild on behalf of the Access to Justice Commission, the Standing Committee on the Delivery of Legal Services, and the Public Interest Clearinghouse.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 Agree = 3
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of the most vulnerable among us. This definition is within the definition used by the Pro Bono Institute, and we do want to avoid adopting any rule that causes confusion (and possibly the result that less pro bono will be done by large firms.)	
3	California Young Lawyers Association (CYLA) Executive Committee and Pro Bono Committee	D			The California Young Lawyers Association's (CYLA) Executive Committee and Pro Bono Committee oppose the addition of proposed rule 6.1, "Voluntary Pro Bono Service," to the Rules of Professional Conduct of the State Bar of California. While CYLA actively encourages and supports pro bono service amongst its members through various efforts as an organization, we believe the rule is duplicative and misplaced as an amendment to the Rules of Professional Conduct. CYLA encourages pro bono activity through co-sponsored trainings with legal aid organizations that prepare CYLA members and others for pro bono opportunities across the state. In addition, CYLA supports pro bono activity by publicizing pro bono opportunities to our members on our website at http://www.calbar.ca.gov/state/calbar/calbar_g	The Commission disagrees. Although CYLA "actively encourages and supports pro bono service," this does not mean that the rule is duplicative or misplaced. The Commission, after lengthy deliberations, concluded that including the rule in the proposed Rules of Professional Conduct is appropriate. CYLA's goals and activities are not in conflict with the rule.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					eneric.jsp?cid=10105&id=10610. CYLA is committed to promoting and facilitating the completion of 50 hours of pro bono service per year by each of its members.	
					Currently, there are three pro bono standards in California, all of which are aspirational. California Business and Professions Code section 6073 encourages lawyers to provide pro bono legal services and in the alternative to provide financial support to organizations providing free legal services. The California State Bar's Board of Governors Pro Bono Resolution sets forth an aspirational standard for pro bono service that exceeds the standard proposed in rule 6.1. Finally, the Pro Bono Institute Law Firm Challenge urges law firms with more than 50 lawyers to aspire to meet pro bono service targets. The addition of proposed rule 6.1 is duplicative and unnecessary. Moreover, the placement of proposed rule 6.1 in the Rules of Professional Conduct of the State Bar of California is inappropriate. The Rules of Professional Conduct are attorney conduct rules the violation of which subject an	The Commission has considered and included language from the Board of Governors resolution. Notwithstanding other aspirational goals that support and encourage pro bono service reflected by CYLA, the Pro Bono Institute and others, the overwhelming and pressing issues of Access to Justice justify inclusion of this rule and comments.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					attorney to discipline. The proposed rule is aspirational and states in Comment 12, that "the responsibility set forth in this Rule is not enforceable through disciplinary process." An aspirational goal is misplaced within the Rules of Professional Conduct and is better located in a formal policy statement or Board of Governors' resolution.	
4	Committee on Professional Responsibility and Conduct ("COPRAC")	A			COPRAC supports adoption of proposed Rule 6.1. While several members of our committee are sympathetic to the view of the Commission's minority and question whether this aspirational statement should be included in the rules, the majority supports the Rule. Given the importance of our professional obligation to improve access to justice, and recognizing the enormous unmet need for counsel for persons of limited means, we favor adoption of the Rule. Recognizing, however, that there remains some controversy about including this Rule with other rules which are obviously concerned with potential disciplinary issues, we have four suggestions for changes that would make it clearer that Rule 6.1 is aspirational.	The Commission agrees with the majority of COPRAC's members who support the proposed rule. The Commission responds to COPRAC's suggested revisions as follows:

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					1. We would retain the ABA language in the opening paragraph stating that lawyers are to "aspire to" provide pro bono services. We think this is sufficiently important to be included in the text of the rule.	1. The Commission considered the word "aspire to" but substituted "every lawyer, as a matter of professional responsibility, should" to convey this concept. The Commission concluded it was appropriate to recognize that this Rule derives from a lawyer's professional responsibilities to the justice system.
					2. We recommend incorporating the language of Comment [12] into the body of the Rule.	2. The Commission discussed moving Comment [12] into the body of the Rule but determined that placing the provision in the Comment achieved the same effect.
					3. We would also change Comment [12] to state that the rule is not enforceable through the "disciplinary process or otherwise."	3. While the Commission has included a statement that the rule is not enforceable through the disciplinary process, "or otherwise" has not been included. COPRAC has offered no example of any other possible means or risk of enforcement, or explained, if such means exist, how a disciplinary rule could provide immunity from its application.
					4. We would preface the last sentence of Comment [12] with "Notwithstanding Rule 1.0(b)(2)".	4. The Commission disagrees with the commenter's suggestion. Including a reference to proposed Rule 1.0(b)(2), which provides "[a] wilful violation of these Rules is a basis for discipline," would add nothing to the sentence's substance.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					By making very clear that this rule is different from most of the other rules, the Commission need not further address other concerns raised by COPRAC members regarding the terminology in the Rule which is, in some parts, somewhat vague and unclear. (For example, eligibility for group representation in (b)(1) is not well-defined.) Since no one would be subject to punishment for an incorrect interpretation of the Rule, we agree that retention of the imprecise ABA language is appropriate.	
5	Office of the Chief Trial Counsel	D			This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.	The Commission disagrees. Some form of the rule has been adopted in a substantial majority of states. Access to justice is an overwhelming problem in California and including proposed Rule 6.1 (and Comments), in the rules of professional conduct will have no effect on the remainder of the disciplinary rules.
6	Orange County Bar Association	D			We support adoption of the minority's view to leave this aspirational statement that lawyers should strive to provide pro bono legal services out of the disciplinary-based rules being considered.	The Commission disagrees. In recommending the adoption of this Rule, the Commission recognizes the overwhelming need for access to justice in California, and this rule supports a means of accomplishing it. Although the Board of Governors' Resolution expresses this policy, many members of the bar are unaware of its existence. This Rule will be a stronger policy statement if it is approved by the Supreme Court. Given the repeated statements

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
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No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						by Chief Justice George regarding access to justice issues, and the findings of the Commission on Access to Justice, it is likely that the Supreme Court would look favorably upon such a rule.
					If the Commission decides to adopt this Rule, we urge the Commission to utilize the 1983 ABA Model Rule language for proposed Rule 6.1. This older version of the Model Rule promoting pro bono service not only encapsulates the overall intent of the ABA's current Model Rule (and the California Board of Governors' 2002 Pro Bono Resolution), but it also artfully avoids the imposition of the type of hourly and financial commitments that the minority view of the proposed Rule found to be either economically unacceptable, or simply not attainable, for some practitioners: "A lawyer should render public interest service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means."	The Commission disagrees that the older version of Model Rule 6.1 is preferable. In conformance with the Model Rule definition, the Commission considered and approved specific pro bono activities including Law Day activities, MCLE instruction, and mediation and arbitration activities. The Commission determined that including these activities was appropriate. Neverthless, in response to comments received from pro bono organizations, the Commission unanimously approved revisions to paragraph (b)(3) and Comment [8] of the Rule to emphasize that these kinds of activities still should have as their goal increasing access to justice. See Response to e-mail from CCAJ, PIC, and SCDLS, above.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 Agree = 3
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.	The Commission disagrees. Members of the Commission recognize the overwhelming need for access to justice in California, and this rule supports a means of accomplishing it, whether or not it is enforceable as a disciplinary rule, Such a rule presents a strong policy statement consistent with comments expressed by Chief Justice George regarding access to justice issues, as well as the findings of the Commission on access to justice. It is likely that the Supreme Court would look favorably upon such a rule.
7	Public Interest Clearinghouse ("PIC")	M			1. All but a handful of states have adopted some form of ABA Model Rule 6.1 and the time is ripe for California to adopt an aspirational rule that encourages pro bono participation. PIC supports an aspirational pro bono rule but we have significant concerns about the definition of pro bono used in this Proposed Rule. 2. There are already two other definitions of "pro bono" in wide use in California. The first is the national Pro Bono Institute's (PBI) definition, and the second is the definition set forth in the State Bar Pro Bono Resolution. PIC believes it is critical for the State Bar of California to maintain a consistent and unified voice with respect to pro bono, and introducing a third definition of pro bono that is broader than both the Resolution definition	1. The Commission agrees with PIC's members who support the proposed rule. 2. The Commission appreciates the concerns the commenter expresses but does not believe that the Commission's recommendation to adopt a modified version of the Model Rule definition of pro bono will necessarily result in the consequences the commenter foresees. The Commission specifically considered and approved this broader definition of pro bono service. The added categories of service, which are derived primarily from the Model Rule, do not exclude the provision of legal services directly to

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					and the PBI definition is likely to cause confusion and divert attention from the key goal here, which is to encourage more pro bono activity for people of limited means and related to issues of significant public importance.	persons of limited means or to organizations "in matters designed to address the needs of persons of limited means." On the contrary, this aspirational Rule expressly states that every lawyer should provide a "substantial majority" of the "at least" 50 hours of service in the activities that the commenter apparently believes should be the sole focus of the Rule. The Commission expressly approved the concept that lawyers time devoted to the social good should also come within this Rule and believe that encouraging such activities will not result in causing confusion or diverting attention away from the principal goals of the Rule as implied in paragraph (a): the promotion and realization of access to justice for those in need.
					2a. Firms have indicated that they would not be able to monitor or report on pro bono activity based on a different definition because of the degree to which the Pro Bono Institute definition has been institutionalized within their firms.	2a. The Commission notes that the more limited activities approved by the Pro Bono Institute still remain - the proposed definition merely expands those activities. A law firm may choose not to participate in all of the activities set forth or allow its attorneys to do only certain activities. That should not necessarily preclude activities such as Law Day, etc. as being pro bono work for all other lawyers.
				6.1(a)	3. In 6.1(a), delete "a substantial majority of the" and replace with "at least." PIC believes 50 hours of pro bono legal services should be the minimum as stated in the Pro Bono Resolution.	3. The Commission did not make the suggested change. The introductory clause of the Rule already provides that a lawyer should provide "at least" 50 hours. Of that total of at least 50 hours, paragraph (a) provides that a "substantial majority" should be

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						devoted to the activities identified therein. See also response in paragraph 2.
				6.1(b)(1)(2) &(3)	4. Change 6.1(b)(1), (2) and (3) to reflect either the PBI definition or the State Bar Pro Bono Resolution definition. If the Commission wants to retain the ABA Model Rule language as proposed, PIC strongly encourages the Rules Revision Commission to seek input on the pro bono definition from stakeholders.	4. The Commission did not make the suggested change. See response in paragraph 2, above. However, at the request of several groups, including the commenter, the Commission made the following change to paragraph (b)(3): (b) provide any additional services through: * * * (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of[4] increasing access to justice. See also Response to ¶. 10, below.
				Comment [2]	5. In Comment [2], replace "a substantial majority" with "all." Also, PIC recommends adding language with respect to "legislative lobbying" and "administrative rule making" that relates those activities to increasing access to justice for persons of limited means or addressing other systemic issues on behalf of clients of limited means.	5. The Commission did not make the requested change. See response in paragraph 3., above.

[4] **RRC Action**: At the 3/26-27/10 meeting, the RRC voted 12-0-0 to approve Rule 6.1, with changes to paragraph (b)(3) and Comment [8], as proposed by Toby Rothschild on behalf of the Access to Justice Commission, the Standing Committee on the Delivery of Legal Services, and the Public Interest Clearinghouse.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [4]	6. In Comment [4], retain the last sentence and replace “to contribute an appropriate portion of such fees” with “to make a contribution.” Donation of statutory attorneys’ fees to the legal services organization through which the attorney is doing pro bono work has been a widely accepted practice in California and nationally. By not linking the contribution to the award of attorneys’ fees, there is no fee sharing issues and thus no violation of Proposed Rule 5.4.	6. The Commission did not make the requested change. The Commission does not understand how the proposed change in language will insulate a lawyer from a violation of proposed Rule 5.4.
				Comment [5]	7.In Comment [5], delete both references to “judges.” Proposed Rule 6.1 applies only to lawyers.	7. The Commission agrees and has made the suggested change.
				Comment [6]	8. In Comment [6], PIC supports the proposed language.	8. No comment necessary.
				Comment [7]	9. Comment [7] can be deleted with the suggested change to (b)(1), (2) and (3)..	9. The Commission has not made the suggested changes. Please see response in paragraph 2, above.
				Comment [8]	10. In Comment [8], PIC supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition. Additionally, serving on bar association committees, taking	10. The Commission has not made the suggested changes. Please see response in paragraph 2, above. At the request of several groups providing pro bono services, including the commenter, the Commission revised Comment [8] as follows:

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 **Agree = 3**
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					part in Law Day activities, acting as a legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are not considered pro bono activities and should not be included in the Comments.	[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.
				Comment [9]	11. In Comment [9], PIC supports the Comments but recommends inserting “at least” before “reasonably equivalent” per the Pro Bono Resolution (see Recommendations to Proposed Rule 6.1(a), above).	11. The Commission did not make the suggested change. See response in paragraph 3, above. In addition, inserting “at least” in this context of making a financial contribution is unnecessary. Lawyers are urged in the introductory paragraph to of the Rule provide “at least” 50 hours. A lawyer proceeding under this Comment might determine that he or she would have provided 60 hours of service if feasible. The contribution therefore would be “reasonably equivalent” to the value of 60 hours. The term “at least” would be unnecessary.

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [11]	In Comment [11], after "law firms," add "corporate and governmental legal departments, and other employers of lawyers" and delete "in the firm." PIC believes the Comment should be broadened to include lawyers in other practice settings and not limited to law firms.	The Commission did not make the requested change. The definition of "law firm" in proposed Rule 1.0.1 already encompasses the organizations listed by the commenter.
8	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
9	Santa Clara County Bar Association	D			We recommend against including this as a disciplinary rule. Our Association fully supports encouraging lawyers to provide pro bono services to persons of limited means. However, this rule is hortatory in nature and is not a rule of conduct that can or should be subject to discipline.	The Commission disagrees. As the rule states in its title, it sets forth the parameters of "Voluntary" Pro Bono Service. Although this rule will not subject an attorney to discipline, it nevertheless sets forth an important principle that every attorney should contribute to access to justice.
10	State Bar Standing Committee on the Delivery of Legal Services (SCDLS)	M			1. All but a handful of states have adopted some form of ABA Model Rule 6.1 and the time is ripe for California to adopt an aspirational rule that encourages pro bono participation. SCDLS supports an aspirational pro bono rule but we have significant concerns about the definition of pro bono used in this Proposed Rule. 2. There are already two other definitions of "pro bono" in wide use in California. The first is the national Pro Bono Institute's (PBI)	1. The Commission agrees with SCDLS's members who support the proposed rule. 2. The Commission appreciates the concerns the commenter expresses but does not believe that the Commission's recommendation to adopt a modified

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 Agree = 3
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					definition, and the second is the definition set forth in the State Bar Pro Bono Resolution. SCDLS believes it is critical for the State Bar of California to maintain a consistent and unified voice with respect to pro bono, and introducing a third definition of pro bono that is broader than both the Resolution definition and the PBI definition is likely to cause confusion and divert attention from the key goal here, which is to encourage more pro bono activity for people of limited means and related to issues of significant public importance.	version of the Model Rule definition of pro bono will necessarily result in the consequences the commenter foresees. The Commission specifically considered and approved this broader definition of pro bono service. The added categories of service, which are derived primarily from the Model Rule, do not exclude the provision of legal services directly to persons of limited means or to organizations "in matters designed to address the needs of persons of limited means." On the contrary, this aspirational Rule expressly states that every lawyer should provide a "substantial majority" of the "at least" 50 hours of service in the activities that the commenter apparently believes should be the sole focus of the Rule. The Commission expressly approved the concept that lawyers time devoted to the social good should also come within this Rule and believe that encouraging such activities will not result in causing confusion or diverting attention away from the principal goals of the Rule as implied in paragraph (a): the promotion and realization of access to justice for those in need.
				6.1(a)	2a. Firms have indicated that they would not be able to monitor or report on pro bono activity based on a different definition because of the degree to which the Pro Bono Institute definition has been institutionalized within their firms.	2a. The Commission notes that the more limited activities approved by the Pro Bono Institute still remain - the proposed definition merely expands those activities. A law firm may choose not to participate in all of the activities set forth or allow its attorneys to do only certain activities. That should not necessarily preclude activities such as Law Day, etc. as being pro bono work for all other lawyers.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 **Agree = 3**
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				6.1(b)(1)(2) &(3)	3. In 6.1(a), delete "a substantial majority of the" and replace with "at least." SCDLS believes 50 hours of pro bono legal services should be the minimum as stated in the Pro Bono Resolution.	3. The Commission did not make the suggested change. The introductory clause of the Rule already provides that a lawyer should provide "at least" 50 hours. Of that total of at least 50 hours, paragraph (a) provides that a "substantial majority" should be devoted to the activities identified therein. See also response in paragraph 2.
					4. Change 6.1(b)(1), (2) and (3) to reflect either the PBI definition or the State Bar Pro Bono Resolution definition. If the Commission wants to retain the ABA Model Rule language as proposed, SCDLS strongly encourages the Rules Revision Commission to seek input on the pro bono definition from stakeholders.	4. The Commission did not make the suggested change. See response in paragraph 2, above. However, at the request of several groups, including the commenter, the Commission made the following change to paragraph (b)(3): (b) provide any additional services through: * * * (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of[5] increasing access to justice. See also Response to ¶. 10, below.

[5] **RRC Action**: At the 3/26-27/10 meeting, the RRC voted 12-0-0 to approve Rule 6.1, with changes to paragraph (b)(3) and Comment [8], as proposed by Toby Rothschild on behalf of the Access to Justice Commission, the Standing Committee on the Delivery of Legal Services, and the Public Interest Clearinghouse.

Rule 6.1 Voluntary Pro Bono Service [Sorted by Commenter]						TOTAL = 10 Agree = 3 Disagree = 4 Modify = 3 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
				Comment [2]	5. In Comment [2], replace "a substantial majority" with "all." Also, SCDLS recommends adding language with respect to "legislative lobbying" and "administrative rule making" that relates those activities to increasing access to justice for persons of limited means or addressing other systemic issues on behalf of clients of limited means.	5. The Commission did not make the requested change. See response in paragraph 3., above.
				Comment [4]	6. In Comment [4], retain the last sentence and replace "to contribute an appropriate portion of such fees" with "to make a contribution." Donation of statutory attorneys' fees to the legal services organization through which the attorney is doing pro bono work has been a widely accepted practice in California and nationally. By not linking the contribution to the award of attorneys' fees, there is no fee sharing issues and thus no violation of Proposed Rule 5.4.	6. The Commission did not make the requested change. The Commission does not understand how the proposed change in language will insulate a lawyer from a violation of proposed Rule 5.4.
				Comment [5]	7.In Comment [5], delete both references to "judges." Proposed Rule 6.1 applies only to lawyers.	7. The Commission agrees and has made the suggested change.
				Comment [6]	8. In Comment [6], SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition.	8. The Commission has not made the suggested changes. Please see response in paragraph 2, above.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 10 **Agree = 3**
Disagree = 4
Modify = 3
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [7]	9. In Comment [7], SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition.	9. The Commission has not made the suggested changes. Please see response in paragraph 2, above.
				Comment [8]	10. In Comment [8], SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition. Additionally, serving on bar association committees, taking part in Law Day activities, acting as a legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are not considered pro bono activities and should not be included in the Comments.	10. The Commission has not made the suggested changes. Please see response in paragraph 2, above. At the request of several groups providing pro bono services, including the commenter, the Commission revised Comment [8] as follows: [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.
				Comment [9]	11. In Comment [9], SCDLS supports the Comments but recommends inserting "at least" before "reasonably equivalent" per the Pro Bono Resolution (see Recommendations	11. The Commission did not make the suggested change. See response in paragraph 3, above. In addition, inserting "at least" in this context of making a financial contribution is unnecessary. Lawyers are

TOTAL = 10	Agree = 3 Disagree = 4 Modify = 3 NI = 0

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					to Proposed Rule 6.1(a), above).	urged in the introductory paragraph to of the Rule provide "at least" 50 hours. A lawyer proceeding under this Comment might determine that he or she would have provided 60 hours of service if feasible. The contribution therefore would be "reasonably equivalent" to the value of 60 hours. The term "at least" would be unnecessary.
				Comment [11]	In Comment [11], after "law firms," add "corporate and governmental legal departments, and other employers of lawyers" and delete "in the firm." SCDLS believes the Comment should be broadened to include lawyers in other practice settings and not limited to law firms.	The Commission did not make the requested change. The definition of "law firm" in proposed Rule 1.0.1 already encompasses the organizations listed by the commenter.

Rule 6.1: Voluntary Pro Bono Publico Service

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Editors' Note. No state yet requires lawyers to perform pro bono work, and no state is actively considering mandatory pro bono. Some states, however, require lawyers to report their pro bono hours, and other states encourage lawyers to do so. When we went to press in September 2009, a state-by-state chart of pro bono reporting rules and policies found at www.abanet.org/legalservices/probono/reporting.html indicated that 7 states have mandatory pro bono reporting (Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico); 8 states have formally rejected mandatory pro bono reporting (Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee, and Utah); 11 states encourage voluntary pro bono reporting (Arizona, Georgia, Kentucky, Louisiana, Missouri, Montana, New Mexico, Oregon, Texas, Utah, and Washington); and 2 states were actively considering voluntary pro bono reporting (Michigan and Vermont).

Alabama: See the entry under Rule 6.5.

Arizona: Rule 6.1 contains the following key provisions:

(a) A lawyer should voluntarily render public interest legal service. A lawyer may discharge this responsibility by rendering a minimum of fifty hours of service per calendar year. . . .

(c) A law firm or other group of lawyers may satisfy their responsibility under this Rule, if they desire, collectively. For example, the designation of one or more lawyers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation. . . .

(d) The efforts of individual lawyers are not enough to meet the needs of the poor. The profession and government have instituted programs to provide direct delivery of legal services to the poor. The direct support of such programs is an alternative expression of support to provide law in the public interest, and a lawyer is encouraged to provide financial support for organizations that provide legal services to persons of limited means or to the Arizona Bar Foundation for the direct delivery of legal services to the poor.

California: California has no rule of professional conduct comparable to ABA Model Rule 6.1, but California Business and Professions Code §6068(h) makes it the duty of a lawyer "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." In addition, the California State Bar's Board of Governors has adopted a Pro Bono Resolution that echoes the substance of ABA Model Rule 6.1. It provides as follows:

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(3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities. . . .

Colorado: Colorado adds the following paragraph at the end of the rule:

Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono responsibility by performing services or participating in activities outlined in paragraph (b).

In 1999, the Colorado Supreme Court rejected a recommendation by the state's Judicial Advisory Council to institute mandatory pro bono reporting. The court said that mandatory reporting was a step toward mandatory pro bono, and "[s]ince we are unwilling to arrive at that destination, we are also unwilling to take the first step." However, the Colorado Supreme Court has adopted a detailed "recommended Model Pro Bono Policy" for law firms, which is reprinted in the Colorado Rules of Professional Conduct immediately after Rule 6.1. Among other things, the Model Pro Bono Policy urges firms to include "a statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation." In addition, the Colorado Supreme Court will annually recognize Colorado law firms that "voluntarily advise the Court . . . that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for persons of limited means or organizations serving persons of limited means. . . ."

Connecticut, Georgia, Indiana, Kansas, Michigan, Missouri, Pennsylvania, and South Carolina have retained the 1983 version of ABA Model Rule 6.1, which provides as follows:

A lawyer should render public interest service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

District of Columbia: D.C. Rule 6.1 provides as follows:

A lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorneys' fees or who are otherwise unable to obtain counsel. A lawyer may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel, or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

Florida: In 1993, in a divided opinion, the Florida Supreme Court adopted an elaborate pro bono rule requiring lawyers to report their pro bono hours. See 630 So. 2d 501 (Fla. 1993). The Florida Bar subsequently sought to eliminate mandatory reporting, but the Florida Supreme Court refused to do so at 696 So. 2d 734 (1997). In Schwarz v. Kogan, 132 F.3d 1387 (11th Cir. 1998), the court upheld Florida's mandatory

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reporting provisions against a federal constitutional challenge. The full rule provides as follows:

> 4-6.1 Pro Bono Public Service
>
> (a) Professional Responsibility. Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor or (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of The Bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline.
>
> (b) Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. The professional responsibility to provide pro bono legal services as established under this rule is aspirational rather than mandatory in nature. The failure to fulfill one's professional responsibility under this rule will not subject a lawyer to discipline. The professional responsibility to provide pro bono legal service to the poor may be discharged by:
>
> > (1) annually providing at least 20 hours of pro bono legal service to the poor; or
> >
> > (2) making an annual contribution of at least $350 to a legal aid organization.
>
> (c) Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. Each member of the bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been filed previously with the circuit pro bono committee and only when providing pro bono legal service to the poor:
>
> > (1) in a major case or matter involving a substantial expenditure of time and resources; or
> >
> > (2) through a full-time community or public service staff; or
> >
> > (3) in any other manner that has been approved by the circuit pro bono committee in the circuit in which the firm practices.
>
> (d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual dues statement. . . . The failure to report this information shall constitute a disciplinary offense under these rules.
> . . .

Florida also adds a lengthy Rule 6.5 (Voluntary Pro Bono Plan). Rule 6.5(c)(2) instructs every judicial circuit to "(a) prepare in written form a circuit pro bono plan after evaluating the needs of the circuit and making a determination of present available pro bono services; (b) implement the plan and monitor its results; [and] (c) submit an annual report to The Florida Bar standing committee. . . ." Rule 6.5(d) provides as follows:

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The following are suggested pro bono service opportunities that should be included in each circuit plan:

(1) representation of clients through case referral;

(2) interviewing of prospective clients;

(3) participation in pro se clinics and other clinics in which lawyers provide advice and counsel;

(4) acting as co-counsel on cases or matters with legal assistance providers and other pro bono lawyers;

(5) providing consultation services to legal assistance providers for case reviews and evaluations;

(6) participation in policy advocacy;

(7) providing training to the staff of legal assistance providers and other volunteer pro bono attorneys;

(8) making presentations to groups of poor persons regarding their rights and obligations under the law;

(9) providing legal research;

(10) providing guardian ad litem services;

(11) providing assistance in the formation and operation of legal entities for groups of poor persons; and

(12) serving as a mediator or arbitrator at no fee to the client-eligible party.

Georgia: Rule 6.1 tracks the pre-2002 version of ABA Model Rule 6.1, but Georgia adds the following: "No reporting rules or requirements may be imposed without specific permission of the Supreme Court granted through amendments to these Rules. There is no disciplinary penalty for a violation of this Rule."

Illinois: In the rules effective January 1, 2010, Illinois omits Rule 6.1. Comment 6B of the Preamble explains the omission as follows:

The absence from the Illinois Rules of a counterpart to ABA Model Rule 6.1 regarding pro bono and public service should not be interpreted as limiting the responsibility of lawyers to render uncompensated service in the public interest. Rather, the rationale is that this responsibility is not appropriate for disciplinary rules because it is not possible to articulate an appropriate disciplinary standard regarding pro bono and public service.

However, Illinois encourages pro bono obligations through court rules. The Preamble's Comment 6A refers to Illinois Supreme Court Rule 756(f), which provides as follows:

> (f) Disclosure of Voluntary Pro Bono Service. As part of registering under this rule, each lawyer shall report the approximate amount of his or her pro bono legal service and the amount of qualified monetary contributions made during the preceding 12 months. . . .

Rule 756(f) then defines the term "Pro bono legal service," stating explicitly that legal services for which payment "was expected, but is uncollectible, do not qualify as pro bono legal service." The rule also sets out the precise contents of the form for reporting such service on the annual registration statement. Information provided pursuant to Rule 756(f) is considered "confidential," but the information may be reported "in the aggregate." Rule 756(g) instructs the Bar's

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Administrator to ‘‘remove from the master roll’’ any attorney who has failed to provide the information on voluntary pro bono service required by Rule 756(f). A person whose name is not on the master roll and who practices law in Illinois ‘‘is engaged in the unauthorized practice of law and may also be held in contempt of the court.’’

Finally, Rule 756(j) permits retired and inactive attorneys, as well as in-house attorneys who have a more limited registration status, to provide pro bono legal services under certain circumstances that are described in the Rule.

Kentucky: Rule 6.1, entitled ‘‘Donated Legal Services,’’ encourages lawyers to render voluntary public interest legal service and permits lawyers to report donated legal services on the Bar's annual dues statement. ‘‘Lawyers rendering a minimum of fifty (50) hours of donated legal service shall receive a recognition award for such service from the Kentucky Bar Association.’’

Maryland adds that a lawyer ‘‘in part-time practice’’ should aspire to render at least ‘‘a pro rata number of hours.’’ Maryland also makes an exception for lawyers who are ‘‘prohibited by law’’ from rendering certain types of pro bono legal services. Maryland allows a substantial majority of pro bono services to be rendered to ‘‘individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights. . . .’’ Maryland Rule 6.1 concludes: ‘‘This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions.’’

Massachusetts: Rule 6.1 states that a lawyer ‘‘should provide annually at least 25 hours of pro bono publico legal services for the benefit of persons of limited means.’’ Alternatively, the lawyer should ‘‘contribute from $250 to 1 percent of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means.’’

Michigan essentially retains the 1983 version of ABA Model Rule 6.1.

New Jersey: Rule 6.1 tracks the original (1983) version of ABA Model Rule 6.1 except that the first sentence reads: ‘‘Every lawyer has a professional responsibility to render public interest legal service.’’

New York: In the rules effective April 1, 2009, Rule 6.1 provides as follows:

> Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.
>
> (a) Every lawyer should aspire to: (1) provide at least 20 hours of pro bono legal services each year to poor persons; and (2) contribute financially to organizations that provide legal services to poor persons.
>
> (b) Pro bono legal services that meet this goal are: (1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel; (2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and (3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.
>
> (c) Appropriate organizations for financial contributions are: (1) organizations primarily engaged in the provision of legal services to the poor; and (2)

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organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

North Carolina omits Rule 6.1, but Paragraph 6 of North Carolina's Preamble states that "all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel," and Paragraph 7 of the Preamble contains language almost identical to the 1983 version of ABA Model Rule 6.1.

Ohio omits ABA Model Rule 6.1. The Supreme Court of Ohio explains that it "deferred consideration of Model Rule 6.1 in light of recommendations contained in the final report of the Supreme Court Task Force on Pro Se & Indigent Representation and recommendations from the Ohio Legal Assistance Foundation." (The Task Force on Pro Se & Indigent Representation, which was appointed by the Supreme Court of Ohio in 2004, recommended in its April 2006 final report that Ohio attorneys be required to report their pro bono activities. The report is available at www.sconet.state.oh.us/publications/prose/report_april06.pdf.)

Texas omits Rule 6.1, but Paragraph 6 of the Texas Preamble addresses pro bono services by stating, among other things: "The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally."

Virginia: Rule 6.1 says that a lawyer "should render at least 2 percent per year of the lawyer's professional time to pro bono publico legal services." The Rule also defines pro bono services and allows a law firm or group of lawyers to satisfy their responsibility under the Rule collectively. Further, "direct financial support of programs that provide direct delivery of legal services to meet the need described" in the Rule "is an alternative method for fulfilling a lawyer's responsibility."

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Proposed Rule 6.2 [n/a]
"Accepting Appointments"

(**Draft #4, 3/31/10**)

Summary: Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule closely tracks the Model Rule. Some changes have been made to conform language to California rule style and statutes and a comment added to address concerns of California public defenders. See Introduction and Explanation of Changes.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(h); Cal. Gov. Code § 27706; Penal Code § 987.2(e).
Case law	

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

☑ Other Primary Factor(s)

State Bar of California Board of Governors Pro Bono Resolution (2002).

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 __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Public Defenders Association; L.A. Public Defender; Riverside Public Defender

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.2* Accepting Appointments

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule closely tracks the Model Rule, except for some changes to conform language to California rule style and statutes, and also to conform comment language to the language of proposed Rule 6.1, which concerns the provision of pro bono services. A cross-reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has also been added. Model Rule 6.2, cmt. [2], has been stricken because it neither explains nor clarifies the application of the Rule. Finally, a new Comment [3] has been added to addressed concerns raised by public defenders. See Explanation of Changes for Comment [3].

Minority. A minority of the Commission declines to recommend the Rule because it would allow a lawyer to reject an appointment to represent a client the lawyer considers "repugnant" or who is unpopular. The minority notes that lawyers are traditionally obliged to represent people they consider "repugnant." A client accused of a crime, a philandering spouse, and a protester arrested in a mass demonstration are all entitled to representation, even if the lawyer considers them "repugnant" or unpopular because of their acts or for other reasons. The unpopularity of a client should not permit a lawyer to refuse appointment by a tribunal. An appointed lawyer does not espouse the client or the client's cause.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.2, with little variation. New York and Oregon have declined to adopt the Rule, and Georgia has reduced the rule to a single sentence.

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* Proposed Rule 6.2, Draft #4 (3/31/10).

ABA Model Rule Rule 6.2 Accepting Appointments	Commission's Proposed Rule[*] Rule 6.2 Accepting Appointments	Explanation of Changes to the ABA Model Rule
A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:	A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:	The introductory clause is identical to its Model Rule counterpart.
(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;	(a) representing the client is likely to result in violation of ~~the~~these Rules~~ of Professional Conduct~~, the State Bar Act, or other law;	Paragraph (a) is identical to Model Rule 6.2(a), except that "these Rules" has been substituted for "the Rules of Professional Conduct" to conform with the Rules style, and "the State Bar Act" has been added consistent with other Rules.
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or	(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or	Paragraph (b) is identical to Model Rule 6.2(b).
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.	(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the ~~client-~~lawyer-client relationship or the lawyer's ability to represent the client.	Paragraph (c) is identical to Model Rule 6.2(c), except that "lawyer-client" has been substituted for "client-lawyer," consistent with California rules and statute style.

[*] Proposed Rule 6.2, Draft 4 (3/31/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 6.2 Accepting Appointments Comment	Commission's Proposed Rule* Rule 6.2 Accepting Appointments Comment	Explanation of Changes to the ABA Model Rule
[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.	[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). ~~All lawyers have~~ Every lawyer, as a matter of professional responsibility~~ to~~, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a ~~court~~tribunal to serve unpopular clients or persons unable to afford legal services.	Comment [1] is based on Model Rule 6.2, cmt. [1], except: (i) a reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has been added; (ii) the second sentence has been modified to incorporate the actual language in proposed Rule 6.1; (iii) the clause "without expectation of compensation other than reimbursement of expenses," also from proposed Rule 6.1, has been added to clarify that a lawyer fulfills his or her responsibility under Rule 6.1 only if the representation is accepted without expectation of compensation; and (iv) "tribunal" has been substituted for "court" to conform to the black letter of the introductory clause.
Appointed Counsel [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may	**Appointed Counsel** ~~[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may~~	Model Rule 6.2, cmt. [2], has been deleted because it does not explain or clarify the application of the Rule.

* Proposed Rule 6.2, Draft 3 (3/31/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 6.2 Accepting Appointments Comment	Commission's Proposed Rule* Rule 6.2 Accepting Appointments Comment	Explanation of Changes to the ABA Model Rule
also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.	~~also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.~~	
[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.	[~~3~~2] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty ~~and~~, confidentiality, and competence, and is subject to the same limitations on the ~~client-~~lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of ~~the~~these Rules or the State Bar Act. See Rule 1.2(d).	Comment [2] is based on Model Rule 6.2, cmt. [3], except that "competence" has been added to emphasize that an appointed lawyer owes the same duty of competence as is owed when retained. In addition, a reference to Rule 1.2(d), which prohibits a lawyer from assisting a client to engage in criminal or fraudulent conduct, has been added to provide further guidance on the limits of a representation.
	[3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].	Comment [3] has no counterpart in Model Rule 6.2. It has been added to address concerns raised by the California Public Defender Association that paragraph (c) might interfere with the ability of institutional public defenders to effectively manage their case loads and supervise the subordinate lawyers in their offices.

Rule 6.2: Accepting Appointments

(Commission's Proposed Rule – CLEAN)

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). Every lawyer, as a matter of professional responsibility, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

[3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

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

Rule 6.2 Accepting Appointments
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
*[2]	California Public Defenders Association ("CPDA") (Sheela, Barton)	M			We agree with all of the remarks of Michael Judge, Los Angeles County Public Defender.	See Response to Michael Judge, below.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	A		 Comment [1]	COPRAC support adoption of this rule. COPRAC also recommends that the last two sentences in Comment [1] of the proposed Rule 6.2 be deleted. A lawyer's acceptance of "unpopular matters" or "indigent or unpopular clients", as stated in the Comment [1], does not equate with compliance with proposed Rule 6.1. Such references imply that a lawyer can meet her pro bono obligations in these ways, which may be misleading.	No response required. The Commission agrees that the last two sentences in the Comment might be potentially misleading, and has revised them to remove the suggestion that accepting a compensated appointment will comply with Rule 6.1.

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

[2] The two comments marked with an asterisk are informal e-mail messages sent to the Commission after the public comment deadline. They were considered at the Commission's March 26-27, 2010 meeting. These comments are not written comments that were submitted in response to the State Bar's official request for public comment. In addition, with regard to the message from L.A. Public Defender Michael Judge, he participated in the Commission's March meeting and provided additional oral comments on proposed changes to the version of Rule 6.2 that was issued for public comment.

Rule 6.2 Accepting Appointments
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
*[3]	Judge, Michael Los Angeles County Public Defender	M			The appointment of institutional Public Defenders in California is controlled by Penal Code Section 987.2(e) which provides: "In a county of the first, second or third class, the court shall first utilize the services of the Public Defender to provide criminal defense services for indigent defendants."	No response required.
					The only exception is if the public defender determines that accepting the case would create an excessive workload, such that the client would not receive adequate assistance of counsel, and therefore declares the Public Defender's Office unavailable; or if the public defender determines that a conflict of interest exists such that undertaking the representation of the client would conflict with pre-existing legal obligations or duties to others, or would create an appearance of a lack of full allegiance to the client (e.g., the Public Defender's family is the victim of the crime.)	No response required.
				6.2(b)	Except for the above, Public Defender offices do not seek to avoid appointments on cases. Since Public Defenders are financed and resourced by the government there is no financial burden, unreasonable or otherwise,	The Commission recognizes, and public defenders conceded, that because the public defenders are financed by the government, paragraph (b) could never be used by a deputy in the office to refuse an

[3] See note 2, above.

Rule 6.2 Accepting Appointments
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					placed on the public defender by virtue of accepting a case, so paragraph (b) is inapplicable.	appointment, so no change has been made.
				6.2(c)	With respect to the issue of the client and/or the cause being repugnant, the public defender represents the "worst of the worst" and others as well. That's the essence of the mission of the public defender. The application paragraph (c) to Public Defender offices would provide all the authority an individual Deputy Public Defender (DPD) who is a cynical shirker would need to exploit the rule and cause unpleasant cases to be shifted to his or her colleagues, without any effective management response realistically possible. In the Los Angeles County Public Defender's Office we ask each person who applies for a position as a DPD whether there is any kind of case or client the candidate would not be able to properly represent. If there is, such a person does not get hired. If one were to be untruthful, or later experience a change of perspective, we possess all full range of options from counseling, a temporary respite, to reduction in rank and pay to only handle minor charges, to discipline for insubordination, administration of a plan for improvement, to termination.	As with proposed Rule 5.1, the Commission recognizes that proposed Rule 6.2(c) might interfere with the operation of institutional public and federal defenders offices in California and, with the assistance of representatives of the public defenders community, the Commission has drafted new Comment [3] to address the concerns expressed. See Explanation of Changes for Comment [3] in the Rule & Comment Comparison Chart.

Rule 6.2 Accepting Appointments [Sorted by Commenter]						TOTAL = 6 Agree = 4 Disagree = 1 Modify = 1 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					I strongly urge the Commission to either exempt Public Defender offices from the operation of the rule entirely or to draft the rule in a manner that it applies only to the Public Defender and not the DPD's, and further exempt Public Defender offices from the application and operation of subsections (b) and (c).	See Responses, above.
3	Office of the Chief Trial Counsel	D			OCTC appreciates the intent of this Rule, but is concerned that this Rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.	The Commission disagrees. Nearly every jurisdiction has adopted some version of Rule 6.2. Among the issues addressed, the Rule offers protection to the criminal defendant to ensure that he or she has competent counsel unhindered by overriding personal prejudice. It further reinforces the goal of Access to Justice. This Rule is an appropriate addition to the Rules of Professional Conduct. Moreover, the comments provide important clarification as to the application of the Rule.
4	Orange County Bar Association	M			It is not clear whether the proposed Rule applies to any attorney who is asked by a judicial officer to take on a particular representation, or only to those lawyers who voluntarily place themselves on panels for such appointments. In the former case, we believe the ability of a lawyer to decline the "appointment" should be even broader than stated in this proposed Rule.	The Commission does not believe it necessary to distinguish between an attorney who voluntarily places himself or herself on a panel for appointment and one who does not do so. If the assignment presents this problem for a panel attorney, the overriding concern should be the attorney's impairment under the circumstances and his or her ability to competently represent the criminal defendant.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
Rule 6.2 Accepting Appointments [Sorted by Commenter]						*TOTAL = 6* Agree = 4 Disagree = 1 Modify = 1 NI = 0
					In addition, it is not clear whether the proposed Rule also would apply to public defenders and, if so, how the Rule would intersect with a criminal defendant's constitutional right to counsel.	See Response to Michael Judge, above.
5	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
6	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 6.2: Accepting Appointments

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no comparable provision in its Rules of Professional Conduct.

Georgia shortens ABA Model Rule 6.2 to a single sentence: ‘‘For good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.‘‘

New York: In the rules effective April 1, 2009, New York omits Rule 6.2.

North Carolina omits Rule 6.2.

Ohio substitutes the word ‘‘court‘‘ for ‘‘tribunal‘‘ in the first line of the rule to reflect the Ohio Supreme Court’s view that ‘‘the inherent authority to make appointments is limited to courts and does not extend to other bodies‘‘ included within the definition of ‘‘tribunal.‘‘ Ohio also omits ABA Model Rule 6.2(c) because ‘‘the substance . . . is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client.”

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Proposed Rule 6.5 [1-650]
"Limited Legal Services Programs"

(Draft #5, 04/01/10)

Summary: Proposed Rule 6.5 is based upon recently approved rule 1-650, which in turn was based on Model Rule 6.5, and facilitates lawyer's participation in limited legal services programs such as call-in hotlines. Most of the changes from rule 1-650 are non-substantive, and have been made to conform the language of the proposed Rule to that of the other proposed rules, e.g., changing "member" to "lawyer" and substituting proposed new rule numbers for existing rule numbers. See Introduction.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rules	RPC 1-650
Statute	
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __7___
Opposed Rule as Recommended for Adoption __0__
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☐ Yes ☑ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Commission on Access to Justice.

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.5* Limited Legal Services Programs

April 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.5 is based upon recently approved rule 1-650, which in turn was based on Model Rule 6.5. Most of the changes from rule 1-650 are non-substantive, and have been made to conform the language of the proposed Rule to that of the other proposed rules, e.g., changing "member" to "lawyer" and substituting proposed new rule numbers for existing rule numbers. Most of the rest of the changes are for purposes of clarifying the language of the proposed Rule. In addition, the Commission recommends two other language changes intended to conform the Rule to well-settled California law and to provide guidance to lawyers on protecting confidential information they might have acquired under the auspices of a program governed under the Rule. See Explanation of Changes for paragraph (a) and Comment [4], respectively.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.5, with little variation.

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* Proposed Rule 6.5, Draft 5 (04/15/10).

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Commission's Proposed Rule[*] Rule 6.5 Limited Legal Services Programs	Explanation of Changes to the ABA Model Rule
(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:	(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization ~~or court~~, provides short-term limited legal services to a client without reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:	The title of the Rule has been shortened because, unlike the Model Rule, proposed Rule 6.5 is not limited to programs sponsored by courts and nonprofit organizations. The changes to paragraph (a) were first made in rule 1-650 to expand the list of organizations covered by the Rule. The word "reasonable" has been added as a modifier of "expectation" to comport with current California law on the formation of a lawyer-client relationship. See, e.g., *Zenith Insurance v. Cozen O'Connor* (2009)148 Cal. App.4th 998, 1010; Cal. State Bar Formal Ethics Opn. 2003-161.
(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and	(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and	Subparagraph (a)(1) is identical to Model Rule 6.5(a)(1).
(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	(2) ~~is subject to Rule 1.10~~has an imputed conflict of interest only if the lawyer knows that another lawyer associated with the lawyer in a law firm is ~~disqualified~~ prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.	Subparagraph (a)(2) is based on Model Rule 6.5(a)(2). The phrase "has an imputed conflict of interest" has been substituted for a reference to Rule 1.10 as that rule is not recommended for adoption. The phrase "prohibited from representation" has been carried forward from current rule 1-650(A)(2); it is a more accurate statement than "disqualified" in the disciplinary rule context.

[*] Proposed Rule 6.5, Draft 5 (04/01/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Commission's Proposed Rule* Rule 6.5 Limited Legal Services Programs	Explanation of Changes to the ABA Model Rule
(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	(b) Except as provided in paragraph (a)(2), ~~Rule 1.10 is inapplicable to~~ a ~~representation governed by this Rule~~conflict of interest that arises from a lawyer's participation in a program under paragraph (a) will not be imputed to the lawyer's law firm.	Paragraph (b) is based on Model Rule 6.5(b) but carries forward from current rule 1-650(B) the language originally adopted by the Board and approved by the Supreme Court.
	(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.	Paragraph (c) has no counterpart in Model Rule 6.5. The California Supreme Court added this paragraph to proposed rule 1-650, which the Board of Governors had adopted and sent to the Supreme Court. Paragraph (c), which is taken from the last sentence of Model Rule 6.5, cmt. [4], is identical to current rule 1-650(C).

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs** **Comment**	**Commission's Proposed Rule**[*] **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.	[1] ~~Legal services organizations~~Courts, ~~courts~~government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons ~~to address~~in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a ~~client-~~lawyer-client relationship is established, ~~but~~ there usually is no expectation that the lawyer's representation of the client will continue beyond ~~the~~that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically ~~screen~~check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7~~, 1.9~~ and ~~1.10~~1.9.	Comment [1] is based on Model Rule 6.5, cmt. [1]. Changes were made in the first sentence to conform to the changes in paragraph (a). See Explanation of Changes for paragraph (a) and carry forward revisions made by the Supreme Court in approving rule 1-650. This is the language approved by the Supreme Court in rule 1-650. There was some controversy concerning the issue of the formation of an attorney client relationship when lawyers assist others who have legal problems; it appears that the Court inserted "whenever" to avoid specifying that such a relationship is always formed. The word "check" has been substituted for "screen" to avoid confusion that an ethical screen is required when a lawyer participates in a program governed by this Rule. The reference to Rule 1.10 has been deleted as that rule is not recommended for adoption.

[*] Proposed Rule 4.1, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs** **Comment**	**Commission's Proposed Rule*** **Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs** **Comment**	**Explanation of Changes to the ABA Model Rule**
[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.	[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, ~~the~~these Rules ~~of Professional Conduct~~and the State Bar Act, including ~~Rules~~the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9~~(c)~~, are applicable to the limited representation.	Comment [2] is based on Model Rule 6.5, cmt. [2]. References have been added to the State Bar Act, which also regulates lawyer conduct in California, and Bus. & Prof. Code § 6068(e)(1), which in California also governs a lawyer's duty of confidentiality. Finally, because the duty of confidentiality is also relevant in proposed Rule 1.9(a) and (b), the limitation of Rule 1.9's applicability to 1.9(c) has been stricken.
[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.	[3] ~~Because a~~A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 ~~or~~and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, ~~and with Rule 1.10~~paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows that another lawyer in the lawyer's law firm ~~is~~would be disqualified by Rules 1.7 or 1.9(a) in the matter.	Comment [3] is based on Model Rule 6.5, cmt. [3]. Changes have been made to specifically clarify what is required by each subparagraph of paragraph (a) and to carry forward revisions the California Supreme Court made to rule 1-650.

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule* Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.	[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm, paragraph (b) provides that ~~Rule 1.10 is~~imputed conflicts of interest are inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is ~~disqualified~~prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), ~~however~~moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.	Comment [4] is based on Model Rule 6.5, cmt. [4]. Changes to the Comment carry forward changes the Supreme Court approved in rule 1-650. The last sentence of Comment [4] has been added at the suggestion of COPRAC to clarify the actions a law firm should take once a conflict has been identified.

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule* Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.	[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7~~,~~ and 1.9(a) ~~and 1.10~~ become applicable.	Comment [5] is nearly identical to Model Rule 6.5, cmt. [5]. The reference to Rule 1.10 has been deleted as that rule is not recommended for adoption.

Rule 6.5: Limited Legal Services Programs

(Commission's Proposed Rule – Clean Version)

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the lawyer knows that another lawyer associated with the lawyer in a law firm is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), a conflict of interest that arises from a lawyer's participation in a program under paragraph (a) will not be imputed to the lawyer's law firm.

(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

COMMENT

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there usually is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7 and 1.9.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows that another lawyer in the lawyer's law firm would be disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm, paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7 and 1.9(a) become applicable.

Rule 6.5 Limited Legal Services Programs
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response needed.
2	COPRAC	A			We support adoption of the proposed rule and are pleased that the last sentence of Comment 4 has been added in accordance with our suggestion.	No response needed.
3	McIntyre, Sandra K.	A			Agrees, with no comment.	No response needed.
4	Orange County Bar Association	A			We support the adoption of proposed Rule 6.5 and agree with the recommendations of the Commission.	No response needed.
5	San Diego County Bar Association Legal Ethics Committee	A			We approve the rule in its entirety.	No response needed.
6	Santa Clara County Bar Association	A			Agrees, with no comment.	No response needed.

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

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Program

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alabama: Rule 6.5 is based on Model Rule 6.5, but in the rules effective December 10, 2008, Alabama adopted a Rule 6.6, which has no Model Rule equivalent. Rule 6.6 states that any inactive member of the Alabama State Bar may render pro bono services by paying special membership dues and becoming a special member of the Alabama State Bar for the year in which the pro bono services are rendered.

California Effective August 28, 2009, California has adopted a new Rule 1-650 that is substantially similar to Model Rule 6.5, but Rule 1-650(A) also refers to programs sponsored by a ''government agency, bar association, [or] law school,'' and California adds a new Rule 1-650(C) that states as follows: ''The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.''

Connecticut adds the following paragraph that is identical to Comment 2 to ABA Rule 6.5:

> (b) A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2 (c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

New Hampshire: Rule 6.5(a) applies only to a ''one time consultation with a client'' instead of the ABA's version ''short-term limited legal services to a client.'' Also, echoing ABA Comment 2 to Rule 6.5, New Hampshire's Rule 6.5(c) provides that ''Rules 1.6 and 1.9(c) are applicable to a representation governed by this Rule.'' Finally, a special New Hampshire Comment states as follows:

> Should a lawyer participating in a one-time consultation under this Rule later discover that the lawyer's firm was representing or later undertook the representation of an adverse client, the prior participation of the attorney will not preclude the lawyer's firm from continuing or undertaking representation of such adverse client. But the participating lawyer will be disqualified and must be screened from any involvement with the firm's adverse client. See ABA Comment [4].

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New York: In the rules effective April 1, 2009, Rule 6.5(a) covers programs sponsored by government agencies and bar associations. The Rule also specifies that a conflict arises only if a lawyer ‘‘has actual knowledge [of the conflict] at the time of commencement of representation.’’ New York also adds Rule 6.5(c) -(e), which provides as follows:

> (c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.
>
> (d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.
>
> (e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Wisconsin: Rule 6.5(a) also applies to a program sponsored by ‘‘a bar association’’ or ‘‘an accredited law school.’’

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Model Rule 7.6 [1-400]
"Political Contributions to Obtain Legal Engagements or Appointments by Judges"

RECOMMENDATION: NO ADOPTION

(Draft # -- N/A)

Summary: Model Rule 7.6 is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission does not recommend its adoption for the reasons stated in the Introduction.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rules	
Statute	Bus. & Prof. Code §6106
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 for Adoption __8___
Opposed Rule for Adoption __0___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority Position Included. (See Introduction): ☐ Yes ☑ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

April 2010
(No rule is recommended for adoption)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. **The Commission, however, declines to recommend any rule analogous to Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge.**

3. The Commission recommends that Model Rule 7.6 not be adopted because its substance is addressed by Business & Professions Code § 6106, a catchall for corruption, and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer who violates these statutory prohibitions would be in violation of other rules the Commission has proposed, such as Rules 3.5 and 8.4. In addition the Commission is concerned with uneven application of the Rule. Further, the Rule would be ineffective. The Rule does not reach the improper conduct itself. It does not prohibit a lawyer from contributing money to a political campaign to get an appointment or engagement, but rather prohibits the lawyer from accepting the appointment or engagement.

4. Variation in Other Jurisdictions. Model Rule 7.6 is the least adopted of the Model Rules. As of April 22, 2010, only seven jurisdictions have adopted the Rule (Colorado, Delaware, Idaho, Iowa, Maine, Missouri, Washington).

ABA Model Rule **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges**	**Commission's Proposed Rule[*]** **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges**	**Explanation of Changes to the ABA Model Rule**
A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.	~~A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.

[*] No California version of Model Rule 7.6 is recommended.

ABA Model Rule **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges** **Comment**	**Commission's Proposed Rule** **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.	~~[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.
[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.	~~[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.

ABA Model Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Commission's Proposed Rule Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges Comment	Explanation of Changes to the ABA Model Rule
[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.	~~[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.
[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.	~~[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.
[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the	~~[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.

ABA Model Rule **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges** **Comment**	**Commission's Proposed Rule** **Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges** **Comment**	**Explanation of Changes to the ABA Model Rule**
circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.	~~circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.~~	
[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.	~~[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.~~	The Commission is recommending that no version of Model Rule 7.6 be adopted. See introduction.

Rule 7.6 Contributions to Obtain Government Service
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	McIntyre, Sandra K.	A			No comment. (Agrees with the recommendation to not adopt the rule).	No response needed.
2	Santa Clara County Bar Association	A			We support the Rule Revision Commission recommendation not to adopt this proposed rule.	No response needed.

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

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, California, the District of Columbia, Illinois, Michigan, New Jersey, Ohio, Pennsylvania, Texas, and ***Virginia*** (among others) have no rule equivalent to ABA Model Rule 7.6.

New York: In the Rules effective April 1, 2009, New York omits Rule 7.6. However, Comment 5 to New York Rule 7.2 provides as follows:

> Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.
>
> [J]ust as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being

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considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

Comment 6 complements Comment 5 by setting forth seven factors to consider in determining ‘‘whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement. . . .‘‘ For example, the factors include ‘‘(a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a ‘Request for Proposal’ process‘‘ and ‘‘(c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate.‘‘ (The Comments have been adopted only by the New York State Bar Association, not by the courts, but Comments 5 and 6 have special status. In an extraordinary press release in March of 2000 explaining why the courts were rejecting a proposed pay-to-play Disciplinary Rule, the courts expressly endorsed the language of old Ethical Considerations 2-37 and 2-38, and these ECs have been incorporated verbatim into Comments 5 and 6 to Rule 7.2.)

Ohio omits ABA Model Rule 7.6, explaining as follows: ‘‘The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law . . . and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.”

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Proposed Rule 8.2 [1-700]
"Judicial and Legal Officials"

(**Draft #4.1, 04/03/10**)

Summary: Proposed Rule which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 ("Member as Candidate for Judicial Office"). See Introduction.

Comparison with ABA Counterpart

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

Primary Factors Considered

☑ Existing California Law

Rule	RPC 1-700.
Statute	Bus. & Prof. Code § 6068(b).
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 __9___
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. (See Introduction): ☐ 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 8.2[*] Judicial and Legal Officials

April 2010
(Draft following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.2, which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 ("Member as Candidate for Judicial Office"). Paragraph (a) incorporates the concept of respect for the judiciary more generally stated in Bus. & Prof. Code § 6068(b), but also adds an obligation not to make false statements of fact concerning candidates for judicial office. Paragraphs (b) through (d) provide a means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election to judicial office.

The Comment to the Rule largely tracks the comment to Model Rule 8.2, although one Model Rule comment has been deleted because it neither explains nor clarifies the application of the Rule.

Previously, the Board of Governors approved circulation of proposed Rule 2.4.2, which is based on current rule 1-700, for public comment. Paragraph (b) and (d) are carried forward from that Rule, which in turn carried forward the provisions of current rule 1-700. The concept of paragraph (c), which concerns lawyers seeking appointment to judicial office, is also carried forward from proposed Rule 2.4.2, but has been separated out as a separate paragraph for clarity.

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[*] Proposed Rule 8.2, Draft 4.1 (4/3/2010).

ABA Model Rule **Rule 8.2 Judicial and Legal Officials**	**Commission's Proposed Rule*** **Rule 8.2 Judicial and Legal Officials**	**Explanation of Changes to the ABA Model Rule**
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.	(a) A lawyer shall not make a statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.	Paragraph (a) is identical to Model Rule 8.2(a), except that the phrase "of fact" has been added to address Constitutional concerns about the ability of a lawyer to express an opinion.
(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.	(b) A lawyer who is a candidate for judicial office in California shall comply with ~~the applicable provisions~~Canon 5 of the California Code of Judicial ~~Conduct~~Ethics.	Paragraph (b) substantially follows Model Rule 8.2(b). It has been modified only to reference the applicable California Code of Judicial Ethics when a lawyer seeks office in California.
	(c) A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to	There is no counterpart in the Model Rules to paragraph (c). It is included to provide a disciplinary path for lawyers who violate their duty as applicants for appointment to judicial office by requiring that those lawyers comply with the substantive provisions of Canon 5B, as currently provided in the California Code of Judicial Ethics. This paragraph also sets forth when a lawyer is deemed to have commenced or terminated his or her status as an applicant for appointment.

* Proposed Rule 8.2, Draft 4.1 (4/3/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 8.2 Judicial and Legal Officials**	**Commission's Proposed Rule*** **Rule 8.2 Judicial and Legal Officials**	**Explanation of Changes to the ABA Model Rule**
	comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.	
	(d) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.	There is no counterpart in the Model Rules to paragraph (d). It references the terminology used in the Code of Judicial Ethics, and expands on the Code section's explanation as to when a candidacy for election or retention to judicial office ends.

ABA Model Rule Rule 8.2 Judicial and Legal Officials Comment	Commission's Proposed Rule Rule 8.2 Judicial and Legal Officials Comment	Explanation of Changes to the ABA Model Rule
[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.	[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.	Comment [1] is identical to Model Rule 8.2, cmt. [1].
[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.	[2] ~~When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.~~ Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.	Model Rule 8.2, cmt. [2] has been deleted because it neither explains nor clarifies the application of the Rule. In its place, the Commission recommends substituting a new Comment [2], which simply carries forward Discussion paragraph 1 of current rule 1-700.
[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.	[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code section 6068(b).	The first sentence of Comment [3] is identical to Model Rule 8.2, cmt. [3]. The second sentence is a verbatim statement of Bus. & Prof. Code § 6068(b). The Commission recommends its inclusion to provide notice to lawyers of this statutory obligation.

Rule 8.2: Judicial and Legal Officials

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not make a statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.

(c) A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

(d) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

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

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code section 6068(b).

TOTAL = 7	Agree = 5 Disagree = 0 Modify = 2 NI = 0

Rule 8.2 Judicial and Legal Officials
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	M			COPRAC generally supports the adoption of proposed Rule 8.2 subject to the following comment.	No response required.
				(c)	Canon 5B employs a definition of "candidate" that only applies to persons seeking judicial office by election and not to persons seeking judicial office by appointment. Therefore, the reference in 8.2(c) to Canon 5B is ambiguous. We propose replacing the first sentence of 8.2(c) with the actual language from Canon 5B so that it reads as follows: "A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer."	The Commission agrees with the comment and has made the suggested change.

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

TOTAL = 7	Agree = 5 Disagree = 0 Modify = 2 NI = 0

Rule 8.2 Judicial and Legal Officials
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	McIntyre, Sandra K.	A			No comment.	No response required.
4	Office of the Chief Trial Counsel	M			OCTC agrees with requiring the lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics.	No response required.
				Cmts. [1], [2]	OCTC, however, would eliminate Comments [1] and [2] as unnecessary.	The Commission disagrees as to Cmt [1]. The comment is taken verbatim from the Model Rule and explains the policy underlying the Rule, thereby providing lawyers with additional information by which they can conform their conduct to the Rule's standards. The Commission agrees that Cmt. [2] should be deleted because it neither explains nor clarifies the application of the Rule.
				Cmt. [3]	Comment [3] is confusing. It is misleading because nothing in B&P Code section 6068(b) requires lawyers to defend judges, just not disrespect them. If the intent of this Comment is to remind lawyers of the duty not to unjustly criticize judges, OCTC supports that but the Comment should just state that. If the intent of the Comment is to encourage lawyers to defend judges and the court, then the reference to B&P Code section 6068(b) should be stricken.	The Commission believes the commenter has misread the comment. There is no requirement to defend judges; however, lawyers are "encouraged" to do so as is traditional for the legal profession. Nevertheless, the Commission has substituted added a second sentence that restates section 6068(b), and provides a cross-reference to put lawyers on notice of this statutory duty.

TOTAL = 7	Agree = 5 Disagree = 0 Modify = 2 NI = 0

Rule 8.2 Judicial and Legal Officials
[Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [4]	Comment [4] states that nothing in this Rule shall be deemed to limit the applicability of any other rule or law. It should not be a Comment, but part of the Rule.	Provisions such as Comment [4] (now Comment [2]) have regularly been placed in the Discussion to current Rules of Professional Conduct. This provision, in fact, carries forward Discussion ¶.1 to current rule 1-700. The Commission does not understand why the Comment must be part of the Rule to have the desired effect of putting lawyers on notice that other rules or laws might be applicable.
5	Orange County Bar Association	A			We support the adoption of proposed Rule 8.2 and agree with the recommendations of the Commission.	No response required.
6	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
7	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 8.2: Judicial and Legal Officials

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: The California Rules of Professional Conduct have no comparable provision, but California Business & Professions Code §6068(b) provides that it is the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers."

District of Columbia omits ABA Model Rule 8.2.

Florida: Rule 8.2(a) also applies to statements about a mediator, arbitrator, juror or member of the venire.

Georgia omits ABA Model Rule 8.2(a) but adopts Rule 8.2(b) verbatim.

Maryland: Rule 8.2(b)(2) provides that a lawyer who is a candidate for judicial office "with respect to a case, controversy or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office."

New Jersey: Rule 8.2(b) provides that a lawyer who "has been confirmed for judicial office" shall comply with the applicable provisions of the Code of Judicial Conduct. The rule does not apply to lawyers who are only candidates for judicial office.

New York: DR 8-102 provides as follows:

> A. A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
>
> B. A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

DR 8-103(A) provides that a lawyer who is a candidate for judicial office shall comply with §100.5 of the Chief Administrator's Rules Governing Judicial Conduct and Canon 5 of the New York Code of Judicial Conduct.

Ohio: Rule 8.2(a) omits the ABA reference to an "adjudicatory officer or public legal officer."

Pennsylvania: Rule 8.2 replaces all of ABA Model Rule 8.2(a) with language taken verbatim from DR 8-102(A) and (B) and 8-103(A) of the ABA Model Code of Professional Responsibility (see New York entry above).

Virginia: Rule 8.2 provides, in its entirety as follows: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."