

ATTACHMENT 1

Dashboard Cover Sheet, Introduction, Model Rule Comparison Table, Comparison to Public Comment Draft, Comparison to Current California Rule, Clean Rule Draft, Public Comment Synopsis Table and State Variation Excerpts

Proposed Rule 1.0 [RPC 1-100]

“Purpose and Scope of the Rules”

(XDraft #9, 6/28/10)

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

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

Primary Factors Considered

☒ Existing California Law

Rules

RPC 1-100

Statute

Case law

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

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

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

State Bar of California Committee on Professional Liability Insurance

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

July 2010

(Draft rule following consideration of final round of public comment)

INTRODUCTION:

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

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

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

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

* Proposed Rule 1.0, XDraft 9 (6/28/10).

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

^{*} Proposed Rule 1.0, XDraft 9 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

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

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

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

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

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

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

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General Discussion	<u>Commission's Proposed Rule</u> Rule 1.0 <u>Purpose and Scope of the</u> Rules of Professional Conduct, ~~in General~~ Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.	~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~	The definitions in current California Rule 1-100(B) have been moved to a separate terminology rule (proposed Rule 1.0.1) to conform to Model Rule 1.0 on "Terminology." Accordingly, the Discussion paragraph concerning the definition of "law firm" has been stricken.

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

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

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

(b) Scope of the Rules:

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

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

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

COMMENT

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

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

Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].³ Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. ⁴See, *Stanley v. Richmond*, *supra*, 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].⁵ A violation of the rule may have other non-disciplinary consequences. ⁶See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).⁷

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

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

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. ⁸*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.⁹

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct
(Commission's Proposed Rule – Clean Version)**

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

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

(b) Scope of the Rules:

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

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

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

COMMENT

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

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

Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. See, *Stanley v. Richmond, supra*, 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of the rule may have other non-disciplinary consequences. See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).

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

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

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

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.0 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel	M	Yes		Proposed Rule 1.0 sets forth four purposes of the rules. However, it appears that there is one more purpose to the rules not explicitly mentioned in Proposed Rule 1.0: maintaining high professional standards. OCTC believes that maintaining high professional standards should be stated as an explicit purpose of the rules. The Supreme Court has held that the primary purpose of imposing discipline includes maintaining the highest possible professional standards for attorneys. (See e.g. <i>Berry v. State Bar</i>; <i>Jackson v. State Bar</i>.) The Supreme Court has also stated that “[t]he rules are designed to establish ethical standards for the bar and to prohibit unprofessional conduct.” (<i>Zitny v. State Bar</i>.)	The Commission disagrees that establishing professional standards should be listed as one of the purposes of the Rules. The Rules are normative standards; the concept of professional standards resides in the four purposes that are listed in the Rule.
3	Paulson, Bradley	D	No		Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner’s Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800.	The Commission has considered the commenter’s submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission’s charge.

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

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.0(a)(1) & (2)	Soliciting Attorney Groups, working in this area of law, are not disclosing issues that will affect the public, but rather adversely affect the client. Note that the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.	
				1.0(a)(4)	Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.	
				1.0(b)(2)	See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Senate Bill 800 gives the builder the right to repair, but the	

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity. The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups.	
4	Rozner, Maurice	D	No		Why would a sole practitioner bother? The rules are made for and by the large firms. The sole practitioner is ignored and at his detriment.	To the extent that the commenter implies that the Commission's statement of the purpose and scope of the rules includes a large firm bias, the Commission disagrees. The Commission's proposed rule states expressly that the rules "are binding upon all members of the State Bar and all other lawyers practicing law in this state." Because of this, the Commission has been mindful of - and has received public comment reflecting - the wide variety of situations in which rules of professional conduct must be appropriate. These include application to private and to governmental lawyers, to lawyers who work in for profit and in not for profit organizations, and to lawyers who work in large and in small law firms and as sole practitioners. The Commission is unable to see any way in which the proposed rules ignore the circumstances of sole practitioners. In addition, when the issue of bias in the discipline

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						system was last studied in response to a legislative mandate, the study concluded that although there may be evidence of more frequent investigations of small-firm lawyers, the frequency of those investigations were commensurate with the larger number of complaints lodged against them compared to large-firm attorneys, and therefore there was no institutional bias. (See State Bar Senate Bill No. 143 Report posted at: http://www.calbar.ca.gov/calbar/pdfs/reports/2001_SB143-Report.pdf)
5	San Diego County Bar Association	M	Yes		Delete Rule 1.0(b) Add new subsections (a)(5) and (a)(6) as follows: “(5) To provide guidance to lawyers; and (6) To provide a basis for the discipline of lawyers “	Commission disagreed and did not make the requested revisions. First, client protection is a core principle in California. Second, providing guidance to lawyers is a means to achieve the four listed purposes. Third, paragraph (b)(2) provides that a willful violation of the Rules is a basis for discipline which accurately states current law.
6	Sillas, Manuel	M	No		By way of example, Commenter explains an unpleasant encounter with three attorneys against whom he is planning to file criminal charges. Commenter may be trying to convey that the scope and purpose of the Rules are not achieving the desired result.	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

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

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

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

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

“Adjudicatory Proceeding” denotes the consideration of a matter by a Tribunal. “Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

“Firm” or “Law firm” denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

“Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack

of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

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

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

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

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

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

Proposed Rule 1.0.1 [1-100]
“Terminology”
(XDraft #7, 06/27/10)

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 10

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 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,” “informed consent,” “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

July 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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”.

* Proposed Rule 1.0.1, XDraft #7 (6/27/10).

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.

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>means</u> that the person involved actually ~~supposed~~<u>supposes</u> 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, XDraft 7 (06/27/10).

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~ a professional <u>law</u> corporation; ~~a~~ a sole proprietorship or ~~other an~~ association ~~authorized to engaged in the~~ practice <u>of</u> law; or lawyers employed in a legal services organization or <u>in</u> the legal department <u>division or office</u> of a corporation, <u>of a government organization</u>, or ~~other of~~ <u>another</u> 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 <i>People ex rel. Deumkejian v. Brown</i> (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 explained (i) the relevant~~ <u>circumstances and (ii) the actual and</u>	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 "relevant circumstances" (following public comment from several commenters) and "actual and reasonably foreseeable" conforms the definition to California case law. See, e.g., <i>Sharp v. Next Entertainment, Inc.</i> (2008) 163 Cal. App. 4th 410, 429-31.

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
	reasonably foreseeable material risks of the proposed conduct and, where appropriate, the reasonably available alternatives to the proposed ~~course of~~ conduct.	There 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-2) 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).

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>means</u> 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).
	<u>(g-1) "Person" means a natural person or an organization.</u>	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~~<u>means</u> 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~~<u>means</u> 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).

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>means</u> 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~~<u>means</u> the isolation of a lawyer from any participation in a matter ~~through, including~~ the timely imposition of procedures within a <u>law</u> firm that are ~~reasonably~~ adequate under the circumstances <u>(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.</u>	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~~<u>means</u> 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~~<u>means: (i)</u> a court, an arbitrator ~~in a binding arbitration proceeding, or a legislative body, an~~ administrative ~~agency or other body~~<u>law judge</u> acting in an adjudicative capacity. ~~A legislative body, administrative agency~~ <u>and authorized to make a decision that</u>	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

<u>ABA Model Rule</u> Rule 1.0 Terminology	<u>Commission's Proposed Rule*</u> Rule 1.0.1 Terminology	<u>Explanation of Changes to the ABA Model Rule</u>
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.	<u>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.</u>	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.~~ <u>"Writing" or "written" has the meaning stated in Evidence Code section 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.</u>	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. The definition of "signed," added following public comment, is necessary to give effect to several rules that refer to a signed writing.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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	<u>Firm or Law Firm</u> ~~[2]~~ Whether two or more lawyers constitute a <u>law</u> 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 <u>law</u> firm. However, if they present themselves to the public in a way that suggests that they are a <u>law</u> firm or conduct themselves as a <u>law</u> firm, they ~~should~~<u>may</u> be regarded as a <u>law</u> firm for purposes of ~~the~~<u>these</u> 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.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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~~<u>rule</u> 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.
	<u>[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</u>	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.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>continuous,</u> 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., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (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., <i>Chambers v. Kay</i> (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].

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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	<i>Informed Consent</i> <u><i>and Informed Written Consent</i></u> [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. <u>Other rules require a lawyer to obtain informed written consent. Compare,</u>	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

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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	for example, Rules 1.2(c), and 1.6(a) and (informed consent) with Rules 1.7, 1.8.1 and 1.9 (informed written consent). 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.	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.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the consent should be assumed to have given informed 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 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~~ <u>However, except where the standard is one of informed written consent, consent</u> 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) and 1.9(a). For a~~ <u>for the</u> 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~~ <u>prohibited</u> 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.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~parties~~<u>client, former client, or prospective client</u> that confidential information known by the personally ~~disqualified~~<u>prohibited</u> lawyer ~~remains protected~~<u>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</u>. The personally ~~disqualified~~<u>prohibited</u> lawyer ~~should~~<u>shall</u> acknowledge the obligation not to communicate with any of the other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm with respect to the matter. Similarly, other lawyers <u>and non-lawyer personnel</u> in the <u>law</u> firm who are working on the matter ~~should~~<u>promptly shall</u> be informed that the screening is in place and that they may not communicate with the personally ~~disqualified~~<u>prohibited</u> 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~~<u>law firm personnel</u> of the presence of the screening, it may be appropriate for the <u>law</u> firm to undertake such procedures as a written undertaking by the ~~screened~~<u>personally prohibited</u> lawyer to avoid any communication with other <u>law</u> firm personnel and any contact with any <u>law</u> firm files or other materials relating to the matter, written notice and instructions to all other <u>law</u> firm personnel forbidding any communication with the ~~screened~~<u>personally prohibited</u> lawyer relating to the matter, denial of access by ~~the screened~~<u>that</u> 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.

<u>ABA Model Rule</u> Rule 1.0 Terminology Comment	<u>Commission's Proposed Rule</u> Rule 1.0.1 Terminology Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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].
	<u>Tribunal</u> <u>[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.</u>	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.
	<u>Writing and Written</u> <u>[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.</u>	See the Explanation for paragraph (n), above.

Rule 1.0.1: Terminology

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (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~~explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable material risks of ~~the proposed conduct~~ and where appropriate, the 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. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

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 Compare, e.g. for example, Rules 1.2\(c\), and 1.6\(a\), and \(informed consent\) with Rules 1.7, 1.8.1 and 1.9 \(informed written consent\).](#) 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.

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 and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable material risks of the proposed conduct and, where appropriate, the reasonably available alternatives to the proposed 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. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

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. Compare, for example, Rules 1.2(c) and 1.6(a) (informed consent) with Rules 1.7, 1.8.1 and 1.9 (informed written consent). 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.

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 5
Agree = 2
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Balin, William and Andrew Dilworth	M	No	(m)	There are important administrative decisions that would be outside the scope of the definition, citing <i>Clare v. State Board of Accountancy</i> , 10 Cal. App.4th 294 (1992) [upholding suspension of accountant's license] and arguing that a lawyer should not be permitted to lie in such a proceeding. The Model Rule definition applies to all proceedings that are adjudicative of a party's legal rights or interests regardless of the specific body that is entrusted with carrying out the adjudicative proceeding. The Commission's materials do not articulate any reason why an adjudicative proceeding that is not carried out by a court, arbitrator, administrative law judge or special master, but that nonetheless adjudicates a party's legal rights or interests, should not be included within the definition of "tribunal." We understand certain concerns have been raised about defining the term "tribunal" in a manner that would apply to adjudicative bodies before which both lawyers and non-lawyers appear, thus ostensibly placing lawyers at a disadvantage, since the non-lawyers would not be subject to the same limitations. This does not persuade us that the	See the Commission's Response to the SDCBA comment, and in particular the reference to California's unique disciplinary standard under B&P Code § 6106, which will have the effect of permitting discipline when a lawyer lies to an administrative body without the risks created by an over-inclusive definition of "tribunal". In addition, the Commission notes that the suspension in the <i>Clare</i> case was based on finding by an administrative law judge, which explicitly is within the proposed definition of "tribunal".

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.0.1 Terminology
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					ABA definition should be so limited. First, the fundamental principles at issue here should not be displaced simply by the fact that a lawyer's opponent may not be limited by the ethical constraints that bind attorneys. Simply because non-lawyers may feel free to act unscrupulously does not mean that lawyers should also be free to do so. Second, if the concern is that lawyers are therefore at a disadvantage when opposing lay people representing themselves, then we should not promulgate any rule at all. regarding candor to a tribunal. Third, we are not convinced that a non-lawyer would get away with dishonesty before a tribunal where the lawyer opposing that person must conform to the rule. The lawyer can still question and challenge the non-lawyer's conduct and attempt to discredit it. The bottom line is that lawyers are held to higher standards than other individuals. These standards apply even to acts that do not strictly constitute the practice of law. (See, e.g., <i>Crawford v. State Bar</i> (1960) 54 Ca1.2d 659) Being a lawyer carries both special privileges and special responsibilities. That an adversary may not be held to the same high standard does not mean that our ethical obligations must therefore be diminished. An attorney must be truthful even when his or her opponent is not.	

Rule 1.0.1 Terminology [Sorted by Commenter]							TOTAL = 5 Agree = 2 Disagree = 1 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
2	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (law professors group)	m	Yes	(e)	The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1 (e), in the redlined language below: The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1 (e), in the redlined language below: 'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated <u>and explained adequate information and explanation about the relevant circumstances and</u> the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct The Commenter recommends the use of the Model Rule's expansive definition of "tribunal" so that a lawyer's duties to a court also apply in other adjudicative situations.	The Commission agrees and has revised paragraph (e) along the lines recommended. See response to SDCBA and to Balin and Dilworth.	

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 1 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Los Angeles County Public Defender	A	Yes	1.0.1(n)	Comment [10] of Proposed Rule 1.5 refers to Rule 1.0.1(n) for a definition of “signed,” however, “signed” is not defined in 1.0.1(n) or Evidence Code 250.	The Commission agrees and has added a definition of “signed” to Rule 1.0.1(n).
4	Office of Chief Trial Counsel (“OCTC”)	D	Yes	1.0.1(e)(2)	OCTC is concerned with the definition in Proposed Rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed Rule 1.0.1(e)(2) states that information protected by B&P Code section 6068(e) is defined in Rule 1.6, Comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the B&P Code. That would be interfering with the Legislature’s authority to impose some regulation on the legal profession. (See <i>Obrien v. Jones</i> .) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see Proposed Rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.	The Commission disagrees and has not made the requested change. The Commission believes that terms can be defined in Comments, as they sometimes are in the current California rules and in the Model Rules, and that doing so has had and will have no impact on the ability to impose discipline. Placing a definition in a Comment merely explains a term in the related Rule, as is true of other Comment explanations. The absence of a definition effectively tells the reader to look in a dictionary, and do so also does not affect the ability to impose discipline. The Commission also does not believe that it has defined a statute as opposed to merely explaining it.
				1.0.1(m)	OCTC remains concerned that Proposed Rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative	See the Commission responses to SDCBA and to Balin and Dilworth

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 1 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [1], [3], [4], [5], [11], [12] Comments [6] – [10]	bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes the legislative bodies <i>acting in an adjudicative capacity</i> should be included in the definition of tribunal. Comments [1], [3], [4], [5], [11] and [12] are more appropriate for treatises, law review articles, and ethics opinions. Comment [6] – [10] belong in the rules involving conflicts, not this rule.	The Commission has reexamined each of these Comments and believes that each one serves a useful purpose and should be retained.
5	San Diego County Bar Association Legal Ethics Committee	A	Yes		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 that a lawyer’s duty of candor would extend beyond adjudicative bodies.	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 duty of candor were extended to legislative and administrative bodies, 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 <i>ex parte</i> requirements of Rule 3.3(d). Moreover, California uniquely 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

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 1 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, <i>et seq.</i> The Commission believes it is important to retain the distinction between the special responsibilities 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.

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

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

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

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

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

“Adjudicatory Proceeding” denotes the consideration of a matter by a Tribunal. “Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

“Firm” or “Law firm” denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

“Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack

of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

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

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

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

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

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

Proposed Rule 1.1 [RPC 3-110] Competence

(XDraft 8, 6/28/10)

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

Comparison with ABA Counterpart

Rule

Comment

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

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- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-110

Statute

Case law

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

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 4
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

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

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.1* Competence

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

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

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

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

* Proposed Rule 1.1, XDraft 8 (6/28/10).

INTRODUCTION (Continued):

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

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

* Proposed Rule 1.1, XDraft 8 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

* Redline/strikeout showing changes to the ABA Model Rule

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

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

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

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

<u>ABA Model Rule</u> Rule 1.1 Competence Comment	<u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Maintaining Competence [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.	Maintaining Competence ~~[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.~~	The Commission did not include Model Rule, cmt. [6], because California requires all of its actively-licensed lawyers to comply with Mandatory Continuing Legal Education requirements. See also Explanation of Changes for Comment [1], above.
	[6] This Rule does not apply to a single act of negligent conduct or a single mistake in a particular matter.	This Comment succinctly reaffirms current California law, that is, current Rule 3-110 is not intended to subject a lawyer to discipline for a single negligent act. See Introduction, at ¶. 2. Conduct constituting gross negligence would be prohibited either as “reckless” or “intentional” acts under this Rule or as acts constituting moral turpitude under Rule 8.4(b) or Business and Professions Code §6106.
	[7] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3 (b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.	This Comment is designed to point lawyers to related rules. The responsibilities of supervising lawyers are covered in current California rule 3-110, Discussion ¶. 1. Given the Commission's contemporaneous recommendation that California adopt Model Rules 5.1 to 5.3, which collectively address the respective responsibilities of supervising lawyers and subordinate lawyers and employees, the duty to supervise is more appropriately discussed in those Rules. Thus, it is necessary to cross-reference specific new rules on the responsibilities of supervisory lawyers.

Rule 1.1 Competence

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

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

COMMENT

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

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

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

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

Rule ~~3-110~~ Failing to Act Competently 1.1 Competence

(Comparison of the Current Proposed Rule to Current California Rule)

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

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

~~(C)~~ (c) If a ~~member~~ lawyer does not have sufficient learning and skill when the legal ~~service is~~ services are undertaken, the ~~member~~ lawyer may nonetheless ~~perform such services competently~~ provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~ believes to be competent, ~~or~~ 2) ~~by~~ acquiring sufficient learning and skill before performance is required, ~~or~~ 3) ~~referring the matter to another lawyer whom the lawyer reasonably believes to be competent.~~

Discussion: COMMENT

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

[1] It is the duty of every lawyer to provide competent legal services to the client.

[2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where

referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. ~~(Amended by order of Supreme Court, operative September 14, 1992.)~~

- [5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person. [See also Rule 6.2]
- [6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.
- [7] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3 (b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

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

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

COMMENT

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

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

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

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

**Rule 1.1 Competence.
[Sorted by Commenter]**

**TOTAL = 7_ Agree = 2_
Disagree = 3_
Modify = 2_
NI = __**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association	A	Yes		Majority = support as drafted. Dissent = paragraph (a) should be deleted; and paragraph (b) should be modified to include the concept of "loyalty."	Majority – no action needed. Minority– Commission disagreed with the dissenting views and did not make the requested revisions because the changes would depart from the Commission's proposed affirmation of California's longstanding approach to regulating competence (see the Model Rule comparison chart).
2	William Balin & Andrew Dilworth	D	No		Competence is one of the fundamental duties owed by a lawyer to client and is integral to preserving public confidence and trust in the administration of justice. The proposed rule, as drafted, tends to undermine this confidence. Whereas the ABA Model Rule articulates an <i>affirmative</i> duty of competence in the handling of all legal matters, the proposed rule speaks only to a prohibition against a "subset" of incompetent conduct. The directive of the rule is not an affirmative obligation to act competently in all matters but rather a prohibition against acting incompetently <i>if</i> the incompetence is intentional, reckless or repeated.	The Commission disagrees with this assessment; it proposes to reaffirm California's longstanding approach to the regulation of competence. The Commission believes that the Model Rule formulation would be misleading to clients to the extent that it would suggest that discipline is available for a single negligent act. California policy is clear in providing that a single act of incompetence should not be the subject of discipline. See <i>In the Matter of Torres</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149 where the State Bar Court states: "We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.1 Competence.
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	Comment [1] states without qualification" "[i]t is the duty of every lawyer to provide competent legal services to the client." If this is the position of the RRC, it is unclear why this affirmative duty is not stated in the rule. At a minimum, putting the general duty in the Comment, and having the rule speak to only a subset of such conduct, is confusing. We suggest that the substance of the rule should set forth the affirmative obligation of the attorney, and if there are exceptions or nuances to be provided with respect to the application of the rule they should be in the Comments.	rule 3-110(A) violation." See also <i>In the Matter of Riley</i> (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113 and cases cited therein. Comment [1] sets out the general rule that lawyers should provide competent legal services. The Commission does not agree that this is confusing.
				Comment [6]	The dichotomy between the language of the rule and Comment [1] is heightened by the language of Comment [6] which provides: "[t]his rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter." This is problematic for several reasons. First, the rules are rules of	See comments above. The Commission disagrees. The proposed rule is substantially the approach of the current rule and its predecessors. It reaffirms California's longstanding approach to regulation of competence which distinguishes a single act of negligence from misconduct warranting discipline. The Commission is informed that conduct constituting gross

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

**Rule 1.1 Competence.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					discipline, not a basis for civil liability. Linking the application of the rule to the civil concept of "negligence" is unnecessary and likely to create confusion. Second, the substance of the rule suggests that a single act of negligent conduct that is "intentional" or "reckless" <i>can</i> constitute a violation of the rule. The Comment's generalized statement that the rule is "not intended to apply to a single act of negligent conduct" is at odds with this language. Third, the language of the Comment does not articulate the full scope of conduct that could fall within the rule and is likely to create confusion. We appreciate the RRC's thought behind the proposed rule and the desire to reconcile the rule with CA Supreme Court's holding in <i>Lewis v. State Bar</i> . But, we suggest that the rule and its comments do not fully reflect the body of law surrounding the issues raised in <i>Lewis</i> , and may not provide the guidance to practitioners intended by the RRC. Many of the concerns could be resolved by adopting an affirmative rule on competence that mirrors ABA Model Rule 1.1, and leaves out Comment [6] which furthers the RRC's charge to try and heighten uniformity with the ABA Model Rules. Alternatively, if Comment [6] remains, we suggest modifying the Comment to acknowledge that, while a single act of	negligence would be prohibited either as "reckless" or "intentional" acts under this Rule or as acts constituting moral turpitude under Rule 8.4(b) or Business and Professions Code §6106. Accordingly, California's approach to regulating competence affords sound public protection.

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

Rule 1.1 Competence.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					"ordinary negligence" or a single mistake in a particular mater is not "generally" intended to constitute a violation of the rule, such conduct could violate the rule if it is intentional, reckless, repeated or rises to the level of gross negligence.	
3	Bradley Paulson	D	No		Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner's Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800. Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code section 910 and other areas as outlined in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow the Civil Code and Legal Ethics. The State Bar is not involved.	These comments are concerned with issues of enforcement of the rules that is a subject beyond the purview of the Commission.

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

**Rule 1.1 Competence.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	CA State Bar Law Practice Management & Technology Section (LPMT)	M	Yes	(b)	LPMT believes that the definition of "competence" in Proposed Rule 1.1(b) should expressly recognize that differences in legal resources, skills and expectations may exist between different communities. LPMT recommends that the RRC revise ¶(b)(1) to clarify that "competence" is to be assessed by reference to the particular locality in which a lawyer is practicing by adding the following language to the of the single sentence of this subparagraph: "...in the locality in which the legal services are provided."	The Commission disagrees with the proposed approach. The rule applies to all lawyers in California. If there are differences in the level of competence in different localities in California as suggested by these comments, the Commission has never been presented evidence of such differences.
5	Zitrin, Richard (law professors group)	D	Yes	Comment [6]	The competence rule, as modified, gives an unfortunate and overly broad "free pass" to a lawyer committing any first act of negligence, or any first "mistake," <u>no matter how egregious</u> that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not <u>intentionally, recklessly, or repeatedly</u> fail to perform legal services with competence." (Emphasis added.) However, Comment ¶6 has been added, explicitly stating that the rule is "not intended to apply to <u>a single act</u> of negligent conduct <u>or a single mistake</u> .. ." (Emphasis added.) "...seriously misguided." Moreover, Comment ¶6 would forbid discipline even if the "single act" would meet a "gross	See response to William Balin & Andrew Dilworth. The Commission disagrees with the suggestions in this comment. The proposed rule reaffirms California's longstanding approach to regulation of competence. The Commission is informed that conduct constituting gross negligence would be prohibited either as "reckless" or "intentional" acts under this Rule or as acts constituting moral turpitude under Rule 8.4(b) or Business and Professions Code §6106. Accordingly, California's approach to regulating competence affords sound public protection.

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

**Rule 1.1 Competence.
 [Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					negligence" standard. Use of the common non-legal word "mistake," muddies the scope of 1.1 (a) and creates the possibility that any single mistake, however great, would fall outside the rule. . Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶6 of the Comment. At the very least, the Board should strike the words "or a single mistake" and add the word "simple" before "negligent conduct," so that the comment would only excuse a first act of simple negligence. Second, we recommend that the Board add the words "gross negligence" to 1.1 (a): "A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence "	
6	Office of Chief Trial Counsel	M	Yes		OCTC supports this rule so long as diligence is included either in this rule or elsewhere as in the Model Rules. OCTC does not find the Comments to this rule necessary.	The Commission has declined to recommend a separate rule on diligence. The Commission determined that diligence under California law is a professional responsibility standard that is subsumed within a lawyer's duty of competence. Both current California Rule 3-110 and the Commission's proposed Rule 1.1 define competence as inclusive of diligence as a key factor in assessing a lawyer's performance of legal services.
7	COPRAC	A	Yes		Support as drafted.	No response required.

Rule 1.1: Competence

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

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

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

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

acquiring sufficient learning and skill before performance is required.

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

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

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

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

(a) Handle or neglect a matter entrusted to the lawyer in such manner

that the lawyer's conduct constitutes gross negligence.

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

New York: In the rules effective April 1, 2009, New York substitutes the word "should" for "shall" and adds Rule 1.1(b) and (c), which is based on DR 6-101 and DR 7-101 of the old ABA Model Code.

Texas: Rule 1.01 provides as follows:

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

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

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

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

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

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

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

Proposed Rule 1.2 [n/a]

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

(XDraft #6.1, 6/29/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

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

Statute

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

Case law

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

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

- ☐ Other Primary Factor(s)

Cal. Constitution, Art. I, Sec. 16

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10
Opposed Rule as Recommended for Adoption 2
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

July 2010

(Draft rule following consideration of final round of public comment)

INTRODUCTION:

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

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

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

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

* Proposed Rule 1.2, Draft 6.1 (6/29/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer	<u>Commission's Proposed Rule*</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.	(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ~~It~~ <u>Except as otherwise provided by law</u> in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.	Paragraph (a) is substantially similar to Model Rule 1.2(a), except the last sentence has been revised to recognize that, at least in California, there are certain situations under which a lawyer's consent to a guilty plea is required. See Penal Code § 1018. See also Comment [1]. <u>Minority.</u> A minority of the Commission objects to the Rule on the ground that, although it might be appropriate as a statement of hortatory principles, it is wrong as a disciplinary rule and will conflict with lawyers' duties to their clients, both constitutional and statutory. The minority identifies a fundamental problem in that there is no clear distinction between the "objectives" and the "means" of representation. For example, in a criminal case, the accused has a constitutional right to have the complaining witness cross-examined. If we characterize the decision about whether to cross-examine that witness as "means" and therefore within the dominion of the lawyer, we deprive the accused of a fundamental Constitutional right. Denial of cross-examination of a witness without a waiver by the client is ". . . a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." <i>Brookhart v. Janis</i>, 384 U.S. 1, 3 (1966). A rule of professional conduct should not deprive a client of a Constitutional right. The majority notes that the rule does not countenance such conduct by the lawyer. As explained in Comment [1], decisions concerning a client's "substantial rights" are within the province of the client. The rule does not require a lawyer to ignore the client's interests in making decisions about how to conduct a case; rather, it emphasizes that the lawyer must be sensitive to the client's rights and interests.

* Proposed Rule 1.2, XDraft 6.1 (6/29/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Allocation of Authority between Client and Lawyer [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.	Allocation of Authority between Client and Lawyer [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. <i>Blanton v. Womancare, Inc.</i> (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, ~~the~~ decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(a)(1)(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. See Rule 1.14 and Comment [4] of this Rule.	Comment [1] is based on Model Rule 1.2, cmt. [1] but makes five changes to conform the comment to California law. First, as a specific example of "limits imposed by law and the lawyer's professional obligations," the comment includes a reference to Penal Code § 1018, which provides: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." The citation to Cal. Constitution Article I, section 16, added following public comment, is to the same effect. Second, it adds language and a citation to well-settled California authority, <i>Blanton v. Womancare, Inc.</i>, concerning the allocation of authority between lawyer and client. Third, it recognizes that in California, the authority under the California Constitution to waive a jury trial in a civil matter resides in the client. Fourth, it substitutes a cross-reference to proposed Rule 1.4(c), which expressly sets forth a lawyer's communication duties concerning settlement offers. Rule 1.4(c) carries forward current rule 3-510, which itself conforms to legislative policy in Bus. & Prof. Code § 6103.5. Finally, Comment [1] provides a cross-reference to proposed Rule 1.14 and Comment [4] of this Rule as an example of when a lawyer is impliedly authorized to act in the interests of the client.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	Comment [2] is identical to Model Rule 1.2, cmt. [2], except that the specific reference to Model Rule 1.16(b)(4) has been deleted because the Commission recommends not adopting that subparagraph. Model Rule 1.16(b)(4) permits a lawyer to withdraw from representing a client if: "(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." The Commission's recommended drafting of Rule 1.16 increases client protection by narrowing a lawyer's right to withdraw from a representation. Consequently, the Comment now generally points the lawyer to proposed Rule 1.16(b), which governs permissive withdrawal from the representation.
[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a	[3] At the outset of <u>or during</u> a representation, the client may authorize the lawyer to take specific action on the client's behalf without further	Comment [3] is identical to MR 1.2, cmt. [3], except that it clarifies that a client may authorize the lawyer to take specific action at any time during the representation.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	
[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.	[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.	Comment [4] is identical to MR 1.2, cmt. [3].
Independence from Client's Views or Activities [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.	Independence from Client's Views or Activities [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.	Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."
Agreements Limiting Scope of Representation [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the	Agreements Limiting Scope of Representation [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the	Comment [6] is nearly identical to Model Rule 1.2, cmt. [6], the only change being the deletion of "repugnant," a term found in Model Rule 1.16(b)(4), a provision the Commission recommends not adopting. See Explanation of Changes, Comment [2], above.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.	client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as ~~repugnant or~~ imprudent.	
[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.	[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. <u>Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.</u>	Comment [7] is nearly identical to Model Rule 1.2, cmt. [7]. However, a sentence has been added at the end of the comment to alert lawyers that they may be obligated to inform clients of legal problems that fall outside the scope of representation. See, e.g., <u>Nichols v. Keller</u> (1993) 19 Cal.Rptr.2d 601.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.	[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).	Comment [8] is based on Model Rule 1.2, cmt. [8] and is identical, except that references to the California Rules of Court on limited scope representation have been added to apprise lawyers of these important provisions for access to justice.
Criminal, Fraudulent and Prohibited Transactions [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.	Criminal, Fraudulent and Prohibited Transactions [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. ~~This prohibition or to violate any rule, however law, or ruling of a tribunal. However, this Rule does not preclude the prohibit a~~ lawyer from giving ~~an honest a good faith~~ opinion about the ~~actual foreseeable~~ consequences ~~that appear likely to result from of~~ a client's ~~proposed~~ conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.	Comment [9] is based on Model Rule 1.2, cmt. [9], but adds language primarily to conform to and explain the added scope of proposed paragraph (d). Sentence 1 adds the language of the expanded scope of proposed paragraph (d) by adding "or to violate any rule, law or ruling of a tribunal." Sentence 2 substitutes "prohibit" for "preclude" to clarify that the prohibition is mandatory. It substitutes "good faith" for "honest" to change from the subjective standard to an objective standard. The words "forseeable consequences of a client's proposed conduct" have been substituted for "actual consequences that appear likely to result from a client's conduct" for the sake of clarification, brevity and to create an objective rather than subjective standard.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[10]When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.	[10]~~When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. The lawyer is required to avoid assisting the client, for~~ For example, ~~by drafting a lawyer may not draft or delivering/deliver~~ documents that the lawyer knows are fraudulent ~~or by suggesting; nor may the lawyer counsel~~ how the wrongdoing might be concealed. ~~A~~ The lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposed~~believed was legally proper but ~~then~~later discovers is criminal ~~or, fraudulent. The lawyer must, therefore, withdraw from~~or the ~~representation~~violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client~~in, including counseling the matter. See Rule 1.16(a)~~client about possible corrective or remedial action. In some cases, ~~withdrawal alone might be insufficient. It may be necessary for the lawyer~~lawyer's response is limited to ~~give notice of the fact of withdrawal~~lawyer's right and, ~~where appropriate, duty to disaffirm any opinion, document, affirmation~~resign or the like. ~~See~~withdraw in accordance with Rule ~~4.1~~1.16.	Although the concepts contained in Model Rule 1.2, cmt. [10] have been retained, the comment has been redrafted to remove ambiguity and to create a brighter line for lawyer guidance and public protection. Sentence 1 of the Model Rule comment has been stricken because it provides no guidance (i.e., telling a lawyer that a situation is delicate provides no guidance concerning conduct). Substituted sentence 1 provides guidance by clarifying that a lawyer must comply with subparagraph (d)(1) regardless of the temporal status of the client's conduct. Sentence 2 strikes language creating ambiguity and clarifies that a lawyer may not engage in the conduct described. Sentence 3 substitutes "believed" for "supposed" and "later" for "then" to removed ambiguity and to conform with the proposed black letter rule. Sentence 4 has been added to conform the Comment to statutory duties of confidentiality. Sentence 5 has been added to clarify that the lawyer's duties are consistent with California law. Sentence 6 retains the Model Rule Comment concept of withdrawal but clarifies that the option may be mandatory or permissive, depending upon the circumstances. The last sentence of the Model Rule Comment concerning disaffirmation of "any opinion, document, affirmation or the like,"

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		has been deleted to conform to California policies of confidentiality, which do not permit “noisy” withdrawals.
[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.	~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~	Model Rule 1.2, cmt. [11] has been stricken because it is ambiguous and may imply a relationship with beneficiaries that is not consistent with California law. For example, a lawyer representing a trustee generally has no duties or special obligations to the beneficiaries of a trust.
[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.	~~[12]~~ Paragraph (d) ~~applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services.~~ <u>(2) authorizes a lawyer to assist a client to make a good faith effort to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity, scope, meaning or application of a law, rule, or regulation ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute, law, rule, or regulation ruling of a tribunal, or of the interpretation meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a</u>	Although Comment [11] retains the concepts contained in Model Rule 1.2, cmt. [12], the Model Rule comment has been substantially revised to provide better guidance to lawyers, and thus better protection to client's, concerning the scope of subparagraph (d)(2)'s permitted conduct. In particular, in the last two sentences the revised comment expands on the last clause of subparagraph (d)(2), providing guidance to lawyers whose clients intend to engage in civil disobedience.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.</u>	
[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).	~~[13]~~^[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(~~5~~⁶).	Comment [12] is based on Model Rule 1.2, cmt. [13]. The only changes are to conform to California rules style and to correct a cross-reference.

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

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d)
 - (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
 - (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

Comment

Allocation of Authority between Client and Lawyer

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., [Cal. Constitution Article I, section 16](#); Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womanicare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, ~~provided the lawyer does not violate Rule 1.6 or Business and Professions Code section 6068(e).~~ [See Rule 1.14 and Comment \[4\] of this Rule.](#)
- [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such

questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

- [3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.
- [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.
- [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See,

e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

Criminal, Fraudulent and Prohibited Transactions

- [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- [10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and,

where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

- [11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.
- [12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

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

(Commission's Proposed Rule – Clean Version)

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d)
 - (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
 - (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

Comment

Allocation of Authority between Client and Lawyer

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womanicare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. See Rule 1.14 and Comment [4] of this Rule.
- [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the

matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

- [3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been

retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

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

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

Criminal, Fraudulent and Prohibited Transactions

- [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- [10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- [11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or

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

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

**Rule 1.2 Scope of Representation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association ("CPDA") [Garrick Byers]	M	Yes	1.2(a)	The commenter requests that a new comment be added to clarify the last sentence of paragraph (a) of the Rule, which provides: Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. Because many prosecutors and criminal defense lawyers (and judges) do not know of the basic California law concerning waiver of jury trial, the commenter requests the addition of the following comment: California Constitution article I, section 16, first paragraph, second sentence, provides that "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." The commenter also requests the addition of a reference to the leading California treatise on criminal law, as follows: "See, generally, 5	The Commission agrees in part with the request and has added a reference in Comment [1] to the relevant section of the Constitution. The Commission, however, declines to add a reference to the cited treatise because the Rules style does not permit references to such secondary sources.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.2 Scope of Representation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Witkin & Epstein, California Criminal Law (3d Ed., 2000), Ch. XIV, §§ 452 – 459 ("Waiver of Right [to Jury Trial]")."	
2	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		The commenter strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. The commenter supports the Commission's recognition of a lawyer's obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, the commenter has long advocated limited representation as a cost-saving innovation that enhances consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).	No response required.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC is concerned that subparagraphs (a) and (b), although in the Model Rules, are not rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. Further, OCTC believes that the concepts in subparagraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.	The Commission disagrees with the commenter's position. The Rule not only provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210, but also provides important guidance to lawyers in their relationships with clients.

**Rule 1.2 Scope of Representation.
[Sorted by Commenter]**

TOTAL = 6
Agree = 3
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					OCTC is concerned that, while subparagraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. (In the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521.) While Comment 8 states this, it should be in the rule, not just a Comment. OCTC believes that the consent in paragraph (c) should be in writing or at least by written documentation, not just informed consent. This would protect both the client and the attorney and impress upon the client the limitation and the importance of the limitation. This is not more than is being required when the attorney informs the client that he or she does not have professional liability insurance or when an attorney enters into a true retainer agreement. (See e.g. proposed rules 1.4.1 and 1.5(e).) Given that limited scope representation is an important exception, it	The Commission disagrees. OCTC's proposals regarding paragraph (c) and comment [8] do not appear to reflect the views repeatedly expressed by Supreme Court Justice George, the Judicial Council, the Access to Justice Commission and others. Limited scope representation is not prohibited unless there is an exception allowing for such representation. Rather, it is permitted unless specifically prohibited or other duties have been imposed. The OCTC's reading of <i>Valinoti</i> appears overbroad and inconsistent with the goal of access to justice. Nevertheless, the Commission agrees with OCTC's suggestion regarding comment [8] and has added to Comment [7] guidance regarding duties attendant to limited scope representation. The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution concerning limited scope representation. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					would be better policy and more enforceable to require that it be in writing. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, subparagraph (d), unlike rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See In the Matter of Broderick (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; Zitny v. State Bar, supra, 64 Cal.2d at 793.) While the Commission's Comments show that it intends to keep a good faith defense, Comments are not rules or authority and OCTC believes that if the Commission wants this defense it should be in the rule and not in a comment. OCTC is concerned with Comments [1] and [2]'s statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. It has never been that the attorney must consult (or advise) on every step and action, just the significant ones.	The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal." (emphasis added). Whether it is the lawyer who "takes appropriate steps in good faith" to test the validity of any law, etc., or it is the lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					OCTC is concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See <i>Janik v. Rudy, Exelrod & Zieff</i> (2004) 119 Cal.App.4th 930, 940.) The rest of the Comments seem more appropriate in other forums, such as treatises, law reviews, and ethics opinions.	The Commission has included the following statement at the end of Comment [7]: Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. The foregoing should address OCTC's concern. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
4	Orange County Bar Association	D	Yes		We oppose the Commission's proposed Rule 1.2 and support the adoption of ABA Model Rule 1.2. Propose changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law."	The Commission disagrees with the commenter's concerns about the language that has been added to paragraphs (d)(1) and (d)(2). As already noted, it carries forward the language in current rule 3-210, which the commenter has not asserted has caused any problems for lawyers or the courts. It thus provides continuity with current California law.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					We believe the additional language proposed by the Commission may introduce a degree of ambiguity into the rule, and may make it overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue. The added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal. The Commission's response expressed disagreement with the OCBA's position, but the only reason given was that the language of Proposed Rule 1.2(d)(1) adopts the language of current Rule 3-120. The objections raised by the OCBA do not appear to have been addressed. OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the Proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that	The Commission again disagrees with the commenter's concerns. The first sentence of Comment [5] provides important clarification of paragraph (b). Paragraph (b) simply states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Comment [5] then links the concepts that because

**Rule 1.2 Scope of Representation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					legal representation should not be denied to people “who are unable to afford legal service.” This statement is not germane to the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary. The Commission’s response expressed disagreement with OCBA’s position, on the grounds that Comment [5] is identical to Comment [5] for Model Rule 1.2, and it is consistent with the legislative policy of B&P Code section 6068(h). The OCBA believes that if Comment [5] is not stricken, it should at least be modified to clarify that Rule 1.2(d)(2) does not create any obligation for a particular individual attorney to provide legal services to any particular client for little or no compensation, but rather provides a general goal that clients in general not be denied legal services by the legal community as a whole on the basis of inability to pay.	such a representation does not constitute an endorsement, a lawyer should not raise that possibility as a reason to refuse services to individuals because of their views or activities. As to the commenter’s concern with the reference to “ability to pay,” the Commission disagrees that the phrase could be interpreted as possibly creating an obligation to provide legal services with little or no compensation. Rather, the phrase recognizes that those whose views might be considered offensive are often the ones who are likely not to have the resources necessary to retain a lawyer.
5	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response required.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Santa Clara County Bar Association	A	Yes	1.2(c)	We approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."	The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given. Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money. Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be discipline if they do not. Other jurisdictions have not included such a requirement.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 2 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [8]	Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq., which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996." This language is the same that is used by the District of Columbia in modifying the ABA Model Rule version.	The Commission did not make the requested change. The Commission has revised the Model Rule language from which proposed Comment [8] is derived to add reference to generally-applicable Rules of Court concerning limited scope representation. Moreover, that comment already states that "[a]ll agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law," which would include the referenced Government Code sections.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

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 1.2(a) states as follows: “In a criminal case the lawyer shall abide by the client’s decision . . . whether to take an appeal.”

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

Colorado: Rule 1.2(a) and (c) and the Comment to Rule 1.2 encourage “limited representation” of pro se clients. Rule 1.2(c) provides that a lawyer may limit the

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

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

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

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

District of Columbia: D.C. Rule 1.2 generally tracks the ABA Model Rule, but adds a paragraph (d) providing that a "government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c)." D.C. Rule 1.2(f) — formerly 1.2(e) — retains language that the ABA deleted in 2002.

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

Illinois: In the rules effective January 1, 2010, Illinois adds Rule 1.2(e), which provides that, "[a]fter accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the

lawyer's firm the responsibility for performing or completing that employment, without the client's informed consent." Comment 14 offers the following explanation:

The prohibition stated in paragraph (e) has existed in Illinois ethics rules and in the prior Code since 1980. It is intended to curtail abuses that occasionally occur when a lawyer attempts to transfer complete or substantial responsibility for a matter to an unaffiliated lawyer without the client's awareness or consent. . . . The Rule is not intended to prohibit lawyers from hiring lawyers outside of their firm to perform certain services on the client's or the law firm's behalf. Nor is it intended to prevent lawyers from engaging lawyers outside of their firm to stand in for discrete events in situations such as personal emergencies, illness or schedule conflicts.

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

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

Missouri: Rule 1.2(c) permits the unbundling of legal services, providing as follows:

A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer’s limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions:

(a) the representation is limited to the lawyer and the services described in the form, and (b) the lawyer does not represent the client generally or in any matters other than those identified in the form. . . .”

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

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

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

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

New Mexico specifies in Rule 16-303(E) that a lawyer must disclose to a tribunal if the lawyer is representing the client in a “limited manner.”

New York: In the rules effective April 1, 2009, New York adds Rule 1.2(e)-(g), which is based on DR 7-101 of the old ABA Model Code. Comment 10 elaborates on what a lawyer must do when a client has undertaken an illegal or fraudulent course of action and “the representation will result in violation of the Rules of Professional Conduct or other law....” Under these circumstances, “the lawyer must advise the client of any relevant limitation on the lawyer’s conduct and remonstrate with the client. See Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client’s conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer’s continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw.”

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

Ohio: Rule 1.2(c) provides:

A lawyer who undertakes representation of a client, other than by court appointment, shall confirm in writing, within a reasonable time, the nature and scope of the representation, unless the

lawyer has regularly represented the client or the anticipated fee from the representation is \$500.00 or less. A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client in writing.

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

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

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

Proposed Rule 1.4 [RPC 3-500, 3-510]
“Communication”
(XDraft #9, 6/27/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☐ Existing California Law

Rule

RPC 3-500, 3-510

Statute

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

Case law

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9
Opposed Rule as Recommended for Adoption 1
Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

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

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4* Communication

July 2010

(Draft rule revised following consideration of final round of public comment)

INTRODUCTION:

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

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

State Variations. Every state has adopted some version of Model Rule 1.4, with limited variations, mostly related to duties concerning communications regarding settlement or plea offers. See, e.g., Ariz. Rule 1.4(c), D.C. Rule 1.4(c); Michigan Rule 1.4(a). See Selected State Variations, Rule 1.4, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2010), attached.

* Proposed Rule 1.4, XDraft 9 (6/27/10).

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

* Proposed Rule 1.4, XDraft 9 (6/27/10). Redline/strikeout showing changes to the ABA Model Rule.

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

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

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

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

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

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

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

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

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

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

Rule 1.4 Communication

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

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

COMMENT

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

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

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

- [6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule ~~1.2(a)~~.
- [7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.
- [8] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.
- [9] In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another

person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule ~~1~~1.16(e)(1) and Comment [9].

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

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

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

COMMENT

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

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

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

- [6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule 1.2(a).
- [7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.
- [8] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.
- [9] In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another

person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule 1.16(e)(1) and Comment [9].

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

Rule 1.4 Communication. [Sorted by Commenter]							TOTAL = 7	Agree = 1	Disagree = 1	Modify = 5	NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response					
1	COPRAC	M	Yes	Comment [4]	Under the definition of “client” for purposes of communication of settlement offers in a class action may not be practical for lawyers representing entity clients. We propose to revise the Comment to provide that a client “includes a person who possesses the authority to accept an offer of settlement or plea, or in a class action, all the named representatives of the class or a representative authorized by the client to communicate with the lawyer regarding settlement offers.	The Commission generally agrees with the commenter and has revised Comment [4].					
				Comment [6]	COPRAC is concerned that Comment [6] includes language that is not sufficiently protective of clients. Because the lawyer may not be aware of changed circumstances that would cause the client to reconsider the authority to settle previously provided, COPRAC believes that a client should always be told of a settlement offer, regardless of whether authority to accept or reject the authority may have been previously provided.	The commenter is correct that it may be possible for there to be changed circumstances of which the lawyer is not aware because the client has not communicated the necessary facts to the lawyer. However, the Commission believes that if such circumstances arose, the client, aware that its previous instructions were no longer appropriate, would communicate such facts to the lawyer. Also, as is suggested by the reference to Rule 1.2(a), the lawyer should not subject to discipline because the lawyer would have complied with the client's directions by rejecting the settlement offer in the Comment [6] situation.					

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.4 Communication. [Sorted by Commenter]						TOTAL = 7 Agree = 1 Disagree = 1 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9]	A bright-line rule requiring all written offers of settlement in a civil matter to be communicated to clients is beneficial to both clients and lawyers and suggests that the proposed language of the Comment be deleted. If the Commission keeps this language, COPRAC joins the LACBA's concern regarding the inclusion of this language. The language appears to be an exception to the proposed Rule and should be clearly stated in the rule text. We disagree with the RRC's conclusion that this language is an interpretation of the Rule and not an exception. COPRAC is concerned that the language in Comment [9] permitting a lawyer to "withhold" information from a client is overly broad. It appears that the impetus for the Comment is to permit a lawyer to withhold information where delivery of the information could result in harm to the client. However, this is not clearly stated. COPRAC proposes replacing the first sentence of the proposed Comment with the following: "A lawyer may be justified in delaying transmission of information when the	See previous response. Commission disagrees and has not made the requested revision. As state previously in its response to LACBA, the sentence provides an interpretation of the Rule, in effect recognizing a client's right to pre-authorize a lawyer to accept settlement offers on the client's behalf so long as there are no changes in the circumstances that require the lawyer to communicate with the client. The Commission disagrees that the suggested change would provide the client with more protection. The example in the second sentence of the Comment indicates that the lawyer cannot make the decision to withhold information in a vacuum. The Comment contemplates an independent justification, such an "examining psychiatrist's [indication] that disclosure would harm the client." The proposed substituted language would based the decision on the lawyer's reasonable belief.

Rule 1.4 Communication. [Sorted by Commenter]						TOTAL = 7 Agree = 1 Disagree = 1 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					client would be likely to react imprudently to an immediate communication. In some circumstances, a lawyer may be justified in withholding transmission of information when the lawyer reasonably believes delivery of the information could result in harm to the client or others. See <i>also</i> proposed rule 1.14"	
2	HALT, Inc. – an Organization of Americans for Legal Reform	M	Yes	(c)(2) 1.4(c)(2), Comment [7]	HALT strongly supports the RRC's acceptance of ABA MR 1.4 as a substantial improvement over current CRPC 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critic decision during the course of the representation. The proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any <i>written</i> offer of settlement made to the client" in civil matters. Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed rule 1.2, and should be informed of all such offers. Comment [7] states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant." But a Comment is not a Rule. As currently drafted, the Proposed rule and the RRC's commentary create unnecessary	No response required. The Commission disagrees that all offers of settlement must be communicated and believes that Comment [7] constitutes an appropriate balance between the need for a client to be informed of significant developments and the practical realities of oral negotiations. The Commission also notes that Comment [7] carries forward what is now Discussion ¶. 2 of current rule 3-510. The Commission is unaware that this placement has interfered with enforcement of the Rule.

Rule 1.4 Communication. [Sorted by Commenter]						TOTAL = 7 Agree = 1 Disagree = 1 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					ambiguity. HALT urges the RRC to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.	
3	Office of Chief Trial Counsel ("OCTC")	M	Yes	Comment [9]	OCTC suggests that the rule also include the language currently in Rule 3-500 that attorneys inform the client about significant developments relating to the employment. While OCTC believes that employment is included in representation, it also believes that using employment as well as representation is clearer and will prevent arguments about whether employment issues are included in this rule. Further, since it is in the current rule, some may argue that the new rules removed any requirement that was included by the language in the old rule. We support Comments [8] and [10]. OCTC is concerned that the first two sentences in Comment [9] are confusing and could be misconstrued by attorneys to think that they can make the decision to withhold information from a client. The other Comments seem more appropriate for treatises, law review articles, or ethics opinions.	The Commission disagrees that including the word "employment" in the Rule is necessary to avoid confusion about the scope of the Rule. The language the Commission has proposed tracks the Model Rule and there is no evidence that it has been interpreted differently from the current California rule. No response required. See response to COPRAC. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to

Rule 1.4 Communication.
[Sorted by Commenter]

TOTAL = 7 **Agree = 1**
Disagree = 1
Modify = 5
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						lawyers on how to be in compliance with their professional obligations.
4	Paulsen, Bradley	D		1.4(a)(2) 1.4(b)	Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner's Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800. Many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplied propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are, in many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.

Rule 1.4 Communication. [Sorted by Commenter]						TOTAL = 7 Agree = 1 Disagree = 1 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair most certainly would have deteriorated or escalated to further repair necessary.	
5	San Diego County Bar Association ("SDCBA")	A	Yes		Support as drafted.	No response required.
6	Santa Clara County Bar Association ("SCCBA")	M	Yes		Approve the proposed rule as written. However, comment [7] to the rule should be either deleted or should be included in the rule itself. Rationale: Comment [7] states "Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant." This comment expands the rule itself. A comment should not create a duty that is not specifically and clearly set forth in the rule.	The Commission disagrees. Comment [7] simply carries forward what is now Discussion ¶. 2 of current rule 3-510. The Commission is unaware that this placement has interfered with enforcement of the Rule.
7	Tracy, Michael	M	No		Comment [4] should read: "As used in paragraph (c), 'client' includes all persons whose authority is required to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class."	The Commission agrees generally that Comment [4] requires revision and has revised it, although not as suggested by the Commenter.

Rule 1.4 Communication. [Sorted by Commenter]						TOTAL = 7 Agree = 1 Disagree = 1 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [6] should read: "Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of an offer of a settlement conveyed solely by electronic mail in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)]."	The Commission disagrees with the suggested inclusion of a reference to electronic mail. The Commission does not understand why a particular mode of written communication should be distinguished from other modes.

Rule 1.4: Communication

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

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

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

California: Rule 3-500 provides:

A member shall keep a client reasonably informed about significant

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

Rule 3-510 provides:

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

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

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

(B) As used in this rule, “client” includes a person who possesses the authority to accept an offer of settlement or

plea, or, in a class action, all the named representatives of the class.

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

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

Florida: Rule 4-1.5(f)(4)(C) requires every lawyer entering into a contingent fee agreement in a case involving personal injury or property damage to provide the client with a Statement of Client’s Rights for Contingency Fees that contains the following paragraph:

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

Louisiana: Rule 1.4(c) provides as follows:

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to

providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

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

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

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

Nevada has a Rule 1.4(c) entitled “Lawyer’s Biographical Data Form.” Among other details, it requires each lawyer or law firm to maintain a form containing “a factual statement detailing the background, training and experience of each lawyer or law firm.” The form must list certain basic information and requires a lawyer or law firm to provide additional information upon request.

New York: In the rules effective April 1, 2009, New York adds Rule 1.4(a)(1)(ii) and (iii), which provides that a lawyer should promptly inform a client of: “(ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers.”

Ohio: Rule 1.4(c) provides:

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

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

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

Proposed Rule 1.4.1 [3-410]

“Disclosure of Professional Liability Insurance”

(XDraft #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 7

Opposed Rule as Recommended for Adoption 2

Abstain 3

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*

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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, XDraft 6 (04/01/10).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 3-410)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 3-410)	<u>Explanation of Changes to California Rule 3-410</u>
(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.	(Aa) 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.	(Bb) If a ~~member~~lawyer does not provide the notice required under paragraph (Aa) 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, XDraft 6 (04/04/10). Redline comparisons are to current rule 3-410.

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 3-410)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 3-410)	<u>Explanation of Changes to California Rule 3-410</u>
(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~~) This ~~rule~~<u>Rule</u> does not apply to a ~~member~~<u>lawyer</u> who is employed as a government lawyer or in-house counsel when that ~~member~~<u>lawyer</u> is representing or providing legal advice to a client in that capacity. <u>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.</u>	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~~) This ~~rule~~<u>Rule</u> 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~~) This ~~rule~~<u>Rule</u> does not apply where the ~~member~~<u>lawyer</u> has previously advised the client under ~~Paragraph~~<u>paragraph</u> (~~A~~<u>Aa</u>) or (~~B~~<u>Bb</u>) that the ~~member~~<u>lawyer</u> does not have professional liability insurance.	See Explanation of Changes to Paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 3-410)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 3-410)	<u>Explanation of Changes to California Rule 3-410</u>
Discussion: [1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.	~~Discussion~~Comment: [1] The disclosure obligation imposed by Paragraph ~~(Aa) 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: <i>"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."</i>	[2] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Aa), and may include that language in a written fee agreement with the client or in a separate writing: <i>"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."</i>	"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): <i>"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."</i>	[3] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Bb): <i>"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."</i>	See Explanation of Changes to Comment [1]. See Explanation of Changes to Comment [2].

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 3-410)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 3-410)	<u>Explanation of Changes to California Rule 3-410</u>
[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~~<u>Paragraph (C)</u> ~~in part~~ provides an exemption for a "government lawyer or in-house counsel when that ~~member~~<u>lawyer</u> 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~~<u>Rule</u> is to provide information directly to a client if a ~~member~~<u>lawyer</u> is not covered by professional liability insurance. If a ~~member~~<u>lawyer</u> 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~~<u>lawyer</u> is or is not covered by professional liability insurance. The exemptions ~~under this rule~~<u>for government lawyers and in-house counsels</u> 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).
	<u>[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).</u>	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).

Rule 1.4.1 Insurance Disclosure [Sorted by Commenter]						TOTAL = 5 Agree = 4 Disagree = 1 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.4.1 and the Comments to the Rule.	No response required.
2	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Proposed Rule 1.4.1 is an important step toward that objective and thanks the RRC for beginning to address the problem of uninsured and inadequately covered attorneys. HALT believes there is a better approach reflected by the Oregon system of universal coverage and urges the RRC and the BOGs to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon.	No response required. The issue of other possible regulatory approaches concerning bar members and professional liability insurance was part of the study conducted by the State Bar's Insurance Disclosure Task Force. The State Bar Board of Governors has the discretion to monitor California's experience under the relatively new insurance disclosure rule and to revisit these issues. However, it does not appear that a mandatory insurance rule would necessarily be a Rule of Professional Conduct or within the purview of the Rules Revision Commission.
3	Office of Chief Trial Counsel ("OCTC")	A			OCTC believes Comments 4 and 5 are more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.4.1 Insurance Disclosure [Sorted by Commenter]						TOTAL = 5 Agree = 4 Disagree = 1 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
4	Rozner, Maurice	D	No		This is not a smart rule and it was most likely pushed by large firms to drive the sole practitioner out of business. Disclosure to client is no indication of competence.	The Commission does not agree. The insurance disclosure rule, Rule 3-410, was approved by the Supreme Court and is currently operative. The proposed rule continues the current rule with several revisions.
5	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response required.

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 Statement¹ (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 (<i>See also, Oregon:</i> 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.supremestate.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 Order adopting RPC 3-41			N/A	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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 (<i>See also, Oregon:</i> 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 <i>Private-practice attorneys must make disclosure in annual registration.</i> 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

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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,

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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 (<i>See also, Oregon:</i> 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.massrep.orts.com/courtrules/sjcrules.htm#4:02		Yes.	

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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 (<i>See also, Oregon:</i> 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 Statement¹ (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 (<i>See also, Oregon:</i> 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/InsuranceDisclosures/proprul.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

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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 (<i>See also, Oregon:</i> 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#Rule14			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.aop.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_Article_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 Statement¹ (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 (<i>See also, Oregon:</i> 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		

	Requires Disclosure Directly to Client (7) (AK, CA, NH, NM, OH, PA and SD)	Requires Disclosure On Annual Registration Statement¹ (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 (<i>See also, Oregon:</i> 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 Statement¹ (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 (<i>See also, Oregon:</i> 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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Proposed Rule 1.5 [4-200] “Fees for Legal Services”

(XDraft #14.1, 6/28/10)

Summary: Proposed Rule 1.5, together with proposed Rule 1.5.1 and to a limited extent, proposed Rule 1.8.1, regulates fee arrangements between lawyers and their clients. The principal differences between the proposed Rule and Model Rule 1.5 is the former’s retention of the “unconscionability” standard for imposing discipline relating to legal fees and the provisions regulating flat and fixed fees that are purported to be nonrefundable or earned on receipt. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

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

- ☐ ABA Model Rule substantially adopted
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-200, 2-200

Statute

Bus. & Prof. Code §§ 6147, 6148

Case law

Herrscher v. State Bar (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].

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

Arizona Rule 1.5; Washington Rule 1.5 (2008).

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 5

Abstain 0

Approved on Consent Calendar ☐

Approved by consensus ☐

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

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

California Attorneys for Criminal Justice; Criminal Defense Lawyers Club of San Diego; National Association of Criminal Defense Lawyers; and members of the California criminal defense bar. See Public Comment Chart for a complete list of those who commented on proposed Rule 1.5.

☒ Very Controversial – Explanation:

During both public comment periods, members of the California criminal defense bar and some of their representative organizations disagreed with the Commission's proposals regulating fee arrangements that purport to be non-refundable fee. After each public comment period, the Commission revised the Rule in an attempt to address the concerns raised.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5* Fees for Legal Services

July 2010

(Draft rule following consideration of second round of public comment.)

INTRODUCTION:

1. Proposed Rule 1.5 diverges from Model Rule 1.5 in several important respects: (1) An unconscionability standard is incorporated into the Rule rather than the Model Rule's "reasonable" fee standard as the bench mark for imposing discipline on lawyers, thus carrying forward the standard in current California Rule 4-200; (2) Model Rule 1.5(b), which identifies requirements for fee agreements and Model Rule 1.5(c), which sets forth requirement for contingent fee agreements, have both been deleted because those topics are already covered in Business & Professions Code §§ 6148 and 6147, respectively [see Explanation of Changes for Model Rule 1.5(b) and (c)]; (3) Model Rule 1.5(e), which concerns fee divisions among lawyers, has been deleted because that topic is covered in a separate rule, proposed Rule 1.5.1 [see Explanation of Changes for Model Rule 1.5(e)]; (4) proposed Rule 1.5 also includes new paragraphs (e) and (f), which have been revised following extensive public comment. Rather than prohibit outright a lawyer from contracting for, charging or collecting a non-refundable fee (first public comment draft), paragraph (e) now permits lawyers to denominate a fee as "non-refundable" or "earned on receipt" or in similar terms, but only if the lawyer makes certain written disclosures to the client that are intended to avoid the client being misled [see Explanation of Changes for paragraph (e) and (f), which explain that the Commission's approach simply recognizes what is California law and is an attempt to balance a number of competing interests that were identified in the public comment]; and (5) It adds new paragraph (g), which prohibits a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. New paragraph (g) was added by the Board to enhance public protection and was based upon a recommendation by a minority of the Commission [see Explanation of Changes for paragraph (g); see also, Introduction to proposed Rule 1.8.1].

* Proposed Rule 1.5, XDraft 14.1 (6/28/10).

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

We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. As was said by the Washington court in *In Re Wiltsie*, 109 Wash. 261, 186 P. 848:

“The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited.”

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

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

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

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

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

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

4. *Non refundable fees & Public Comment.* During both rounds of public comment, members of the California criminal defense bar and some of their representative organizations disagreed with the Commission's proposed paragraphs (e) [second round of public comment] (f) [first round of public comment]. The latter provision provided for an absolute ban on any non-refundable fee by stating that a lawyer "shall not charge, contract for or collect a non-refundable fee, except for a true retainer." After the initial round of public comment, the Commission proposed the former provision, which recognized the potential advantage to clients of a "flat" or "fixed" fee arrangement and expressly permitted its use so long as certain disclosures were made in the agreement. Further criticism of the Commission's treatment of non-refundable fees was lodged during the second public comment period.

The Commission believes that the commenters who have disagreed with the Commission's treatment of nonrefundable and earned on receipt fee arrangements misinterpret current California law, which clearly makes fixed and flat fees refundable. Nevertheless, to address the concerns stated by those in the legal community who opposed the revisions, the Commission has made further revisions to the Rule in an attempt to balance the competing interests that had been identified: the interests of clients in taking advantage of the certainty of a flat fee agreement (see Explanation of Changes for paragraph (f)), while still being able to discharge their lawyers at any time without the threat of losing the fee that was advanced to the lawyer whom the client seeks to discharge, and the interests of preventing attachment by third parties of fees advanced by the client. Paragraph (e) now permits the use of the terms "nonrefundable," "earned on receipt," or similar terms, but only if the lawyer provides specific written disclosures intended to prevent the client from being misled as to the client's rights to discharge the lawyer at any time and potential right to a refund. For a fuller discussion, please see Explanation of Changes for paragraphs (e) and (f), below.

Minority. A minority of the Commission believes that proposed paragraphs (e) and (e)(2) as drafted would be a source of overreaching and confusion. The minority argues that there are many different fee arrangements involving flat or fixed fees. While a lawyer may require advance payment of a fixed or flat fee, the lawyer remains obligated under the rules in all jurisdictions, including Washington, to return any unearned portion. See Model Rule 1.16(d); current California Rule 3-700(D)(2) and Washington Rule 1.5(f)(2). Washington Rule 1.5(f) is not intended to authorize lawyers to charge "non-refundable fees" as proposed rule 1.5(e) purports to do. Rather, Washington's rule provides that the client and the lawyer may agree in writing that a flat or fixed fee paid in advance is the lawyer's property and, therefore, need not be placed in the lawyer's client trust account, which Washington's rule would otherwise require. Unlike the rule in most jurisdictions, California does not required advance fee payments to be place in a client trust account. However, California law does not permit lawyers to make an agreement, charge or retain a "non-refundable" flat or fixed fee that has not been earned. *Matthew v. State Bar* (1989) 49 Cal. 3d 784, 787-788; *Matter of Lais* (Rev.Dept 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea* (9th Cir. 1988) 838 F.2d 395, 397 (applying California law). A rule that authorizes lawyers to charge "non-refundable" flat or fixed fees is not good public policy. "Nonrefundable" when used to signify a prepaid fee is misleading because the lawyer's fee is never truly nonrefundable until earned. When used in connection with a "true" or "classic" retainer, the term "nonrefundable" is redundant. Not only is the label not controlling, the term "non-refundable" retainer has been the source of confusion and should not be encouraged in a rule of professional conduct. Most authorities are in agreement. See, Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 Fla. Coastal L. J. 293 (1999), ABA Manual on Professional Responsibility 45:109 (1993), *In re Mance*, D.C. Ct. of Appeals, 06-BGT-890 (09-24-2009). Many criminal defense lawyers, including some who submitted comments to the earlier version of proposed Rule

1.5, said they would agree to refund a portion of a flat or fixed fee to a client who changed counsel shortly after paying the fixed fee or if charges were dismissed soon after the lawyer was retained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:	(a) A lawyer shall not make an agreement for, charge, or collect an ~~unreasonable~~ <u>unconscionable or illegal</u> fee or an ~~unreasonable amount for expenses. The factors to be considered~~ <u>unconscionable or illegal</u> in determining the reasonableness of a fee include the following: <u>house expense.</u>	The first sentence of paragraph (a) has been revised to substitute the recommended standard – unconscionable or illegal – for the Model Rule's "reasonable" standard. See Introduction. The second sentence has been similarly revised and moved to paragraph (c) as that paragraph's introductory clause. The limitation in paragraph (c) on charging an unconscionable or illegal expense is limited those expenses charged that incurred in-house by a lawyer, over which the lawyer has control. The Commission was concerned that some expenses incurred, for example from retaining consultants and experts, might be viewed as unconscionable. However, the cost of such expenses are often beyond the ability of a lawyer to control.
	<u>(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee would amount to an improper appropriation of the client's funds because there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.</u>	The Commission recommends including a definition for "unconscionable" fee, a definition not provided in current rule 4-200. The language of the definition is taken from California decisional law, including two Supreme Court cases. See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513]. Paragraph (b) is intended to be used in conjunction with the factors set forth in paragraph (c) as an analytical framework for determining whether a fee is unconscionable. The last sentence specifies the time at which the conscionability of a fee is to be determined.

* Proposed Rule 1.5, XDraft 14.1 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
(8) whether the fee is fixed or contingent.	~~(8)~~ whether the fee is fixed or contingent.	Subparagraph (9) is identical to Model Rule 1.5(a)(8).
	<u><i>(10) the time and labor required.</i></u>	Subparagraph (10) consists of language that has been moved from Model Rule 1.5(a)(1) and given its own subparagraph.
	<u>(11) whether the client gave informed consent to the fee or in-house expense.</u>	Subparagraph (11) has no counterpart in the Model Rule. It is carried forward from current rule 4-200(B)(11), which provides: "(11) The informed consent of the client to the fee."
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.	~~(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.~~	The Commission recommends deletion of Model Rule 1.5(b), which prescribes what a lawyer is obligated to communicate to a client about the scope of representation and basis or rate of the fee. Those requirements are already addressed in Business & Professions Code § 6148. Under that statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6148(c). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A	~~(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A~~	The Commission recommends deletion of Model Rule 1.5(c), which prescribes a lawyer's duties when the lawyer is retained on a contingent fee basis. Those requirements are already addressed in Business & Professions Code § 6147. Under that

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.	~~contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.~~	statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6147(b). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.
(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.	(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a ~~domestic relations~~<u>family law</u> matter, the payment or amount of which is contingent upon the securing of a ~~divorce~~<u>dissolution or declaration of nullity of a marriage</u> or upon the amount of ~~alimony~~<u>spousal</u> or <u>child</u> support, or property settlement in lieu thereof; or	Paragraph (d) is based on Model Rule 1.5(d), except that the language in subparagraph (1) has been revised to conform to the language used in that area of law in California, e.g., "family law" in place of "domestic relations". The Commission recommends adoption of Model Rule 1.5(d) as revised. The Commission recognizes that there are other kinds of contingent fee cases that might be prohibited, for example, the representation of a governmental entity by a private lawyer or firm on a contingent basis, (see, e.g, County of Santa Clara v. Superior Court (2008) 74 Cal.Rptr.3d 842, review granted, 80 Cal.Rptr.3d

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(2) a contingent fee for representing a defendant in a criminal case.	629 (7/23/2008). However, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g. In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy. In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
(e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.	~~(e) A division of a fee between lawyers who are not in the same firm may be made only if:~~ ~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~ ~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~ ~~(3) the total fee is reasonable.~~	The Commission recommends deletion of Model Rule 1.5(e) because the subject of fee divisions between lawyers is addressed in a separate rule. See proposed Rule 1.5.1. The Commission determined that fee divisions should be addressed in a free-standing rule because: (i) proposed Rule 1.5.1 is a substantial departure from the Model Rule (ii) the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, and (iii) of the large amount of litigation this Rule has traditionally engendered. See proposed Rule 1.5.1, Introduction, ¶. 8.
	<u>(e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "nonrefundable," or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.</u>	Paragraph (e) has no counterpart in the Model Rule. In recommending its adoption, the Commission is attempting to balance the interests of clients in taking advantage of the certainty of a flat fee agreement (see Explanation of Changes for paragraph (f)), while still being able to discharge their lawyers at any time without the threat of losing the fee that was advanced to the lawyer whom the client seeks to discharge, and the interests of preventing attachment by third parties of fees advanced by the client. Instead of banning "nonrefundable" or "earned-on-receipt" fee agreements outright, or simply prohibiting the use of these terms under any circumstances, after further consideration following the extensive public comment, the Commission determined that lawyers should be permitted to use these terms so long as they make certain disclosures in writing to the client.

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
		The disclosures simply state the current law of California, i.e., that no fee nonrefundable until earned and a client has the right at any time to discharge the client's lawyer. Paragraph (f) describes two kinds of fee arrangement with which the terms "nonrefundable" and "earned on receipt" are commonly used. The concept of paragraph (e) is also found in Arizona Rule 1.5(d)(3). See also Explanation of Changes for paragraph (f) and Comments [6A] and [6B].
	<u>(f) A lawyer is permitted to denominate a fee as "earned on receipt" or "nonrefundable" only in making an agreement for the following types of fee arrangements:</u>	Paragraph (f) permits the use of the terms, "nonrefundable" and "earned on receipt" only in two types of fee arrangements, as described in subparagraphs (f)(1) and (f)(2).
	<u>(1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.</u>	Subparagraph (f)(1) is the first of the fee arrangements that this Rule permits to be denominated as non-refundable or earned on receipt. Subparagraph (f)(1) carries forward this nonrefundable/earned on receipt fee arrangement that traditionally has been recognized in the profession and is already found in current rule 3-700(D)(2).
	<u>(2) a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.</u>	Subparagraph (2) describe the second of the fee arrangements that can be denominated as nonrefundable or earned on receipt: a flat fee. A variant of subparagraph (2) was added following the initial public comment to address concerns raised by members of

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<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
		the California criminal defense bar that prohibiting such earned-on-receipt flat fees and requiring all such fees paid to criminal defense lawyers to be advance fees, could result in the government impounding the fee advance, thereby preventing a criminal defendant from retaining the defendant's counsel of choice. The Commission believes the written disclosures required under paragraph (e) will operate to prevent abuses of the flat fee arrangement and avoid the problems envisioned by the defense bar. See the Public Comment chart for a complete list of the members of the California criminal defense bar who submitted public comment on proposed Rule 1.5.
	<u>(g) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.</u>	Paragraph (g) addresses fee agreement modifications that occur during the course of a representation. Paragraph (g) has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. In response to Board member concerns about the Commission's initial proposal for limited applicability of Rule 1.8.1 to fee agreement modifications, paragraph (f) was drafted and garnered the support of a minority of the Commission. The minority drafted paragraph (g) to afford new public protection by prohibiting a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (1) the client is represented by an independent lawyer regarding the modification; or (2) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Fee agreement modifications that are not adverse to a client's interests are not prohibited by paragraph (f) and, in this regard, there are new comments that provide guidance for applying the rule. See also Explanation of Changes for Comments [3] – [3C].

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
<i>Reasonableness of Fee and Expenses</i> [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. . . . [COMMENT [1] is continued in the next row]	~~Reasonableness~~<u>Unconscionability</u> of Fee ~~and Expenses~~ <i>[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., Kallen v. Delug (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., In re Shalant (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; In re Harney (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. E.g., Birbrower, Montalbano, Condon and Frank v. Superior Court (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; In re Wells (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.</i>	The title for this section of the Rule has been revised to reflect the standard being recommended. The Commission recommends that Model Rule 1.5, cmt. [1] be rejected because it addresses the reasonable fee standard, which the Commission has recommended be rejected. See Introduction. In its place, the Commission has proposed Comment [1] and [1B], which clarifies paragraphs (a) and (b) and provides additional guidance for their application by citing to California decisional law concerning illegal or unconscionable fees.
[COMMENT [1] continued] The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses	<i>[1B] Paragraph (a) ~~requires that lawyers charge fees that are reasonable under the circumstances~~ defines an unconscionable fee. See Herrscher v. State Bar (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; Goldstone v. State Bar (1931) 214 Cal.</i>	Comment [1B] emphasizes that the eleven factors in paragraph (c) are not exclusive, and that not all of them will necessarily be relevant in every instance. The next-to-last sentence observes that contingent fees are subject to the same unconscionability standard as other fee arrangements. Finally, the last sentence

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

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

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Modifications of Agreements by which a Lawyer is Retained by a Client</u> <u>[3] Paragraph (g) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (g). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.</u>	See above explanation of paragraph (g). Comment [3] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3] clarifies that the Paragraph (g) prohibition applies only to a material fee agreement modification with a current client that is adverse to the client's interests, provides a standard for determining whether a modification is material, and clarifies a common agreement that would not be material.
	<u>[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (g). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (g). A modification that extends the time within which a</u>	See above explanation of paragraph (g). Comment [3A] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3A] addresses the issue of whether a particular fee agreement modification is "material" and "adverse." It provides an example of a modification that is material and adverse and an example of a modification that is not material and not adverse.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>client is obligated to pay a fee ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.</u>	
	<u>[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. <i>Setzer v. Robinson</i> (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., <i>Ramirez v. Sturdevant</i> (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; <i>Berk v. Twentynine Palms Ranchos, Inc.</i> (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; <i>Carlson, Collins, Gordon & Bold v. Banducci</i> (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.</u>	See above explanation of paragraph (g). Comment [3B] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3B] clarifies that while only certain fee agreement modifications are subject to paragraph (g), lawyers still have professional responsibilities to clients with respect to all fee modifications. In general, these responsibilities arise from the lawyer's fiduciary duties and are addressed in ethics opinions and case law. The Comment is intended to alert lawyers about the existence of such duties and to direct lawyers to examples of current law on the subject. The Comment also provides cross references to Rule 1.4 regarding client communication, Rule 1.7 regarding conflicts of interests, and the statutory prohibition against conduct constituting moral turpitude found in the State Bar Act.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.</u>	See above explanation of paragraph (f). Comment [3C] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3C] explains that Rule 1.8.1 applies to a fee agreement modification that confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. Such fee modifications would be subject to the full rigorous protocol of Rule 1.8.1.
<i>Terms of Payment</i> [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.	Terms of Payment [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16~~(de)~~(2). ~~A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a~~ fee paid in property instead of money may be subject to the requirements of Rule ~~1.8(a) because such fees often have the essential qualities of a business transaction with the client~~<u>1.8.1</u>.	Comment [4] is based on Model Rule 1.5, cmt. [4]. The second sentence has been deleted because it concerns Model Rule 1.8(i), which the Commission has not recommended be adopted. The other changes are to correct the cross-references to the appropriate proposed Rule or provision of a proposed Rule.
[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is	[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is	Comment [5] is identical to Model Rule 1.5, cmt. [5] except that the last, hortatory sentence of the Model Rule comment has been deleted.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.	foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. ~~A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.~~	
<i>Prohibited Contingent Fees</i> [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.	Prohibited Contingent Fees [6] Paragraph (d) ~~prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision~~ (1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of ~~post-judgment~~ balances <u>past</u> due under <u>child or spousal</u> support, ~~alimony~~ or other financial orders because such contracts do not implicate the same policy concerns.	Comment [6] is based on Model Rule 1.5, cmt. [6]. The first sentence has been deleted because it simply restates the prohibition in paragraph (d)(1) and uses terminology different from that used in California. See Explanation of Changes for paragraph (d). The second sentence has been revised to substitute terminology used in California for the Model Rule terminology.
	<u>Prohibited Designation of Fees as Nonrefundable</u> <u>[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures</u>	Comment [6A], which is derived in part from Arizona Rule 1.5, Comment [7], clarifies the rationale underlying the Commission's approach in paragraph (e) and its application. Several cases

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made</u>	supporting the Commission's approach are included in the Comment.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., <i>Matthew v. State Bar</i> (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; <i>In re Matter of Lais</i> (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudge the outcome of fee arbitration proceedings as this Rule, like any law, must be applied to the facts of a particular matter.</u>	
	<u>Paragraph (e) Requirement of a Writing in an Emergency</u> <u>[6B]A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (e) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (e) as soon as practicable after the legal services have been provided.</u>	At the request of the criminal bar, the Commission has added a Comment that explains how a lawyer should proceed in the event of an emergency. The Comment recognizes that under exigent circumstances, a lawyer might not be able to provide the client with the required disclosures in writing. However, the lawyer must provide those disclosures as soon as practicable.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Payment of Fees in Advance of Services</u> <u>[7] Every fee agreed to, charged, or collected, including a fee under paragraph (f)(1) or (f)(2), is subject to paragraph (a) and may not be unconscionable.</u>	Comment [7] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [10].
	<u>[8] Paragraph (f)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (f)(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer's availability and that the client will be separately charged for any services provided. Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].</u>	Comment [8] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [13]. It carries forward the substance of the definition for "true retainer" in current rule 3-700(D)(2). The Comment also provides guidance on determining whether a particular fee arrangement is a true retainer.

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[9] Paragraph (f)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services.</u>	Comment [9] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [14]. The Comment clarifies that if all the requirements set forth in subparagraph (e)(2) are not satisfied, the flat fee must be treated as if it were an advance fee under Rule 1.15.
	<u>[10] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2), the lawyer must comply with Rule 1.15(d)(2).</u>	Comment [11] has no counterpart in the Model Rule. Comment [11] points lawyers to Rule 1.15(d)(2) for their obligations when disputes arise concerning fees advanced under paragraph (e)(1) or (e)(2).
<i>Division of Fee</i> [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In	Division of Fee ~~[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In~~	Model Rule 1.5, cmts. [7] and [8] have been deleted because they relate to fee divisions, which are covered separately under proposed Rule 1.5.1. See also Explanation of Changes for paragraph (c).

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

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<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.	~~entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.~~	
	[11] A division of fees among lawyers is governed by Rule 1.5.1.	Comment [12] provides a cross-reference to Rule 1.5.1, the proposed Rule that governs fee divisions.

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Rule 1.5: Fees For Legal Services

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the ~~lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or fee~~ amount to an improper appropriation of the ~~client's~~ client's funds. ~~because there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts.~~ Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
 - (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.

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

~~(1) a lawyer may charge (e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "nonrefundable," or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.~~

(f) A lawyer is permitted to denominate a fee as "earned on receipt" or "nonrefundable" only in making an agreement for the following types of fee arrangements:

(1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any but not as compensation for legal services performed. A true retainer must or to be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt performed.

~~(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can~~

~~easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.~~

~~(fg)~~ A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Rev. Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Rev. Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under *Business and Professions Bus. & Prof.* Code section, § 6146]), or when an unlicensed lawyer provides legal

services. ~~(e)~~E.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (~~Rev.~~Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896-~~2~~].

[1B] Paragraph (b) defines an unconscionable fee. ~~(See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]-~~4~~].~~ The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) ~~of this Rule.~~ In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

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

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

[3] Paragraph ~~(f)~~(g) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. ~~-~~ A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is

contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph ~~(f)~~(g). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

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

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in ~~paragraph (f)~~Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. ~~(See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]-~~4~~).~~ Depending on the circumstances, other ~~Rules~~rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

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

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

Prohibited Contingent Fees

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

Prohibited Designation of Fees as Nonrefundable

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudice the outcome of fee arbitration

proceedings as this Rule, like any law, must be applied to the facts of a particular matter.

Paragraph (e) Requirement of a Writing in an Emergency

[6B] A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (e) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (e) as soon as practicable after the legal services have been provided.

Payment of Fees in Advance of Services

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

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). ~~The~~(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer's availability, and that the client will be separately charged for any services provided, ~~and that the lawyer will treat the payment as.~~ Concerning the lawyer's ~~property immediately on receipt.~~obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

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

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

~~[11]~~ [10] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) ~~of this Rule,~~ the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

~~[12]~~ [11] A division of fees among lawyers is governed by Rule 1.5.1.

Rule 4-2001.5: Fees for Legal Services
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (Bb) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee would amount to an improper appropriation of the client's funds because there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. ~~Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:~~
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
- (1) ~~The~~the amount of the fee or in-house expense in proportion to the value of the services performed_;
 - (2) ~~The~~the relative sophistication of the ~~member~~lawyer and the client_;
 - (3) ~~The~~the novelty and difficulty of the questions involved_; and the skill requisite to perform the legal service properly_;
 - (4) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member~~lawyer_;
 - (5) ~~The~~the amount involved and the results obtained_;
 - (6) ~~The~~the time limitations imposed by the client or by the circumstances_;
 - (7) ~~The~~the nature and length of the professional relationship with the client_;
 - (8) ~~The~~the experience, reputation, and ability of the ~~member~~lawyer or ~~members~~lawyers performing the services_;
 - (9) ~~Whether~~whether the fee is fixed or contingent_;
 - (10) ~~The~~the time and labor required_;
 - (11) ~~The informed consent of whether~~ the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
- (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.
- (e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “nonrefundable,” or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.
- (f) A lawyer is permitted to denominate a fee as “earned on receipt” or “nonrefundable” only in making an agreement for the following types of fee arrangements:
- (1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.
- (2) a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.
- (g) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client’s interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer

of the client’s choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. E.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.

[1B] Paragraph (b) defines an unconscionable fee. See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]. The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a). In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

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

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

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

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

ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

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

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

Prohibited Contingent Fees

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

Prohibited Designation of Fees as Nonrefundable

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but

merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudge the outcome of fee arbitration proceedings as this Rule, like any law, must be applied to the facts of a particular matter.

Paragraph (e) Requirement of a Writing in an Emergency

[6B] A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (e) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (e) as soon as practicable after the legal services have been provided.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee under paragraph (f)(1) or (f)(2), is subject to paragraph (a) and may not be unconscionable.

[8] Paragraph (f)(1) describes a true retainer, which is sometimes known as a “general retainer,” or “classic retainer.” A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer’s availability, but that will be applied to the client’s account as the lawyer renders services, is not a true retainer under paragraph (f)(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer’s availability and that the client will be separately charged for any services provided. Concerning the lawyer’s obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

[9] Paragraph (f)(2) describes a fee structure that is known as a “flat fee”. A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services.

[10] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2), the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

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

Rule 1.5: Fees For Legal Services
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee would amount to an improper appropriation of the client's funds because there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
 - (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.
- (e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “nonrefundable,” or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.
- (f) A lawyer is permitted to denominate a fee as “earned on receipt” or “nonrefundable” only in making an agreement for the following types of fee arrangements:
 - (1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.
 - (2) a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.
- (g) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client’s interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer

of the client’s choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. E.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.

[1B] Paragraph (b) defines an unconscionable fee. See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]. The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a). In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

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

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

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

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

ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

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

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

Prohibited Contingent Fees

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

Prohibited Designation of Fees as Nonrefundable

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but

merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Laís* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudice the outcome of fee arbitration proceedings as this Rule, like any law, must be applied to the facts of a particular matter.

Paragraph (e) Requirement of a Writing in an Emergency

[6B] A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (e) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (e) as soon as practicable after the legal services have been provided.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee under paragraph (f)(1) or (f)(2), is subject to paragraph (a) and may not be unconscionable.

[8] Paragraph (f)(1) describes a true retainer, which is sometimes known as a “general retainer,” or “classic retainer.” A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer’s availability, but that will be applied to the client’s account as the lawyer renders services, is not a true retainer under paragraph (f)(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer’s availability and that the client will be separately charged for any services provided. Concerning the lawyer’s obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

[9] Paragraph (f)(2) describes a fee structure that is known as a “flat fee”. A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services.

[10] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2), the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

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

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

**TOTAL = 66 Agree = 0
Disagree = 60
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Arguedas, Cassman & Headley, LLP	D	No	1.5(e)(2)	We are unaware of any pattern of attorneys abusing non-refundable fees to bilk their clients. Such misconduct is barred by already-existing rules, such as current Rule 4-200, which prohibits attorneys from charging or collecting unconscionable fees. Exception (e)(1) to the Proposed Rule purports to permit a “true retainer” fee to “ensure the lawyer’s availability to the client.” But the Proposed Rule would prohibit an agreement under which the retainer would constitute a minimum fee that ensures the attorney’s availability yet also serves as a credit against which the attorney charges her time until the fee is exhausted. Such arrangements are common and benefit both the client and the attorney. Proposed Rule 1.5(e)(2) purports to permit “flat fee” agreements under which the fee becomes the property of the attorney upon receipt, but the Rule will in fact make such arrangements impossible. Subsection (e)(2) requires a written agreement that states, among other things, “that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.” This is a contradiction – the fee cannot be the lawyer’s property upon receipt if it is also potentially refundable.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning “nonrefundable” and “earned on receipt” fees. Notwithstanding the commenter’s stated position and practice, with the exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.

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

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The Proposed Rule would essentially bar flat fee arrangements by placing all the risk on the attorney – under the Proposed Rule, if the case requires less work than anticipated at the time of the agreement, the attorney will be required to refund a portion of the fee, but if the case requires more work, the attorney will be stuck with the flat fee. Few attorneys will enter into such an arrangement. It is a matter of concern that the Proposed Rule has proceeded this far toward approval without proper notification to the Bar's membership. Many attorneys and organizations opposed previous efforts to make similar amendments to the rules governing non-refundable fees, yet this Proposed Rule was conditionally approved by the Board of Governors without any meaningful opportunity for public comment. This procedure seems to violate the terms of Rule of the State Bar 1.10, and in any case is not advisable when, as here, the proposal at issue is likely to be the subject of significant controversy.	The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's

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						reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
2	Ash, Jon	D	No	1.5(e)(2)	I have been a licensed attorney since 1972. My practice has been limited to criminal defense. For the past 38 years, I have been charging a flat fee service based on my experience in dealing with every type of criminal offense. I have found, over the years, that my clients would much rather know, up front, what the handling of a case is going to cost. If my fees aren't acceptable to them, I can always refer them to an attorney that might charge less. If the handling of a case takes much less time than anticipated, I have the ability to refund fees if I wish. In all my years, I might have had one or two clients, out of hundreds, who have asked for any type	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading.

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of refund. It's been my experience most criminal defense attorneys in California charge a flat fee. Not only does a client feel more assured knowing what the fees are going to be, I believe an all inclusive fee encourages more attorney-client contact. I tell my clients to call with any problem or question. This approach promotes better trust; the client knows I'm not encouraging contact so I can bill for an extra 15 minutes. My primary practice is now in Oregon. I've been practicing in Bend since 1993. A lot of criminal defense attorneys in Oregon charge by the hour and I've heard many complaints from clients regarding that approach. Clients feel they are being "nickel and dimed" to death and appreciate the flat fee approach. I constantly hear that their attorney is "dragging the case out" just to charge additional hourly fees. If an attorney is too expensive, clients won't hire them. Fee arbitration is always an option if a client is really taken advantage of. Clients are usually looking for results. If they get the result they want for a set amount of money, they are happy. Curtailing the flat fee would be a mistake.	Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
3	Avola, Melyssa	D	No	1.5(e)(2)	Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non- Refundable Retainers would radically alter the way the majority of the Criminal Defense Bar does business. "Flat Fees" or "Fixed Retainers" are a common, and accepted way to	See Response to California Attorneys for Criminal Justice ("CACJ").

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					retain clients in need of a criminal defense attorney. Such a practice keeps fees low to accommodate clients that may not be financially able to pay for accrued hourly fees and costs. Please refer to the attached letter from the President of CACJ Board of Governors, Ann C. Moorman for more information.	
4	Ball, Scott	D	No	1.5(e)(2)	This is simply untenable and would have a profound negative effect on the practice of law in the area of criminal defense, as well as other areas of law as well. Flat fee, non-refundable retainers enable attorneys to take cases where it is impossible at the outset to know the amount of work that will be necessary. When we take a case, we agree that we will not ask for additional funds when the work necessary is greater than anticipated - and to be able to make that guarantee it has to work both ways.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or

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						part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
5	Berman, Richard P.	D	No	1.5(e)(2)	The new proposed State Bar Rule 1.5(e)(4-200) to prohibit non-refundable retainers is an anti-consumer measure. I have been practicing criminal law, both as a prosecutor and a defense attorney, for almost 40 years. During that time I have won numerous awards and received the highest possible peer ratings and reviews. It is unfair to the public to prohibit them from negotiating a reasonable and fair price for my services. In America, competition and the free market are hallmarks of our success. If a consumer wants to pay for my years of experience, track record of success, thousands of hours of post-law school education, reputation and expertise, they should be free to do so. If I could not charge a significant non-refundable retainer, I would be likely forced to charge an hourly fee which could not be reflective of my past accomplishments and experience in relationship to a relatively new and unproven attorney. If the new attorney is charging the "going rate" of \$250.00 to \$350.00 per hour, I would have to charge many times that amount per hour to reasonably value my services. Simply put, a large non-refundable retainer paid to me may provide the results and the piece of mind that a new attorney may never be able to provide, and do so with a fair and reasonable cost to the client.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing

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					Anyone who has dealt with a person charged with a serious crime, or their family, knows the stress that a criminal prosecution visits upon a defendant and his/her family. If I can save a person's liberty, reputation, life savings, and professional license, and do so in an expeditious manner that does not force him/her and the family to go through protracted proceedings, then the consumer has enjoyed the freedom to hire the lawyer they desire at the price that they are free to negotiate and to enjoy the results, of the many thousands of clients I have represented the complaints about the fees can be counted on the fingers of one hand. That is in almost 40 years of handling both serious and mundane criminal matters and charging what I and the client feel is fair and reasonable, I simply cannot provide such services under the new proposed state Bar Rule. Both the public and I will lose a great deal if this measure is passed.	of competing client interests.
6	Bermant, Alison	D	No	1.5(e)(2)	I have been practicing criminal defense law for 11 years now; eight years in private practice after working as a public defender. To have the State Bar suddenly involved in my fee contracts with my clients is very disturbing. 100% of the time that I have allowed clients to make payments to me for work performed, I have not been paid. There are no exceptions to this. My experience is such that if I am not paid in full prior to the making of the first	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not

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					court appearance, I will not be paid. Once a case is resolved, the client no longer has any interest in keeping his or her obligations to me because they are either incarcerated or so focused on paying court fines and reporting to their probation or parole officer that it is not on their agenda to see that the lawyer who helped them gets paid. Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues over being prosecuted for their crimes. Flat rate fees in criminal cases are the only way to assure an attorney gets paid. While many people believe that criminal lawyers are getting rich and some sort of windfall by this agreement, I am here to tell you that there are so few Johnny Cochrans in this world. I still live month to month most times. I have been out of law school for 11 years and every single month have made significant law student loan payments (still am). Not being paid for my work eventually means I go out of business. That is my reality. I vehemently oppose any modifications to the way I conduct my business. I'm happy to come down and	earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.

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					discuss this in person as well so you understand what real life is really about.	
7	Beverly Hills Bar Association	D	Yes	1.5(e)	We write in opposition to subdivision (e) of the Proposed New Rule of Professional Conduct 1.5, "Fees for Legal Services." Subdivision (e) would subject lawyers to professional discipline for using the term "non-refundable" in their retainer agreements. We do not believe that lawyers who mistakenly employ the wrong term for an otherwise-proper fee agreement should be disciplined. In addition, ABA Model Rule 1.5 does not impose discipline for use of the term "non-refundable." Adoption of the Proposed Rule 1.5(e) would mean that a lawyer following public policy and using a written fee agreement, but selecting the term "non-refundable," would be subject to discipline, whereas a lawyer working without a written fee agreement would not be disciplined. That result would provide a disincentive for using written fee agreements and would be contrary to the expressed policy of the State of California. The distinction between "non-refundable" and "true retainer" is subtle. Ethics experts can and often do disagree. Many criminal defense lawyers (and a host of other lawyers) do not know the nuanced issues that can be triggered by use of these terms, and in reality, many lawyers use the terms interchangeably. Lawyers are not and should not be subject to professional	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.

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					discipline for inadvertence or negligence. Use of a non-refundable fee is not sanctionable in other jurisdictions. As a Louisville Bar Association article notes, “[m]any jurisdictions, including Kentucky, allow an attorney to refer to a fee as non-refundable.” A recent order from the Michigan Supreme Court validated a lawyer’s non-refundable fee agreement in a disciplinary case, and dismissed the charges against the lawyer. (attached) The Court cited the relevant rule, and stated that the “agreement is unambiguous because it clearly states that the \$4,000 minimum fee is non-refundable.” In addition, esteemed ethics professors Geoffrey Hazard and William Hodes conclude that “[s]everal situations may be imagined in which a substantial non-refundable fee—better understand as a minimum fee—might be justified.” While we do not support or endorse gratuitous use of the term “non-refundable,” we do oppose a rule that will discourage written fee agreements and subject to discipline numerous lawyers who misunderstand the sophisticated distinctions, particularly when this terminology is widely permitted throughout the United States.	The Commission also notes that the Rule as revised does not prohibit flat or fixed fees, or even absolutely prohibit the use of the terms “nonrefundable” or earned on receipt,” or similar terms. Instead, the Rule is intended to ensure that clients are not misled into believing that they cannot recover fees paid in advance under any circumstances, which could result in their forfeiting their right to discharge their lawyer at any time.
8	Bloom, Allen	D	No	1.5(e)(2)	The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case. I can unequivocally state that the benefits and rights	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning “nonrefundable” and “earned on receipt”

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					of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis. The foundation for my beliefs are as follows: 1. A non-refundable and fixed fee agreement provides certainty to the client. They know what they are going to pay at the beginning of the case and they never have to worry that their fee will increase. In my cases, it usually means that I have greatly undercharged the client, because I end up spending more time on the case than I originally estimated, yet never charge a client more. 2. It provides better and full service to the client. The client never has to practice "check-book defense", deciding whether a particular meritorious motion or legal task should be taken as compared to what it would cost. There never is a "short changing" of services, but rather is an expansion of services available. 3. It increases access to the attorney. A client doesn't ever have to worry that he is going to suffer financially by being billed by communicating with his attorney a multitude of times. In this regard, I am reminded of a true story involving the client who met his lawyer at the Padre game, talked about Tony Gwynn and the Padre pitching and asked about the status of his case, only to	fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns.

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					receive a bill the following week for legal consultation. 4. It eliminates the chances of conflict between the client and his attorney. Because the attorney also gains certainty in the receipt of a non-refundable fee at the beginning of the case, there never is a situation where the attorney is not paid for his services, either intentionally or because of a change of financial circumstances of the client, meaning that the attorney does work for the client - maybe is forced to go to trial for the client cuz the judge will NOT relieve an attorney just for the client's failure to pay - all of which builds in a sometimes subtle and sometimes not so subtle conflict between client and attorney. It It should also be noted, that a non-refundable fee agreement is really a much fairer system, if there is ever a dispute as to the fee. This works to the benefit of the client. Let's look at the two circumstances: non-refundable and refundable. If there is a NON-refundable fee agreement, and at the end of the case or anywhere in the middle, the client disputes the fee, the client has the right to (a) attempt an informal resolution, but if such a resolution is not successful, has the right to (b) DEMAND arbitration and the atty MUST, as a matter of state law, accept the arbitration requirement. Of course, the client has the option of (c) filing a law suit. In all matters the attorney is obligated to try to resolve the matter.	However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.

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					On the other hand if there is a REFUNDABLE fee agreement, and the client disputes the fee, the client has the right to (a) seek an in informal resolution, but if such a resolution is not successful, but here the situation changes. The disputed funds now have to be placed in a special trust account and though the client has the right to demand arbitration, the attorney does NOT have the right to do so. In short, the client can refuse to try to settle the issue, and ignore all the efforts of the attorney to resolve the situation. The money remains in the trust account and the client, if she wishes, can do absolutely nothing and if she acts in this way, the ONLY resolution that the atty has is to SUE HIS CLIENT. It destroys atty-client trust; it works greatly to the detriment of the client; it potentially opens the door to privileged communications - it's just bad. Finally, it should be remembered that, of course, it is possible that there could be abuses by the unscrupulous atty taking advantage of a non-refundable fee agreement. There is a remedy is place to deal with such a circumstance. If a case is dismissed two days after filing, then, of course, the prohibition against unconscionable fees and my own ethics, demand that I return a large, if not all, the fee. If I, not my client, were to walk away from representation, then the full fee should be returned.	

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					But problems with unscrupulous attorneys can occur with equal frequency with any other billing system: hourly (where the hours can be gouged and multiplied for unnecessary work); task (where poor work can be done for services). simply put, there is no billing system which is immune for an unscrupulous attorney, or for that matter, an unscrupulous client. The best way to have fair fees and good services for clients, is to have good attorneys and fair clients, and no system of billing guarantees that, however, we should look to create a system which enhances the chances of good representation, and I have found, after 35 years of practice, that the best method is through a non-refundable fee system.	
9	Borden, Mark (Commenter submitted three separate comments on this rule.)	D	No	1.5(e)	The commenter disagrees with the proposed rule.	The Commission cannot provide a response without an explanation why the commenter disagrees with the Rule. However, the Commission directs the commenter to the response to California Attorneys for Criminal Justice ("CACJ")
10	Borden, Mark (Commenter submitted three separate comments on this rule.)	D	No	1.5(e)	The commenter objects to the aspect of the rule regarding non-refundable retainers. The commenter states that this proposed rule "is being done by people who are on large salaries, people from large law firms, and by people who work for the State Bar who have never had to practice in the private sector and earn fees from clients. This is another case of too many bureaucrats with too much time on their hands."	See response to California Attorneys for Criminal Justice ("CACJ"). The Commission disagrees with the commenter's allegations.

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11	Borden, Mark (Commenter submitted three separate comments on this rule.)	D	No	1.5(e)	If adopted, Paragraph (e) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyer and their clients. Commenter's letter contains 14 examples of potential negative impacts concerning the Proposed Rule.	See response to California Attorneys for Criminal Justice ("CACJ").
12	Breeze, John W.	D	No	1.5(e)(2)	As an attorney that has been in private practice for the last 33years, I highly disagree and oppose the proposed change to Rule 1.5(f), providing that "a lawyer shall not make an agreement for, charge, or collect a nonrefundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purposes of insuring the availability of the lawyer for the matter." This language clearly demonstrates the Commission's clear intent to abolish nonrefundable retainers subject to the limited exceptions in subparagraph (e). It prohibits the long-established practice of charging a minimum fee to insure availability where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. The obvious problem with subparagraph (e)(2) is that if any portion of a "nonrefundable" fee "may be" refundable, then the entire fee cannot be the lawyer's	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer

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					property. As a lawyer who has been in private practice since 1976, I highly oppose this amendment to the rules that would basically outlaw nonrefundable retainers. Isn't there anyone that has actually practiced in the private sector who understands what a nonrefundable retainer is? These types of fees are necessary in order to secure the attendance of attorneys at upcoming court proceedings and to guarantee that the client will be represented at those proceedings. If I am going to be required to refund, non refundable retainer fees, then I might as well get out of private practice. The amendment also fails to take into consideration that lawyers pay income taxes on nonrefundable retainer fees and if these fees are going to be refundable, it will have an impact on the lawyer's ability to report his true income to the Franchise Tax Board and the IRS. I ask you whether the State Bar has received any complaints from any of my clients dealing with the issue of nonrefundable retainer fees. I have no knowledge that any of my clients have ever objected to being charged a nonrefundable retainer fee. Therefore, there is no need to amend the Rules of Court if there are no complaints regarding the way I deal with nonrefundable retainers. This is just another example of how the State Bar is	includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current

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					trying to legislate in an area that properly needs to be addressed either by the state legislature or by lawyer professional groups as opposed to the State Bar. I strongly recommend that this amendment be rejected.	California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
13	California Attorneys for Criminal Justice (CACJ) [Nancy Moorman]	D	Yes	1.5(e)	Non-refundable retainer agreements have been accepted as proper fee arrangements for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid." We are unclear why the Board is now considering a ban on non-refundable fee agreements. As we understand it, there have not been a substantial number of complaints from consumer/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer

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					As with all fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: (1) the rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification. As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated. Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the	is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This

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					entire length of the case, including trial. This is not required under current rules and it not practical. Since the proposal would require the “flat fee” to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar. Paragraph 1.5(e)(2)’s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the “sanctified” State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the “gold standard” for California lawyers. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Often lawyers quote flat fees that are far less than	leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in those provisions.

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					what the cost would be if charged at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposed Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee," which, under the Proposed Rule would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.	
14	Campbell, James F.	D	No	1.5(e)(2)	Non-refundable fees, or flat fees, have been used in criminal cases in California for well over a hundred years. The average client is better served by a flat fee in a criminal case, particularly in a misdemeanor case, where to charge hourly would be prohibitive. The average client in a criminal case has no way of having the costs for criminal representation predicted with any real accuracy. It is very difficult for defense lawyers to collect an hourly fee in a criminal case after the work has been performed. The flat fee structure is a better way to deliver this type of legal representation. The client has a predetermined fee that they know they can pay or not pay. It is not open ended. This also encourages counsel to more efficiently deliver the legal service without an eye on the clock. To my knowledge, I have not heard of any reports where clients have	See response to California Attorneys for Criminal Justice ("CACJ").

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					been harmed by non-refundable retainers in criminal cases. I know that my clients are very happy to know what it will cost to defend the case and that the fee will not exceed that non-refundable flat fee. I wish I had more room to tell you how stupid an idea this is. Where is the problem that you feel needs a solution?	
15	Cooper, James	D	No	1.5(e)(2)	With respect to privately criminal cases, the hourly rate scheme is impractical and unworkable. If attorneys could only ask for their compensation after the services have been provided, then clients would never pay us. There are rules in place to deal with excessive fees. This proposed rule would actually frustrate a client's effort to hire a lawyer.	See response to California Attorneys for Criminal Justice ("CACJ").
16	Criminal Defense Lawyers Club of San Diego	D	Yes	1.5(e)	This Proposed Rule puts in place a condition that essentially makes the fee "flat" only upon the client's wish as the case proceeds. If the work for the attorney is substantial, the client will be content with the flat fee arrangement. But if the attorney seems to be on the way to a result that will end the case on a favorable note for the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. Specifically, paragraph (e) of Rule 1.5 prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). Yet, the latter Rule, while first stating the fee is the attorney's on delivery, then says the client may be entitled to a refund prior to the "completion" of services. This paragraph adds uncertainty (which will certainly promote fee disputes) and promotes the	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of

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					problem identified in the preceding paragraph.	a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into

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						proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
17	Daar, Randolph E.	D	No	1.5(e)	I have used non-refundable retainers at various times in my practice. The rules that exist now adequately protect clients from excessive fees or failure of lawyers to refund fees upon withdrawal from representation. The new proposed rule deprives a client of the ability to formally retain an attorney in the circumstance in which, because of the nature of the scope of the proposed representation, it is necessary to secure the attorney services.	See response to California Attorneys for Criminal Justice ("CACJ").
18	Davies, Leroy	D	No	1.5(e)(2)	It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingent or flat).	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the

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					It is internally inconsistent and confusing: the fee is the “lawyer’s property on receipt,” but the client is told s/he/it “may be entitled to a refund” under circumstances. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that “the client may be entitled to a refund of a portion of the fee” appears to give clients a residual interest in a fee that purportedly was “the lawyer’s property immediately on receipt.” This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.” It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.” Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged.	exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential

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					It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule. Finally, it was submitted to the State Bar Board of Governors for preliminary approval without the <i>prior</i> public comment that is mandated by State Bare Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.	problems as they arise from applicable Federal or State statues, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment

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						distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
19	Dillworth, Andrew & Balin, William	D	No	1.5(e)(2)	We oppose subdivision (e) of rule 1.5 as presently drafted. Subdivision (e) begins with the predicate that "[a] lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:...." We respectfully submit that there is no such thing as a "non-refundable" fee and therefore the premise upon which the subdivision is based is misguided and is likely to create unnecessary confusion for both lawyers and clients. The predicate language carries two implications. First, it implies that a fee can actually be non-refundable. Second, it implies that a non-refundable fee is ethically permissible in certain circumstances. According to proposed rule 1.5(e)(1) & (2), those circumstances include: (1) a true retainer, and (2) a flat fee for specified services. Even a true retainer, however, is subject to possible refund under the particular facts and circumstances of	The Commission agrees with the commenters that no fee, except for a true retainer, is nonrefundable, and has attempted in both public comment drafts to so provide. However, the Commission also recognizes that there are genuine concerns expressed by other public commenters and so has further revised the Rule to balance competing client interests. The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. As noted in the revised draft, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To

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					a case. If a lawyer whose availability is to be secured by a true retainer is not available, then there is no legitimate basis for the lawyer to keep the retainer. Consider, for example, a situation in which the retainer is paid to secure the availability of a prominent criminal defense attorney. The client's willingness to pay the retainer is based on the attorney's high profile in this area of practice, and her busy trial schedule. Were the attorney to subsequently advise the client that she had another case that demanded her attention but someone else within the firm would be available to represent the client, would the client not be entitled to a refund of the true retainer? A true retainer must also be earned in order for the lawyer to have a legitimate claim to it. If the lawyer makes him or herself available for the agreed period of time then she earns the retainer. It may be earned earlier than subsequent fees incurred in connection with the provision of actual legal services, but it is not earned simply by the lawyer's physical receipt of the funds. The same is equally true, if not more so, with regard to a flat fee for specified services. Such fees typically contemplate not only availability of the lawyer or law firm, but the provision of specified legal services in connection with the case. In many cases this includes the totality of legal services that will be required from beginning to conclusion of the representation. A flat fee is not earned on receipt of the funds, but rather upon provision of the specified	state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission also believes that the written disclosures required by paragraph (e) will avoid the potential that a client will misapprehend the true nature of the fixed fee arrangement, while at the same time providing some comfort to lawyers and clients in preventing the seizure by third parties of funds advanced to the lawyer.

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					legal services. From the misguided premise that a fee can be non-refundable, subdivision (e) compounds the problem by stating "[i]f agreed to in advance, in a writing signed by the client, a flat fee is the lawyer's property on receipt." In our view, it should not be within the purview of the fee rule to try and create, modify or dictate property rights between lawyers, clients and third parties; and, the inclusion of this language does not effectively establish such rights. Moreover, attempting to define such rights and interests under a general rule ultimately fails because the issues of "when" a fee is earned and "whether it is to be refunded" are fact-specific. Subdivision (e) seems to acknowledge these points when it states that a lawyer who is attempting to earn his or her fee "upon receipt" must nonetheless advise the client in writing that the non-refundable fee may in fact be refundable if the agreed-upon legal services have not been completed. Subdivision (e) therefore sets up an oxymoron. It purports to recognize the existence and permissibility of a "non-refundable" fee earned on receipt, while simultaneously acknowledging that such a fee is still "refundable." The general public and lawyers, who seek guidance from the rules of professional conduct, are not well-served by a facially inconsistent rule - particularly in an	

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					area as important as the provision and handling of client funds. It is common knowledge that the lawyers), are entitled to clear guidance regarding these issues. The confusion created by subdivision (e) is exacerbated by the fact that the requirements of 1.5(e)(2)(iii)-(v)' which deal with flat fees are not present in 1.5(e)(1) which deals with true retainers. Proposed rule 1.5(e)(2)(iii)-(v) requires a lawyer to advise a client in writing: "... (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed." Why is a client who pays a flat fee, but whose lawyer does not perform any or all of the contemplated services, entitled on the face of the rule to a potential refund while a client who pays a true retainer, whose lawyer is not in fact available, is not? Why, for that matter, is the flat fee earned on receipt when the true retainer is not? The materials provided by the Commission do not provide a rationale for differentiating between these two types of allegedly non-refundable fees, yet the requirements set forth in 1.5(e)(2) are not set forth in [1.5(e)(1)]. We respectfully suggest that the answer to these questions is that neither fee is truly "non-refundable," and neither is "earned" simply by receipt.	

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					The notion that a true retainer or flat fee can truly be non-refundable is also at odds with the language in proposed rule 15, as well as other rules of professional conduct, which recognize that a fee (regardless of type) may not be illegal or unconscionable, and that any unearned portion of a fee must be refunded. See, e.g., proposed rules 1.5(a) and 1.16(e). The provisions of subdivision (e) as drafted make these other provisions and rules, and the relationship between them, all the more confusing for practitioners and clients. The effort to dictate through a rule of discipline when a fee is earned and whether it is refundable is also inconsistent with the approach taken by the Commission in other rules. For example, proposed rule 1.15(g) recognizes that when there is a dispute between a client and lawyer over funds, the lawyer must place the disputed funds in a trust account until the dispute is resolved. The rule does not seek to determine whether the fees were in fact earned, who they belong to, etc, What principled basis is there for taking a different approach when addressing the important and fact-specific issue of whether a client's fee will be non-refundable? Given that the provisions of subdivision (e) undermine its central premise (i.e., that a fee can be non-refundable), the question becomes "what is the real purpose and function of subdivision(e)?" The answer	

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					apparently is that it is directed at assisting a subset of lawyers (principally, criminal defense lawyers) in trying to fend-off third party efforts to seize client funds. We would respectfully submit that regardless of whether one agrees with the proposition that a fee rule should be drafted for the purpose of delineating property rights between a client and a third party, the effectiveness of the provision is dubious. It is not clear that a rule of discipline would have any effect on resolution of the legal issue of who actually owns or is entitled to the property (whether through seizure proceedings or otherwise). Whatever minimal benefit lawyers might receive from being able to point to such language is significantly outweighed by the confusion and risks that such a rule would create for clients. The esoteric issues, and special interests, that underlie the rationale for subdivision (e) will be lost on clients. At the end of the day, a client who reads subdivision (e) is left with the following: (1) a true retainer to secure availability is nonrefundable, and the default is that it is earned upon receipt, even if the lawyer ends up being unavailable, and (2) a flat fee for specified services can be non-refundable but even if the parties agree it is non-refundable it may still be "refundable." Will a client who reads the proposed rule have an accurate sense of the non-refundable nature of the fee? As the Commission is undoubtedly aware, there have	

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					historically been significant differences of viewpoint with regard to true retainers, flat fees and non-refundable fees. This longstanding disagreement, even among lawyers who devote their practices to matters of professional responsibility, demonstrates why subdivision (e), as drafted, is not helpful to lawyers or to clients. Simply put, the subdivision does not provide greater clarity, it only muddies already murky waters. The language of subdivision (e) comes in large part from Washington State Rule of Professional Conduct 1.5. The use of Washington's language, while undoubtedly well-intentioned, is eventually unproductive because the Washington rule and the proposed rule address different issues. The Washington rule is tied in large part to the placement of funds received from the client, It creates an exception to the general requirement that the funds be placed in a trust account by providing that flat fees do not need to be placed in a trust account. Unlike most other states in the country, California is generally considered not to require an advance fee to be placed in a trust account. See, e.g., <i>Baranowski v. State Bar</i> (1979) 24 Cal.3d 153, 164; see also Cal. State Bar Formal Opn. 2007-172 ("Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account."). The purpose behind the Washington rule therefore doesn't exist in California where the exception has already been	

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					embodied by California law. Which brings us back to the question what is the real purpose and function of subdivision (e)? Subdivision (e) does not benefit clients. A client has no interest in a fee truly being non-refundable, only the lawyer stands to gain. So, at the end of the day, subdivision (e) will exist for the purpose of assisting a subset of lawyers in fending-off third party claims to client funds through provisions that are unlikely to have any substantive impact on the legal issue of who is actually entitled to the funds. We respectfully urge the Commission to amend proposed rule 1.5(e) to prohibit non-refundable fees in their entirety, as no fee is truly non-refundable. We understand that such a rule was originally proposed by the Commission. We further urge the Commission not to try and use the fee rule to address when a fee is earned, or who owns it. A straightforward rule prohibiting, non-refundable fees would provide clear guidance to both clients and to lawyers. It would also be consistent with established case law and other rules of professional conduct that recognize that a fee must be earned, and that a fee is always subject to "potential refund" depending on the facts and circumstances. If the Commission does not wish to prohibit non-refundable fees through a rule of discipline, then we	

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					urge the Commission to get rid of subdivision (e) altogether. Its inclusion is unnecessary. Clients will not be prejudiced by its omission. Nor will its omission place lawyers (criminal defense or otherwise) in a position any different than that which currently exists, and thus will not prejudice their ability to make the substantive arguments on which they seek to rely in responding to third party claims.	
20	Dorvall, Shannon M.	D	No	1.5(e)(2)	Not necessary. Sufficient safeguards in the long-standing existing rule re charging unconscionable fees to protect clients from being overcharged under all billing arrangements. Internally inconsistent and confusing to state the fee is the lawyer's property on receipt but the client is told it may be refundable under certain circumstances. Will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture because language providing "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." Will also lead to proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace. May be incentive for lawyers to delay, rather than	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client

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					resolve, disputes where clients seek refunds because “the agreed-upon legal services have not been completed. May be incentive for lawyers to minimize clear description in fee agreement of agreed-upon services to be provided. Greater clarity and detail should be encouraged. No ABA counterpart thus does not advance goal of national uniformity. No judicial or other authority, or national experience, to inform of consequences of adopting a novel rule. Submitted to BOGs for preliminary approval without prior public comment as mandated by State Bar rules, thus suffers from lack of input from affected practitioners. May result in lawyers declining to accept representation on flat-fee basis providing disservice to clients who require certainty of flat-fee arrangement vs. potentially limitless cost of retaining counsel on hourly basis.	explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal

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						services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
21	Duree, John	D	No	1.5(e)(2)	I have been in private practice for 29 years. I have used flat fee, non-refundable retainers in at least 85% of my cases. I have never had a fee dispute with a client in a flat fee case, because my contracts are simple, straightforward and fair. My clients appreciate agreements of such a nature because they know the total amount my representation will cost. They are beneficial to me because I do not have to concern myself with time keeping or collections and our decisions on how to proceed in the case are not cost-based; unlike civil cases, my cases are usually about liberty, not money, and assessing strategies on the basis of their cost is simply not done in my practice. My initial agreements are for flat fee amounts through the preliminary examination. If the case goes beyond that point, I reach a new agreement or withdraw. My clients are clearly informed of this limitation at the outset, and I have never had a dispute on this issue. The reasons for this limitation are: First, most cases	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer

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					resolve at, before or immediately after the prelim--to charge a fee based on going, through trial when less than 5% of my cases go that far would be unnecessarily expensive to the client. Second, case law does not require a motion to withdraw if the attorney wishes to do so between the prelim and the next appearance. It is a natural breaking point in the litigation. Third, I do not know how extensive a jury trial will be until I have done the review and investigation of the matter, which, in my practice is largely done prior to the prelim. Postponing the fee agreement for trial allows me to make a fair estimate of the extent of work trial would require and hence, to set a fair fee. The timing also gives my clients the opportunity to decide whether to continue with me or to seek other counsel after they know the total fee. I have charged hourly fees in a number of cases, generally when my client is a corporation or quite wealthy. The reason I am willing to bill hourly in such cases is that the client is sufficiently financially strong that I am confident that my bills will be paid. I have found that my total fees are substantially higher when I bill hourly. Hourly billing would not be an effective method of paying for representation for me or for most of my clients, I am not sure why the state bar is considering a change to rules governing fee agreements to get rid of a fair and workable method for attorneys and clients	includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current

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					operating in the criminal justice system, but I hope, on full reflection, it will decide against such change.	California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
22	Gabbert, Paul L.	D	No	1.5(e)(2)	I have first hand experience in the importance of non-refundable retainers and their significance to the attorney-client relationship in general and in fee forfeitures and Internal Revenue Service ("IRS") and California Franchise Tax Board ("FTB") jeopardy and termination assessment, seizure and levying contexts in particular. On at least three occasions, in which I was representing clients who had their assets seized for federal or state forfeiture, and my compensation was contingent upon obtaining the return of the seized currency, all of the money was seized pursuant to IRS and FTB assessments. This, in turn, required substantial collateral litigation to obtain the return of the funds and payment of my fees.' True retainers and other fixed fees are the only way for practitioners to avoid these pitfalls. Initially, it is my understanding that the proposed new	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer

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					rule was adopted by the Board of Governors without appropriate notice and public comment as required by Rule of the State Bar 1.10(A). The present provision for post-hoc public comment neither solves nor resolves the Special Commission's and the Board of Governors' apparent failures to follow their own rules. Although the purported purpose of the new rule is to protect clients, it appears to work to the detriment of clients and attorneys as well as ignoring the reality of more than a century of practice by California attorneys who have used various varieties of the non-refundable retainer fee. It is also my understanding that the Board of Governors has previously endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" earned upon receipt. Nor am I aware of any course of conduct or pattern of wrongdoing by California attorneys that would warrant modifying the existing rules as well as implicitly questioning the case law upholding them that are not already adequately provided for in the existing body of rules prohibiting the obvious: charging unconscionable fees and stealing money from clients for services not performed. The primary reason that the non-refundable retainer or other fixed, fee earned upon receipt is essential to criminal defense practitioners and to their clients is to avoid fee forfeiture, seizure by tax assessments, orders to withhold, levies, restraining orders, preliminary injunctions, and years of uncompensated	is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This

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					collateral litigation that distracts the lawyer from the purpose for which he was hired. The proposed new rule with its multiple qualifiers and conditions muddies rather than clarifies the existing law. State and federal prosecutors, agents and taxing authorities will have a field day with the proposed rule. It opens the door to seemingly endless "investigations" regarding the nature of the legal work performed by the lawyer and whether or not the fees belong to him or to the client. By definition, any monies deposited into the client's trust account belong to the client and are fair game for seizure, levy, and forfeiture. In criminal securities litigation involving federal prosecutors and the Securities and Exchange Commission ("SEC") payment of attorney's fees and the relationship of that payment to restraining orders and preliminary injunctions can not only distract the attorney from the case she was hired to defend, it can eclipse the underlying case and result in the attorney having to defend herself in contempt proceedings based on how her fee was paid. Even when the attorney prevails in the litigation, this can result in the functional equivalent of a fee forfeiture because the cost of successfully defending the civil contempt action can greatly reduce or eradicate the fee paid to defend the client in the underlying criminal action. Thus, the proposed new Rule 1.5(e)(2) exposes members of the bar performing a variety of legal	leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

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					services to substantial financial risk and additional, uncompensated, extrinsic litigation by increasing the likelihood of the restraint and/or seizure of fees where the client has criminal, bankruptcy, state or federal tax or SEC investigations as well as being subject to a civil or criminal forfeiture or restraining orders. Given the existing minefields in these multiple, overlapping areas of practice, Rule 1.5(e)(2) not only substantially increases the risk of attorney fee seizure and forfeiture, it will deprive many criminal defendants of their Sixth Amendment rights to the retained lawyer of their choice and prohibit many civil clients facing state and federal regulatory and civil penalty actions from retaining counsel. Rule 1.5(e)(2) provides that "[i]f agreed to in advance in writing signed by the client, a flat fee is the lawyer's property upon receipt." Whether or not this is a true statement depends upon the applicable substantive law and a host of factually particular circumstances. Pursuant to its rule making authority, the State Bar cannot promulgate, overrule, alter, amend, or change existing substantive law. The cited portion of the proposed new rule in conjunction with its subsequent, multiple conditions and qualifications, is an unnecessary attempt to meld diverse areas of the law into a single rule that encompasses all potential future circumstances. Given the protean nature of human conduct, this is a factual impossibility, and greatly	

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					exceeds the Bar's rule making authority. Cash flow is the economic life blood of all law firms. Under the proposed new Rule, and its multiple exceptions, when a skilled lawyer through knowledge, experience, reputation and carefully cultivated relationships obtains a significant benefit for the client within a short time, that does not resolve the entire case, the new Rule encourages clients to terminate representation without cause and obtain a refund of a substantial portion of the "flat fee" that would, under this proposal, no longer apparently belong to the attorney. Although it may seem counter intuitive, or even counter-empirical, to those who have not practiced in this area, there can be a surprising lack of gratitude and loyalty from clients even when counsel obtains significant results during the course of the litigation such as pre-trial release on bail, partial suppression of evidence, a severance of the defendant, the release of some assets, and the severance or dismissal of counts. In short, there is no apparent historical, factual, legal or logical basis for the proposed new rule. It appears to unnecessarily and unreasonably create fertile new ground for fee disputes, including arbitration claims, bar complaints and lawsuits, as well as fee seizures, fee levies, fee forfeitures, and civil and criminal	

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					contempt proceedings against attorneys. Accordingly, the proposed new rule should be withdrawn.	
23	Garcia, Antonio	D	No		No comment submitted.	The Commission cannot provide a response without an explanation why the commenter disagrees with the Rule. However, the Commission directs the commenter to the response to California Attorneys for Criminal Justice ("CACJ")
24	Gericke, J. Robert	D	No	1.5(e)(2)	I am opposed to the suggested new rule. In California we have a strong policy of protecting clients, as well we should. However, I think that in the field of criminal law there needs to some consideration to protecting the attorney. The nonrefundable fee tends to do that while also offering the client clear notice of the cost of representation. I would also note that fees in criminal cases tend to be pretty affordable compared to other areas of practice. If the reader has ever been through a divorce this should be evident. The rules for being relieved due to non-payment are different in criminal cases and this is another consideration. If non-refundable fees are banned should criminal attorneys charge by the hour? Can they be relieved more easily for nonpayment? What impact will this have on court calendars? I strongly urge that this proposed rule be scrapped. Criminal clients have many other protections. This rule	See response to California Attorneys for Criminal Justice ("CACJ").

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					is not needed.	
25	Goodman, Louis J.	D	No	1.5(e)(2)	Joins in the comments of CACJ, above.	See response to California Attorneys for Criminal Justice ("CACJ").
26	Gordon, Kenneth G.	D	No	1.5(e)	My principal concern with the proposed change to Rule 1.5(e) has to do with the language of (e)(2) pertaining to flat fees. Assuming the attorney and client agree in writing, a flat fee is the lawyer's property on receipt. As such, the attorney should properly deposit this fee into his operating account and take it into income. In a tax sense, the attorney has dominion and control over the fee and should treat it as income. In the event that it is not the lawyer's property or is subject to a substantial risk of forfeiture, then the tax treatment would be otherwise. The language of Proposed Rule 1.5(e)(2)(v) provides that the written fee agreement shall include a provision that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been performed. This language appears to introduce a substantial condition into the equation of the lawyer's dominion and control of the fee. I believe that there are sufficient remedies against abuses, such as the non-performance or incompetent performance of legal services, without the broad brush approach embodied in the Proposed Rule that not only alters property rights, but puts the interests of both the lawyer and client at risk in certain fact situations.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission

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					The core issue under the Proposed Rule is one of property or interest in property. It appears that the Proposed Rule is confusing and inherently contradictory. If the flat fee is the lawyer's property upon receipt, then there should not be a basis for seizure. However, if the client has a right to a refund of fees attributable to services not completed, then the client has a property interest that can be seized by a taxing agency. My comments have addressed the proposed rule change within a very narrow range of my tax practice and focused on a particular civil tax issue. There are many other factual situations, including those within the criminal law context, that raise issues of legal exposure for both the attorney and client which have not been addressed in this letter. Hopefully, the Commission considering this rule change will reconsider its position regarding this Proposed Rule. Existing legal remedies and professional restraints on attorneys are, in my opinion, sufficient to protect clients. The obfuscation of property rights pertaining to flat fees appears counter-productive to the interests of clients.	regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment

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						was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
27	Gregory, Kenneth C.	D	No	1.5(e)(2)	Your proposed rule is misplaced on so many levels. First, I share a concern that a significant level of deceit is involved in moving this proposed rule forward. The normal and typical process for introducing such a rule has been ignored; in favor of a secretive and deceitful move to push consideration of the rule without encountering known and legitimate opposition – THAT IS NO WAY FOR THE GOVERNMENT TO CONDUCT PROPER BUSINESS. Second, the premise for the bill is seriously flawed and appears to be someone's personal vendetta rather than a legitimate need looking for an actual solution. I recommend that you take the time to read and consider the attached letter from CACJ.	The Commission disagrees with the commenter's statement concerning the Commission's alleged motives. The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client

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						explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
28	HALT (Theresa Meehan Rudy)	D	No	1.5	HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.	The Commission believes that retaining the present "unconscionable" fee standard is appropriate for disciplinary purposes in contrast to the "reasonable" standard of the ABA Model Rules. The latter standard is more suited to a fee dispute regime. California is unique in having an extensive mandatory fee arbitration program in which claims of unreasonable fees can be resolved, leaving to the disciplinary system the more serious claims of unconscionability.
29	Hansen, Michael E.	D	No	1.5(e)(2)	It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingent or flat).	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the

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					It is internally inconsistent and confusing: the fee is the “lawyer’s property on receipt,” but the client is told s/he/it “may be entitled to a refund” under circumstances. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that “the client may be entitled to a refund of a portion of the fee” appears to give clients a residual interest in a fee that purportedly was “the lawyer’s property immediately on receipt.” This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.” It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because “the agreed-upon legal services have not been completed.” Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged.	exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential

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					It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule. Finally, it was submitted to the State Bar Board of Governors for preliminary approval without the <i>prior</i> public comment that is mandated by State Bare Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.	problems as they arise from applicable Federal or State statues, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment

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						distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
30	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	D	No	1.5(a), (b)	The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and - even more puzzlingly - some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, also uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer-rather than client-protective. Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards - one under the ethics rules and one under the State Bar Act. This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."	The Commission believes that retaining the present "unconscionable" fee standard is appropriate for disciplinary purposes in contrast to the "reasonable" standard of the ABA Model Rules. The latter standard is more suited to a fee dispute regime. California is unique in having an extensive mandatory fee arbitration program in which claims of unreasonable fees can be resolved, leaving to the disciplinary system the more serious claims of unconscionability.

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31	Heithecker, Philip	D	No	1.5(e)(2)	Flat fee retainers in our rural county allows access to defense attorneys. Simply put, most, if not all, of my clients could not afford my hourly rate. Defendants would be left without representation as they would be too wealthy for the public defender and not wealthy enough for a private attorney.	See response to California Attorneys for Criminal Justice ("CACJ").
32	Hicks, Aaron	D	No		If we are forced to do away with flat fee retainers, our clients will be billed much higher fees based on hourly work on their case. Most will not be able to afford private representation. Many will be forced to go with public defenders, crippling the private bar and bankrupting the state for the public defender representation. Please leave this alone.	See response to California Attorneys for Criminal Justice ("CACJ").
33	Imhoff, Vince	D	No	1.5(e)(2)	Not necessary. Sufficient safeguards in the long-standing existing rule re charging unconscionable fees to protect clients from being overcharged under all billing arrangements. Internally inconsistent and confusing to state the fee is the lawyer's property on receipt but the client is told it may be refundable under certain circumstances. Will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture because language providing "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." Will also lead to proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of

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					flat fee arrangements, and injunctions, assessments and/or forfeitures, are commonplace. May be incentive for lawyers to delay, rather than resolve, disputes where clients seek refunds because "the agreed-upon legal services have not been completed. May be incentive for lawyers to minimize clear description in fee agreement of agreed-upon services to be provided. Greater clarity and detail should be encouraged. No ABA counterpart thus does not advance goal of national uniformity. No judicial or other authority, or national experience, to inform of consequences of adopting a novel rule. Submitted to BOGs for preliminary approval without prior public comment as mandated by State Bar rules, thus suffers from lack of input from affected practitioners. May result in lawyers declining to accept representation on flat-fee basis providing disservice to clients who require certainty of flat-fee arrangement vs. potentially limitless cost of retaining counsel on hourly basis.	a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into

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						proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
34	Ingber, Joe	D	No	1.5(e)	To modify/abolish rule 1.5(e) re: non-refundable retainer agreements, would create chaos in an unnecessary manner. Please vote against this	See response to California Attorneys for Criminal Justice ("CACJ").

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					abolition.	
35	Johnson, Phil	D	No	1.5(e)(2)	As a criminal lawyer who has served in the public defenders' realm in Louisiana and California for over 20 years and then in a solo or independent contractor capacity, I depend on simplicity and clarity in contracts with clients who need representation, but who do not have a lot of money. I protest this rule. But I will leave to others with more experience and insight the task of adequately explaining to the Commission why the substance of this new rule is abhorrent. I write separately to protest the abysmal lack of notice to the members of the Bar this paid organization was created to assist and serve. I submit that if I similarly tried to foist upon a client - - without any prior notice - - a contract that allowed me to change my hourly rate under certain circumstances (i.e., DA suddenly amends information to include enhancements and priors, or refuses to cooperate in providing discovery, judge issues stunning rulings requiring pretrial writs, etc.) because I cannot modify it any other way, the client-attorney relationship would be adversely impacted. It follows that his case would suffer along with the client's best interests, a complaint would inevitably follow and much energy and time would be lost in a lose-lose situation with absolutely no benefit to anyone. And of course, I would probably be hauled before the Bar Court as one of those villains who are out to gouge clients and otherwise cast aspersions on	Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

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					the legal profession. That is how I view this failure to effectively notify the rank and file that this unsupported and unsupportable engraftment is coming down the pike one more time. Why is notice such a problem in these troubling areas? In 35 years of practice, like the vast majority of others on this list, I have never been cited by any state bar for any malfeasance. Fortunately, I am semi-retired and so this concern has somewhat less impact on me than for my less aged brethren. For now, I just hope I can live out my days without looking over my shoulder for more trebuchetlaunched boulders like this one, raining down from the sky. This may speed up my decision to do something else for a living with less downside. I also feel that it may lead others to do the same thing.	
36	Kolodny, Stephen	D	No	1.5(e)(2)	I write this letter to express my opposition to the proposed new Rule of Conduct that would abolish the right of lawyers to charge flat or non-refundable fees. For many different reasons, in family law, such a Rule would be grossly unfair to the lawyers and allow many clients to receive services at a cost far below the reasonable compensation for the work, effort and experience that goes into the representation of that client. In family law it is not uncommon for potential clients to go around and conflict out lawyers they do not want to have as opposing counsel. Sadly, this is a practice that	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning “nonrefundable” and “earned on receipt” fees. Notwithstanding the commenter’s stated position and practice, with the exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To

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					is promulgated by some lawyers in our community but also has clearly taken hold in the general community because of the proliferation of this kind of advice on various special interest web sites. One of the ways a high profile law firm can protect itself from this kind of practice is to have non-refundable retainer agreements so that the client does not hire you, conflict you out and then fire you, paying only for an hour or so of your time. There is truly a premium value to the retention of certain lawyers in all fields, unfortunately in the Family Law field the concept of "conflicting out" has become a tactic used by some litigants and some lawyers. In Family Law it is not uncommon for some of us to substantially limit the intake of cases so that we can provide full and complete services to the clients we commit to represent. Only by knowing that there will a specific fee [minimum fee] can we afford to do that. If a client is accepted and then we turn away another potential client because of work load commitments, we should not be prejudiced because the client we accepted then chooses to leave before much work is done. In Family Law we are often asked to prepare Pre or Post Nuptial Agreements, which are documents that have very substantial potential liability associated with them. The fees charged are document specific fees, not related to time expended. Prohibition of flat fees [which are a form of non-refundable retainers or will	state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree

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					ultimately be categorized as such] would severely inhibit the willingness of lawyers to provide services in this difficult area. To my knowledge, members of the Bar practicing in many fields including bankruptcy, immigration, family law, criminal law, tax law, and SEC law, as well as entertainment and real estate law understand that there is nothing about a non-refundable retainer that permits a lawyer to charge an unconscionable or clearly excessive fee. That is, the non-refundable retainer, as with any other traditional fee arrangement, has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a "non-refundable retainer" from a naive client, has no established basis for doing so or to justify the amount charged, does little or no work, and keeps the clients' money. These rules include: (1) the case-by-case Rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding Rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). Common sense, fairness, and the existing protections against unconscionable fees, dictate that under a non-refundable retainer arrangement, except as allowed by historical rules and precedent, if a lawyer does very little or no work, the client is entitled to a full refund. Similarly, members of the Bar have almost universally	that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further

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					recognized that when a client signs an agreement and pays a non-refundable retainer, there are unanticipated events that can result in a refund of a non-refundable retainer. For instance, a client would be entitled to a full refund if his/her lawyer gets sick and does no work. Likewise, an honest lawyer would refund a \$10,000 non-refundable retainer if, shortly after receiving it, the client changes her mind and fires him/her without cause, and the lawyer has not done any meaningful work. In these and many other unanticipated circumstances, a non-refundable retainer would be "unconscionable" under Rule 1.5(a) and an honest lawyer would refund the unearned portion of the fee. If adopted, Paragraph (e) to abolish non-refundable retainers (Ex. 2) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example: 1. The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to	public comment period.

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					ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem. See discussion Ex. 1. P. 12. 2. Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions in Paragraph (e)'s ban on non-refundable retainers in (e) (1) and (2)). 3. There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-	

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					refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem. 4. The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," and "flat fees," and "non-refundable retainers," to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments ... to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and conduct ("COPRAC") that first suggested (See May 20, 1991 COPRAC Memorandum), that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. Id.	

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					5. Paragraph (c)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work. 6. Paragraph (e)(2) and Comment [5] would often require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e., trial or an administrative evidentiary hearing), that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. 7. Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds. 8. Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see proposed Rule 1.5(e)(2)(v)). Paragraph 1.5(e)(2) actually will deprive	

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					the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund. 9. Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraining and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims. 10. Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many family lawyer litigants of their ability to retain counsel. 11. Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.	

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					12. The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause. 13. Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.' 14. The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determined in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's	

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					property" or property to which the lawyer is entitled. This Proposal effectively penalizes an effective and/or efficient lawyer or the promotion of early resolution of disputes, all of which is contrary to the legislature's stated intent in the Family Code and which should be the principal to which all lawyers should subscribe. The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits non-refundable fees for performing legal services. In doing so, it abolishes and/or redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt."	
37	Langford, Carol	D	No	1.5(f)	A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached, the integrity of the legal system and the public's respect for the legal profession is jeopardized. The Proposed Rules are designed to regulate lawyer's conduct and bolster the public's confidence in the legal profession. I am concerned that the language of Rule 1.5(f) does not set a high enough standard to protect a client's interest in cases of modification. Rule 1.5(f) language states that a lawyer shall not	No response necessary. The Commission believes that "adverse" in

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					make a modification that is “adverse.” Adverse is defined as a modification that “benefits the lawyer in a manner that is contrary to the client's interests.” I am concerned this language is unclear. Whether a particular modification is adverse to the interest of the client always depends on the circumstances. I believe that a modification that increases a client's fee for a project should be adverse. In addition, adverse modification occurs when the client is coerced or agrees to it under duress or threat of non-performance. However, not all modifications are adverse. A modification that extends the time within which a client is obligated to pay a fee ordinarily is not adverse. The current language does make clear these distinctions. It doesn't set forth a requirement that the client who consents to the modification in writing can do so only if it is knowing and intelligent and the deal is fair and reasonable. The proposed rule will not deter adverse modifications and promote ethical transactions between lawyers and their clients. I support the adoption of a higher standard in evaluating interests adverse to clients as in current Rule 3-300. It states that a lawyer must avoid interests adverse to a client unless all three requirements are satisfied. These requirements are: a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should	the circumstances of the proposed rule can be well understood and is not unclear. The Commission does not disagree with the commenter's premise and has addressed this very issue in Comments [3] and [3A]. The Commission disagrees that the enhanced protocol in current rule 3-300 [proposed Rule 1.8.1] is necessary for fee modifications unless they convey to the lawyer an ownership, possessory, security or other pecuniary interest adverse to a client.

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					reasonably have been understood by the client; and (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.	
38	Law Practice Management Section, State Bar of California [William E. Hoffman]	M	No	1.5	The State Bar Should Acknowledge and Encourage Alternative Fee Arrangements. LPMT believes that Proposed Rule 1.5, as drafted, would hamper the development of alternative fee arrangements, arrangements that would benefit clients and attorneys alike. This consequence is particularly likely given the historical emphasis on hours as the billing touchstone – a touchstone that will likely be less relevant in evaluating alternative arrangements. The Proposed Rule should more directly acknowledge and encourage such alternative fee arrangements, in addition to contingency fees and strictly flat fees. The failure to remove hours expended as the litmus test of conscionability interferes with the development of alternative fee arrangements, which can be of great worth to clients as they plan and budget. Hours expended are often irrelevant and should not be the	The Commission did not make the requested change. The proposed Rule already acknowledges that the factors in paragraph (c) are not exclusive. Moreover, aside from factor (c)(10) ("the time and labor required"), nothing in the Rule suggests that the amount of time spent is the preferred benchmark for determining the unconscionability of a fee. It is but one of eleven non-exclusive factors.

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					standard by which such alternative fee arrangements should be judged. Many lawyers on fixed fees do not keep track of time – that is one of the benefits to both lawyer and client. Rather, alternative fee arrangements can provide the client with much-valued specificity and certainty of cost and time. On the lawyer's side, such arrangements encourage the lawyer to invest in technology, which will yield a better and more efficient result for the lawyer's clients. Without the ability to thus amortize the capital expense of new technology and innovate, lawyers will see no incentive to change to more dynamic fee arrangements that would benefit both client and lawyer While it might not be advisable to address specific alternative arrangements in the Proposed Rule itself, LPMT does urge the Commission to revise its Comments to Proposed Rule 1.5. In particular, we highly recommend that the Commission: • note that such alternative fee arrangements are subject to the proscription against unconscionable fees; and • acknowledge that the factors used to evaluate the conscionability of fees can and should be weighted differently in certain alternative fee arrangements. By doing so, the Commission would clarify that	

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					Proposed Rule 1.5 is not meant to chill the development of such alternative fee arrangements, while at the same time ensuring that such arrangements are nevertheless subject to a fundamental ethical standard. For the foregoing reasons, we recommend that Comment [1B] be amended as follows: [1B] Paragraph (b) defines an unconscionable fee. (See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Indeed, <u>it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement.</u> Contingent fees and other alternative fee arrangements, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.	
36	Linscheid, E. Michael	D	No	1.5(e)(2)	The proposed rule ignores the realities of the practice of criminal defense. Currently, the nonrefundable fee allows a client to pay a known amount which will cover the entirety of his criminal representation without	See response to California Attorneys for Criminal Justice ("CACJ").

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					additional fees. An attorney and client that enter into a contract for a nonrefundable retainer can feel secure that the retainer fee will cover the representation of the client through trial. Such a retainer allows a client to make decisions about a legal defense without taking into consideration the additional costs that may be incurred.	
37	Loftus, Richard A.	D	No	1.5(e)(2)	I am a sole practitioner in the area of criminal defense. The proposed rule is unnecessary, interferes with my ability to contract with potential clients, and in many cases would result in my charging fees that would be much greater than those charged as a flat fee. In many cases, I make court appearances over and above the necessary minimum number strictly for the purpose of benefiting an interest of the client. If my fee arraignments were now all going to be done on an hourly basis, the cost to the client would increase dramatically. Most of my clients could not afford this increase, and be forced to make difficult decisions, based upon limited resources, that would not be in their best interest. I would respectfully urge the rejection of the Proposed New Rule 1.5(e)(4-200)	See response to California Attorneys for Criminal Justice ("CACJ").
38	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (PREC)	M	Yes	1.5(e)(2)	The proposal discourages lawyers from efficiently resolving matters given the potential it creates for a client to request a refund because "the agreed-upon legal services have not been completed." For example, if a lawyer settles a matter before trial, a fee	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt"

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					agreement that provided that the fee would cover representation through trial could be construed to require a partial refund, even though the case was favorably resolved. This would be unfair, and is contrary to the longstanding treatment of what constitutes an earned fee. Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to all types of retainer agreements. Including them in a sub-part that pertains only to flat fee agreements creates the misleading negative inference that these requirements may not apply to hourly or contingency fee agreements. If it is desirable to mandate that fee agreements contain additional provisions, this should be accomplished through the existing statutory framework in the B&P Code. The Legislature could choose to amend sections 6147 and 6148 to specifically address flat fees, but attorneys who use flat fee arrangements should not be singled out for discipline for failing to have details in a fee agreement that are not required for other type of fee arrangements. Sup-part (e)(2) provides that the fee is the "lawyer's property on receipt," but also requires the attorney to state that the client "may be entitled to a refund" under certain circumstances. This is confusing. Also, stating that a fee is the lawyer's property on receipt suggests the creation of substantive law. Isn't the intent simply to clarify that a flat fee need not be placed in the client	fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns.

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					trust account? To describe the fee as the “lawyer’s property” increases the likelihood of future litigation over who owns the fee, especially when combined with the mandate that counsel state that the client may be entitled to a refund. Ambiguities in fee agreements are construed against the lawyer, and this draft rule mandates an ambiguity. The proposed language in sub-part (e)(2) is unnecessary in light of the prohibition on charging unconscionable fees, a traditional and well established standard which sufficiently safeguards clients from unscrupulous lawyers who overcharge clients, and which provides a uniform standard regardless of the type of retainer agreement involved. The language of (e)(2) may discourage the attorney from providing details in the fee agreement regarding the extent of the work for which a flat fee is being paid because of the potential it creates for a client to request a refund because “the agreed-upon legal services have not been completed.” The proposed language will foment greater discord over fee agreements, which is not in the interests of either clients or the legal profession. This proposal likely will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture. It may lead to substantial problems in bankruptcy, tax, collections, criminal, family law, and other matters in	However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission’s drafts of this proposed rule have been

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					which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace. The reason for this is that persons or entities with a claim against a client will seek to seize and forfeit a client's potential interest in obtaining a refund based on the client's possible right to "be entitled to a refund of a portion of the fee." How would a creditor of the client know whether the agreed upon services were or were not provided? This proposal has no counterpart in the ABA Model Rules. Thus, it does not advance the intended goal of national uniformity that is among the purposes for revising California's existing rules of professional conduct. Finally, PREC is aware that some practitioners have expressed concern that this provision was presented to the State Bar Board of Governors without the prior public comment that is required by State Bar Rule 1.10. If there has been a failure to comply with any procedural rule, PREC believes that the Rules Revision commission should consider recommending necessary corrective action in order to ensure that all of California's new Rules of Professional Conduct are lawfully adopted.	issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
39	Los Angeles Public Defenders [Michael Judge]	NI	No	Comment [9]	Comment [9] refers to paragraph (f)(2) but there is no paragraph (f)(2). Paragraph (e)(2) was probably intended.	The Commission has resolved this discrepancy in the revised rule draft.

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				Comment [10]	Comment [10] refers to Rule 1.0.1(n), the definition of "signed," but there is no such provision in Rule 1.0.1.	The Commission has added a definition of "signed" to proposed Rule 1.0.1(n).
40	Martinez, Martin James	M	No	1.5(e)	The Proposed Rule is cause for concern in as much as it will have detrimental effects on criminal defense attorneys. The best solution would be to continue to allow criminal retainers to be placed in the general account as a classic true non-refundable retainer. If the rules committee is still determined to eliminate the use of non-refundable retainers, then a workable compromise would be an amendment to the Proposed Rule that it is not a violation of the rules of professional responsibility to place the retained funds in the general account in criminal defense matters. This would alleviate concerns of the State Bar, of the chilling effects that a non-refundable retainer would have in the eyes of the client, thinking that they cannot change counsel. Yet, this amendment would allow criminal defense attorneys to continue to maintain an active law office. If the funds are placed in trust, it would hamper the everyday operations of the criminal law office.	The Commission notes that there is no requirement that advance fees be placed in a client trust account.
41	Meltzer, Paul	D	No	1.5(e)(2)	I join in the opposition to the Proposed Rule filed by the California Attorneys for criminal Justice (CACJ).	See response to California Attorneys for Criminal Justice ("CACJ").
42	Moss, Richard	D	No	1.5(e)	Abolishing non-refundable retainers will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt"

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					Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)). The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board approved/endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."	fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns.

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					Paragraph (e)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work. Paragraph (e)(2) and Comment [5] would often require that the proposed “flat fee” to cover fees for the entire length of the case, including trial. Since this “flat fee” is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the “flat fee” by representing that the fee “is the lawyer’s property on receipt.” The critical issue is not what the fee is called but who owns the funds. Rather than protecting the client’s entitlement to a refund of the proposed “flat fee” (see Proposed Rule	However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission’s drafts of this proposed rule have been

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					1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund. Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims. Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel. Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar	issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

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					complaints. The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause. Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms that represent the "gold standard" for California lawyers. The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.	

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43	Mueller, Gael G.	D	No	1.5(e)(2)	The only people who would even raise this issue are those who have never practiced criminal law. People who come to a criminal defense attorney can not afford hourly fees and most would not understand them. They would not pay the bill. More importantly, the work required on a criminal case could not be done as monies received would be in the trust account. For instance, discovery on a criminal matter is charged to a private criminal defense attorney by the District Attorney's Office. This can run into hundreds of dollars depending on the complexity of the case and must be paid "up front". The amount of discovery is unknown to the attorney until it is received. Additionally, the number of appearances, the number of phone calls, the number of hearings are all unknown quantities at the time that a client retains a criminal defense attorney. An hourly estimate is impossible and could run into hundreds of thousands of dollars for a case which now costs around 20-30 thousand. We do not bill on hourlies for a very good reason-people need us to protect their constitutional rights-not just their money. This new "rule" would shut down my business. I will not charge people on an unreasonable basis.	See response to California Attorneys for Criminal Justice ("CACJ").

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44	National Association of Criminal Defense Lawyers (NACDL)	D	Yes	1.5(e)(2)	NACDL is concerned that the present text of Proposed Rule 1.5(e)(2) undermines the Sixth Amendment right to counsel by impairing the ability of lawyers and clients to agree that a client will pay a flat fee for legal representation by counsel in a specified matter. As drafted, the language of the Proposed Rule will substantially discourage, if not preclude, criminal defense lawyers from offering to represent clients on a flat fee basis. This is a common form of retention in criminal cases in California and throughout the country. The Proposed Rule discourages flat fees by making flat fees received by counsel vulnerable to third-party claims against clients and/or their property, forfeitures, jeopardy assessments, seizures, liens and attachments. These types of claims would be asserted <i>against counsel</i> because of the inchoate interest the Proposed Rule appears to give a client in fees which purportedly were the "lawyer's property on receipt." This additional potential risk and expense will cause many, if not most, criminal defense lawyers to decline to agree to represent clients on a flat fee basis. Discouraging counsel from using flat fee arrangements is a disservice to those clients who may desire such fee arrangements. Flat fee arrangements allow persons who are under investigation or accused of offenses to plan in advance and reduce the risks they face. If such persons were unable to secure	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized

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					representation in a matter for a flat fee, they would receive the service of counsel retained on an hourly basis only as long as they could continue to compensate counsel on an hourly basis. Flat fee arrangements place the bulk of the risk upon lawyers, and enable risk-sharing between clients and defense counsel. A virtual ban on flat fees – as would result from adoption of the Proposed Rule – will shift the entire burden to clients and disproportionately burden less wealthy individuals. Proposed Rule 1.5(e)(2) is unnecessary in light of the prohibition of unconscionable fees, a uniform standard applicable to all types of fee arrangements, including contingency, hourly and flat fees. This standard is sufficient to protect clients from being charged unreasonable fees, and to safeguard clients from excessive charges where a client chooses to discharge counsel, or other unforeseen circumstances arise such as the death of a client or counsel prior to the conclusion of a matter. The language of the Proposed Rule that provides a fee is the “lawyer’s property on receipt,” but a client also “may be entitled to a refund,” under certain circumstances, is internally inconsistent and confusing. Clarity, rather than confusion, best serves clients and counsel with respect to retainer agreements.	through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in

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					There is no counterpart to Proposed Rule 1.5(e)(2) in the ABA Model Rules and there is no national authority to provide guidance on how the provision may be interpreted by California disciplinary authorities or courts. Accordingly, it may create uncertainty and the potential for protracted and costly litigation, rather than certainty, which best serves the interests of both clients and counsel. Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to <i>all</i> types of retainer agreements, but placing them in a sub-part that pertains only to flat fee agreements creates the inaccurate negative inference they may <i>not</i> apply to hourly or contingent fee agreements. The Proposed Rule could discourage detailed descriptions of the “agreed-upon legal services” in written retainer agreements because it encourages third parties to assert an interest on a previously paid fee on the grounds that “the agreed-upon legal services have not been completed.” This would increase disputes between clients and counsel. Finally, NACDL is concerned that Proposed Rule 1.5(e) is among a large number of Proposed Rules that were provisionally adopted in a manner that may have deprived the Board of Governors of the State Bar of California of the insights of lawyers, and other members of the public, who have knowledge and experience with flat fee arrangements. NACDL	those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission’s drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

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					understands that Proposed Rule 1.5(e) was among a number of provisions adopted by the Board without the prior public comment required by Rule 1.10 of the Rules of the State Bar of California. NACDL believes that public comment in accordance with Rule 1.10 is critical to ensure fairness and the adoptions of a sound and informed rule. Although the Board's adoption was subject to potential reconsideration following a period of public comment for all rules provisionally adopted, NACDL believes that this does not provide a sufficient opportunity for the public scrutiny that is essential for a rule that substantially impacts the Sixth Amendment right to counsel and disproportionately burdens clients of limited means.	
45	Office of Chief Trial Counsel ("OCTC")	M	No	1.5(b)	1. Unconscionable Fees. OCTC still prefers the ABA's language for this rule. Further, OCTC remains opposed to any attempt to specifically define the term "unconscionability" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (<i>In the Matter of Berg</i> (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by a list of facts set forth in subsection (c) of proposed rule 1.5.	1. The Commission believes that retaining the present "unconscionable" fee standard is appropriate for disciplinary purposes in contrast to the "reasonable" standard of the ABA Model Rules. The latter standard is more suited to a fee dispute regime. California is unique in having an extensive mandatory fee arbitration program in which claims of unreasonable fees can be resolved, leaving to the disciplinary system the more serious claims of unconscionability.

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				1.5(c)	2. However, we urge the Commission to consider adding additional factors to the list set forth in subsection (c). Those additional factors are (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see <i>Herrscher v. State Bar</i> (1935) 4 Cal.2d 399, 403; <i>In the Matter of Van Sickle</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see <i>Herrscher v. State Bar, supra</i> , 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see <i>In the Matter of Connor</i> (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see <i>In the Matter of Kroff</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; <i>In the Matter of Van Sickle</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. <i>In re Green</i> (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; <i>Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman</i> (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs];	2. The Commission has made a change along the lines the commenter suggests, adding the terms to the definition of "unconscionable" in paragraph (b).

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				1.5(c)	<i>Cincinnati Bar Assn v. Alsfelder</i> (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)	3. The Commission disagrees that it is necessary to state in the blackletter, rather than in a comment, that the factors are not exclusive.
				1.5(b)	4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1(d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconscionability. However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching, which may not require proof of all of the elements of civil fraud. (See <i>Herrscher v. State Bar</i> , <i>supra</i> , 4 Cal.2d at 403; <i>In the Matter of Van Sickle</i> , <i>supra</i> , 4 Cal. State Bar Ct. Rptr. at 989.)	4. The Commission has made changes along the lines the commenter suggested.

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				1.5(e)	5. True retainers, non-refundable fees, and flat fees. OCTC supports the concept proposed in subparagraph (e) regarding true retainers, non-refundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of current law regarding true retainers, non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do is disciplinable. (See <i>In the Matter of Lais</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; <i>In the Matter of Phillips</i> (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; <i>In the Matter of Fonte</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; <i>Matthew v. State Bar</i> (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.	5. No response required.
				1.5(e)	6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that	6. No response required.

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					they be in writing and places California closer to what is required in other jurisdictions.	
46	Orange County Bar Association ("OCBA")	D	No	1.5(e)(2)	We are aware that a number of other persons have raised the concern that the Board of Governors adopted this proposed rule in the first instance without conforming to public comment procedures established in State Bar Rule 1.10. The OCBA believes that the State Bar should be concerned with the potential implications if the rule is adopted without complying with its. own procedural rules. Substantively, the OCBA is opposed to the present formulation of Rule 1.5, and especially the provisions of paragraph (e)(2) and the comments related to that section. There already is an existing statutory scheme for written fee agreements in B&P Code sections 6146 through 6148. Several of the terms i n proposed paragraph (e)(2) are already contained in these statutory requirements. If there is concern that flat fee arrangements contain peculiar risks for clients, those should be addressed within the existing statutory framework. Lawyers are not subject to discipline for failing to comply with B&P Code sections 6147 and 6148. It would be inappropriate to impose disciplinary consequences only upon those lawyers who charge flat fees, and not those who enter into other fee arrangements.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.

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					Paragraph (e)(2) mandates five contract terms that "shall" be set forth in the flat fee agreement. The 'OCBA believes that requiring inclusion of all of these provisions actually will lead to greater uncertainty and confusion. For instance, it is internally inconsistent to state that the flat fee is the lawyer's property immediately upon receipt, while at the same time mandating that the fee is refundable. Lawyers may believe and claim the fee has been fully earned because the rule declares it is their property. It should not be an ethical requirement that the lawyer state in writing that a fee which is the lawyer's property might have to be given back. This will create ambiguity, resulting in more disputes over whether or not the fee is refundable. It would be very simple to state expressly in the rule that flat fees for specified legal services contractually agreed to between attorney and client need not be placed in the client trust account, without also stating that the flat fee is the attorney's property. That solves the issue of whether or not the fees may be placed in the general account. Whether or not such fees are refundable to a client when the representation ends should depend upon the parties' agreement, as well as whether the lawyer has substantially completed the tasks for which he or she was retained. Substantial completion of the task is difficult to define. There are many factors including the	The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's

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					possibility that an early settlement or resolution is one way to complete a task, even if the consequence is to avoid- trial or other proceedings that might have been contemplated. The question of whether or not the client would be entitled to a partial refund should be left to the parties' .agreement, subject only to the traditional, well-defined rules that prohibit unconscionable fees (Rule 1.15(a)), and mandate the return of an unearned fee (Rule 1.16). A lawyer should not be subject to discipline for retaining a flat fee unless that lawyer violates those rules. The question of whether the flat fee lawyer has earned the fee may be resolved just like all other fee disputes. It should not be a separate basis for lawyer discipline unless the overall fee arrangement or the fee charged was unconscionable, or was not appropriately earned by the performance of a proper degree of services. By seeking to resolve the widespread concern over "nonrefundable" fees, the proposed language is simply overbroad. There is also a risk that the disclosures mandated by paragraph (e)(2) could discourage early resolution of matters by providing incentives for flat fee lawyers to delay resolution of matters so as not to be accused of receiving an excessive fee. This could be an unintended consequence of the rule, contrary to public policy favoring early resolution of disputes. Just because a lawyer has been able to negotiate a	reasonable expectations when entering into the kinds of agreements addressed in those provisions.

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				Comment [9]	favorable early resolution does not mean that the fee is unearned. Better guidance is needed in the comments if the intent is to provide a means of determining when a fee has or has not been earned. In Comment [9], there is a typographical mistake which erroneously refers to paragraph (f)(2), a provision that does not exist. We believe that is intended to refer to paragraph (e)(2). With regard to the substance of Comment [9], the lawyer's failure to include the required contract language would essentially convert the payment received from a flat fee to an advance fee deposit-- a refundable deposit against which a reasonable fee should be charged. Yet, because the parties were contracting for a flat fee, they did not set a rate or method of calculating a different fee. Thus, this provision will necessitate a quantum meruit determination in every instance where the paragraph (e)(2) language is missing, leading to more fee disputes. In summary, the OCBA is strongly opposed to the provisions of paragraph (e)(2) as presently drafted, and would discourage the Commission from imposing special contractual terms that are appropriately left to the parties or better governed by existing statutory provisions.	

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47	Osterhoudt, William	D	No	1.5(e)	Non-refundable fees are a justifiable arrangement to accommodate appropriate needs of attorneys and clients in a wide variety of settings and have been long recognized by the State Bar and widely utilized without any demonstrated pattern of abuse or misconduct. Inadequate notice to and input from bar members who opposed 2008 version of rule. With recognized and effective protections in place, there is no reason to adopt a new rule absent supporting evidence that clients need protection from pattern of misconduct. Proposed change is unwarranted interference with freedom of clients and lawyers to make informed decisions re terms of representation. Provision that "true retainer" be "in addition to and apart from any compensation for legal services performed" is highly problematic because it would prohibit lawyers and clients from agreeing that a retainer to secure the lawyer's availability may also be used, in whole or part, to compensate the lawyer for work actually performed. If any part of a "nonrefundable" fee may be refundable, then the entire fee cannot be the lawyer's property. Lawyers pay income taxes on nonrefundable fees and under 1.5(e)(2)(v) they may have to do so even though the fee may be refundable.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized

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					Ample protections already exist to discourage unscrupulous lawyers who seek to retain substantial fees after doing little or no work, or after being discharged. Will invite needless disputes and litigation about circumstances under which a “nonrefundable” fee must be refunded in part. Comment [5] problematic and does not provide guidance. In practice, it is often impossible for attorney to know what services “probably will be required” at the outset of the representation and will not know, much less be in a position to “adequately explain” the services that will “probably” be required. Proposed rule would require lawyer to anticipate all stages and to embrace them within the agreement which could lead to Bar complaints and litigation. The meaning of “foreseeable that more extensive services probably will be required” and “adequately explained to the client” in Comment [5] will lead to administrative complaints and civil litigation. Urge that proposal be rejected or at a minimum, that it be withdrawn pending a full opportunity for member of the bar and various affected Bar Associations to comment.	through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in

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						those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.
48	Pancer, Michael	D	No		I believe that the "flat fee" can play an important role in maximizing the availability of legal services, especially to those who can least afford it. Many clients prefer to have a "flat fee" arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys who would take advantage of the "flat fee" opportunity, certainly there now exists sufficient safeguards to prevent "unconscionable" fees. But if "flat fee" contracts are not going to be enforced and therefore not entered, many potential clients will find themselves unable to avail themselves of legal services that they	See response to California Attorneys for Criminal Justice ("CACJ").

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					request and require.	
49	Paulsen, Bradley T.	NI	No		The commenter has submitted a lengthy letter with attachments complaining about the conduct of certain plaintiffs' lawyers in the construction industry are violating the law and certain Rules of Professional Conduct in soliciting client homeowners. The commenter specifically refers to certain Rules of Professional Conduct, including proposed Rule 1.5(a) and (b), and asserts that the subject lawyers are in violation of these provisions. The commenter, however, does not suggest any revisions to the identified paragraphs of the Rule, instead noting that "random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 claims."	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.
50	Perlis, Michael F.	D	No	1.5(e)	The Rule proposing the abolition of non-refundable retainers would only serve to further deprive the people of the ability to secure legal representation and/or compel attorneys who are already involved on behalf of those individuals to become involuntary pro bono advocates. Neither alternative is an appropriate avenue. In practice, the non-refundable retainer as it currently operates does not do a disservice to the client. Attorney overreaching is readily remedied and most attorneys would clearly be prepared to return unused portions of retainers where it would be inappropriate to retain them.	See response to California Attorneys for Criminal Justice ("CACJ").

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					Proposed Rule 1.5(e)(2) does not solve the problem. It requires attorneys and clients to make binding estimates of what may be complex legal proceedings, leaves open the possibility that government agencies could require termination of counsel and return of unused retainers, and could potentially lead to attorney/client conflict relative to an evaluation of what portion of a retainer need be returned relative to non-completed legal services.	
51	Pyle, Walter K.	D	No	1.5(e)	<u>Flat Fees.</u> Traditionally, criminal cases are handled on a flat fee basis (although in recent years I have seen variants or hybrids that involve flat fees). The proposed rule says that a flat fee is the lawyer's property on receipt, but then in the last subpart says the agreement must say "that the client may be entitled to a refund of a portion of the fees if the agreed-upon legal services have not been completed." First, I think this is ambiguous. For example, if I agree with a client to represent him for \$15,000 through preliminary examination, with an additional fee to be charged if an information is filed in superior court (a common flat fee arrangement), but.-I talk to the district attorney a week after the arraignment and I settle the case on very favorable terms, have I not "completed the' agreed-upon services, because there was no preliminary examination? What if I have to withdraw from the case because the client has told me he	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer

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					intends to commit perjury? What if the client fires me for no good reason? In my opinion I have fulfilled the contract in the first instance, and the client has breached the agreement in the second. The third situation is not a "breach," because the client always has the right to terminate the services of the lawyer, but in none of these cases should the client be entitled to a refund. Second, I have to pay income taxes on that full \$15,000. I only get a deduction if I refund part of the money. Third, requiring a refund of a fee that has already been fully earned actually means that the fee has not really been earned after all, or means that the fee is not really the lawyer's property, doesn't it? The only time that I can think of where the client is entitled to a refund of a flat fee is if the lawyer breaches the contract. Finally, a a flat fee is not related to the number of hours the lawyer puts in. What you look at is what the lawyer obligated herself to do. If she puts in far more hours than she believed she would when she quoted the fee (which happens fairly often), she does not get to charge an additional fee. By the same token, if she puts in far less hours than she believed she would (which happens far less often), the client should not get a refund. And with a flat fee contract, the client (and the lawyer) know exactly what the fee will be.	includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current

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					<u>True Retainers</u>. I have always treated a true retainer (usually in an hourly fee case) the way the rule does-it makes me available, period. Other lawyers believe that they should be able to apply hourly credits against such a retainer. I think the other lawyers have the better argument, and that my method results in the client paying too much. One of the most important concerns of a lawyer is whether he will get paid. In a complex case I might want to ensure I receive \$150,000, so I'm going to ask for that up front. I don't mind working for my fees, but I want to make sure I get paid. But under the rule, I would have to charge \$150,000 to be available, and then charge a further fee on top of that as I work on the case. If client could not pay the additional fee, a lawyer would have a right to withdraw from the case. I think it is more equitable to allow hourly credits to that \$150,000 (or a part of it), and I think the rule should allow that. It is common practice for my expert witnesses to charge a non-refundable "minimum fee" like that (and give hourly credits), and I think lawyers should be able to, too. I see no way, in actual practice, that the rule's true retainer provision "protects" the client any more than a non-refundable minimum fee. Clients are already protected by the unconscionable fee limitation in the first part of the rule. Finally, while it does not happen often, criminal lawyers are concerned that they will take on a complex	California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.

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					case but the government will seek to seize the fee as the property of the client. A non-refundable retainer (with hourly credits), which becomes the property of the lawyer upon receipt, would prevent this.	
52	Ragen, Frank J.	D	No	1.5(e)	I oppose the Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200), Abolishing Non-refundable retainers. A modification of the Proposed Rules of Professional Conduct which prohibits non-refundable retainers for legal service will do a disservice to the public, and create unnecessary litigation. Many times in my thirty-eight years of practice I have offered clients the option of a non-refundable retainer/flat fee for legal services or hourly billing. Many times the clients have selected the non-refundable retainer. The reason often voiced for choosing this option is that the amount of attorney fees is capped by the amount of the non-refundable retainer. When an hourly billing is selected there is no limit on what the attorney's fees might be. Attached hereto is an analysis of the Proposed Rule. I agree with the analysis and I incorporate it by reference. In my years of practice I have never had a problem with a client when a client chose a non-refundable retainer as an option.	See response to California Attorneys for Criminal Justice ("CACJ").
53	Rojas, Edward R.	D	No	1.5(e)(2)	For all the reasons Mr. Tarlow stated.	See response to Barry Tarlow.
54	San Diego County Bar Association	D	Yes		CA should adopt ABA Model Rule 1.5(a) with the addition of the factors in rule 4-200 to determine reasonableness.	The Commission believes that retaining the present "unconscionable" fee standard is appropriate for disciplinary purposes in

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						contrast to the “reasonable” standard of the ABA Model Rules. The latter standard is more suited to a fee dispute regime. California is unique in having an extensive mandatory fee arbitration program in which claims of unreasonable fees can be resolved, leaving to the disciplinary system the more serious claims of unconscionability.
55	Schweitzer, Eric H.	D	No	1.5(e)(2)	Proposed Rule 1.5 would prevent thousands of Californians from obtaining meaningful access to the criminal courts. The scarcity of public defender resources, particularly in misdemeanor matters is becoming worse and worse from coast to coast. Those private practitioners who provide a realistic alternative to going to court and pleading guilty (usually at arraignment) with the public defender must rely on non-refundable retainers in order to remain viable economic enterprises. The non-refundable retainer benefits both the public and the legal profession because fewer and fewer Californians can afford the cost of a jury trial and because most cases that would plead guilty at arraignment (with the public defender) are likely to be settled far more beneficially for the client or dismissed before trial due to the work of a flat fee compensated private counsel. Proposed Paragraph (e)(1) would have disastrous consequences on the adversary system, because most persons who could afford the relatively modest fees for legal assistance from one stage of the proceedings to the	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning “nonrefundable” and “earned on receipt” fees. Notwithstanding the commenter’s stated position and practice, with the exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client

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					next, could in no way afford a retainer based upon availability for a trial that would, in all likelihood, never occur. Clients need certainty about the cost of a case that they simply want to have settled without the need for protracted litigation or risk. Lawyers often settle the most egregious cases to the client's benefit solely through reputation, skill and ability that would otherwise be unavailable due to the uncertainty of costs. If changed as intended, Rule 1.5 would cause a division between the lawyer's best interests and those of his or her clients. Lawyers would be logically viewed as prolonging cases just to justify a fee, rather than for any legitimate purpose, and in most instances, those criticisms would be rightly based. Please protect the integrity of the adversary system of criminal justice by allowing Californians to choose to engage qualified legal counsel of their choice, when faced with criminal prosecution.	explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
56	Sevilla, Charles	D	No	1.5(e)(2)	Subpart (2) adds uncertainty to the Rules. While the Rule states that the fee is the property of the attorney on receipt, this is contradicted by the addition of the clause stating the client, upon termination of the relationship, can demand a refund. A fee cannot be both an attorney's property if it is also subject to a client right of refund. This makes the fee status uncertain and has direct implications in matters of creditor rights and government forfeiture claims. The client's interest in fee contracts are already protected in a number of areas: (1) B&P Code section	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned

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					6148; (2) CRPC Rule 3-300; <u>Hawk v. State Bar, In re Corona</u>; (3) CRPC Rule 3-700(D)(2); and (4) CRPC 4-200, <u>Bushman v. State Bar</u>. Many criminal defense lawyers are sole practitioners who regularly charge flat fees for routine criminal matters. This Rule unnecessarily puts in place a condition that essentially makes the fee fixed (or "flat") only at client sufferance. If the work for the attorney is substantial, the client will be content with a fixed fee. But if the attorney seems to be on the way to a speedy result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. There is no such thing as a "flat" fee when one party to the contract can void it at will.	fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
57	Sheahen, Robert	D	No	1.5(e)(2)	Nonrefundable retainer fees benefit both attorney and client. We are not talking about gigantic or unconscionable fees. But a reasonable nonrefundable retainer fee is of the essence in the practice of criminal law. Suppose, for example, Attorney A charges a refundable \$10,000 fee against \$350 an hour. Attorney A then proceeds to spend 30 hours on the case doing, say, "research." The fee is exhausted and the client has received nothing -- except a request for an additional fee.	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To

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					Attorney B, however, knows his way around. He charges a nonrefundable fee of \$10,000 --- or a minimum fee of \$10,000 – and puts in only ten hours on the case -- and gets a dismissal for the client. Should this attorney -- having achieved a great result for the client -- be forced to return most of the fee? In the situation of Attorney B, the new Rule would encourage attorneys simply to waste their time to build up "hours" to justify the larger fee. The proposed new Rule is not workable. I urge the Bar to reject it and to create a new Rule guided by "the eye of experience."	state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests.
58	Spital, Samuel	D	No	1.5(e)(2)	My concerns about proposed Rule 1.5(e)(2) include the following: 1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat); 2. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion, of the fee" appears to give clients a residual interest in a fee that purportedly was	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public

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					"the . lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace; 3. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed"; 4. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged; 5. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and 6. It was submitted to the State Bar Board of	comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statues, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to

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					Governors for preliminary approval without the prior public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule. Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.	lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

Rule 1.5 Fees for Legal Services. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
59	Tarlow, Barry	D	No	1.5(e)	Rule 1.5(e), essentially prohibiting non-refundable retainers for almost all legal services, will drastically impact the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services. Considering the significance of the 2009 revisions to Rule 1.5(e)(1)-(2) I am especially concerned that in apparent violation of State Bar Rule 1.10(A) this novel version of Rule 1.5(e)(1)-(2) prepared by the Commission for the Revision of the Rules of Professional Conduct was neither publicized nor disseminated, in any manner prior to its November 2009 approval by the Board of Governors. Therefore, the membership of the Bar was unaware of this new Rule or that it would be considered at the November 14, 2009 Board of Governors meeting and were unable to meaningfully respond or object and be heard at the RAC and Board of Governors' November meetings. The Commission has not published any comprehensive or detailed factual and legal analysis for enacting these extensive changes or demonstrated that a need exists to do so. Rule 1.5(e)(1)-(2) also clearly violates the "Commission Charter." The Commission has asserted that a principle reason for this Rule "is client protection." However, since 1991, I have asked the proponents of attempts to abolish non-refundable retainers for evidence supporting the claim	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning "nonrefundable" and "earned on receipt" fees. Notwithstanding the commenter's stated position and practice, with the exception of a "true retainer" as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as "nonrefundable," "earned on receipt," etc. Rather, the lawyer is permitted do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that in California there is a pattern of unethical lawyers cheating clients by using non-refundable retainers. None has been forthcoming. It is also significant that this prohibition appears nowhere in the ABA Model Rules. Since the 19th Century non-refundable retainers have been used in California and are currently permitted in many states. In fact, in 1992 the Board of Governors of the California Bar endorsed the continued use of “fixed fees,” “flat fees,” and “non-refundable retainers” so long as the written fee agreement explicitly spelled out the arrangement and that the fee was “earned when paid.” Their decision was widely publicized. As far as I can determine, the Commission has never provided written analysis of this persuasive authority, advised the current Board of Governors of its existence and certainly has not demonstrated why it should be ignored by those who now sit on the Board of Governors. Prohibiting nonrefundable retainers, see 1.5(e)(2), will make these fee payments the property of the client until the work is performed. This is so regardless of the inaccurate representation set out in Rule 1.5(e)(2) requiring a written agreement by the lawyer and client asserting that the “flat fee is the lawyer’s property on receipt.” The critical issue in fee forfeiture and restraining order situations is not what the fee is called but who owns the funds.	through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer’s responsibilities and the client’s and lawyer’s reasonable expectations when entering into the kinds of agreements addressed in

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

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					Abolishing the nonrefundable retainer, that for years has protected clients and lawyers from fee restraints, fee forfeiture and jeopardy assessments, will expose lawyers performing many types of legal work to great financial risk. It will facilitate the restraint or seizure of fees if the client has a potential problem involving, for example, securities law, bankruptcy, criminal law, tax law and even some creditors' claims. Why enact this novel and untested fee arrangement that will result in years of collateral litigation, when for more than 40 years the nonrefundable retainer has proved to be the best available fee agreement to protect the client and lawyer from fee restraint and/or fee forfeiture? The proposed Rule changes and Comments are also confusing and internally inconsistent. Rule 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee agreements presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It will also certainly cause clients to fire their lawyers without cause and demand a refund of fees that until now have been considered and were in fact earned when received. The result will be the filing of arbitration demands, State Bar complaints, and civil suits. Of course, if a lawyer has seriously underestimated the work involved in a complicated "flat fee" case, which often occurs, ordinarily he will never be discharged without cause.	those provisions. Concerning the asserted lack of notice, the Commission notes that the Commission's drafts of this proposed rule have been issued for public comment in two separate instances and that these public comment distributions and also related public hearings were noticed on the State Bar website. Moreover, because the current draft of the proposed rule has been revised further, the Commission anticipates that the Board of Governors will authorize a further public comment period.

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
66	Thompson, Daryl B.	D	No	1.5(e)	Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is “earned when paid”) was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of “fixed fees,” “flat fees,” and “non-refundable retainers” as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are “earned when paid.” As with all fees and fee arrangements, non-refundable fee arrangements are subject to well-established	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state current California law concerning “nonrefundable” and “earned on receipt” fees. Notwithstanding the commenter’s stated position and practice, with the exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission does not agree that the current rules adequately protect clients (or

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include (1) the rule against charging excessive fees (Rule 1.5(a)); and (2) the longstanding rule requiring lawyers to refund unearned fee upon withdrawal from representation (Rule 1.16)). These existing rules control unscrupulous lawyers as it stands. Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified" State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.	provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
60	Thomson, James S.	D	No	1.5(e)	Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors	The Commission believes that proposed paragraphs (e) and (f), as clarified by Comments [6A] and [6B], accurately state

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					concluded that a non-refundable retainer (one that is “earned when paid”) was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of “fixed fees,” and “non-refundable retainers” as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are “earned when paid.” As with all fees and fee arrangements, non-refundable fee arrangements are subject to well established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include (1) the rule against charging excessive fees (Rule 1.5(a)); and (2) the longstanding rule requiring lawyers to refund unearned fee upon withdrawal from representation (Rule 1.16)). These existing rules control unscrupulous lawyers as it stands. Paragraph 1.5(e)(2)’s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the “sanctified” State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the “gold standard” for California lawyers.	current California law concerning “nonrefundable” and “earned on receipt” fees. Notwithstanding the commenter’s stated position and practice, with the exception of a “true retainer” as described in paragraph (f)(1), there is a substantial amount of settled case law that a fee is not earned until the lawyer has provided the agreed services, and that any unearned fees must be returned to the client. To state otherwise would be misleading. Nevertheless, unlike previous public comment drafts, paragraphs (e) and (f) do not prohibit outright the characterization of a fee agreement as “nonrefundable,” “earned on receipt,” etc. Rather, the lawyer is permitted to do so, provided the lawyer includes a written disclosure to the client explaining that the client may discharge the lawyer at any time and that the client may or may not be entitled to a refund of all or part of the fees charged. The Commission regards this approach as careful balancing of competing client interests. The Commission has considered the risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged at an hourly rate.	trustee, or by a creditor, and appreciates that these are important concerns. However, it is outside the authority of this Commission to resolve these potential problems as they arise from applicable Federal or State statutes, regulations, or appellate opinions and are not a function of the Rules of Professional Conduct. Further, the Commission does not agree that the current rules adequately protect clients (or provide adequate notice to lawyers of their legal obligations). Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made nonrefundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made. Paragraphs (e) and (f) and Comments [6A] and [6B] clarify the lawyer's responsibilities and the client's and lawyer's reasonable expectations when entering into the kinds of agreements addressed in those provisions.
62	Van Elgort, Howard M.	D	No	1.5(e)(2)	I have been a member of the State Bar of California since 1/9/62, and have been in private practice for	See response to California Attorneys for Criminal Justice ("CACJ").

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					most of this time. I also served as a Judge for 6 years in San Bernardino County. I only handle criminal cases. Eliminating non-refundable and flat fee retainer agreements will only raise fees to clients resulting in heavier caseloads for public defender offices. I know, that if I where to charge for my time on an hourly basis, my fees would far exceed that of my non-refundable retainer fee and flat fee agreements for other services. Most of my clients would not be able to hire private counsel. These proposed changes are a step backwards in the Bar's effort to expand the availability of legal services.	
63	Webster, James W.	D	No	1.5(e)(2)	I have been practicing since 1977 and my practice is devoted probably 85% to criminal defense. If this rule passes my ultimate fees to my clients will need to go way up. I completely agree with the comments in the letter to you dated May 25, 2010, from Ann C. Moorman, President CACJ Board of Governors	See response to California Attorneys for Criminal Justice ("CACJ").
64	Worthington, Thomas	D	No	1.5(e)	Our office opposes the proposed new rule of professional conduct which would, for all practical purposes, abolish non-refundable retainers. The most important reason that a "true retainer" should be allowed in criminal cases is that, often, the reputation of the law firm is critical to the outcome of the case. A demonstration of cooperation can lead to the filing of lesser charges and an opportunity for the client to make bail. Sometimes the best advice can	See response to California Attorneys for Criminal Justice ("CACJ").

Rule 1.5 Fees for Legal Services. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					give the client is an early admission of guilt, which is given great weight by the courts in deciding on the ultimate disposition. The more effective our negotiations with the District Attorney at the early stage of the proceeding, the more likely it is that a good result will be accomplished without the expenditure of the kind of time that would be involved if the case is left to languish in the congested criminal justice system. For a small practice to be financially viable, we must balance our caseload. Some cases resolve quickly, partly because of our excellent reputation. Others take forever no matter what we try to do. It is the cases that resolve quickly that give our firm the financial ability to represent clients who cannot manage the fees and costs involved when their cases drag on forever.	

Rule 1.5: Fees

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 1.5(b) requires all fee agreements to be in writing when the fee will exceed \$1,000. Moreover, Rule 1.5(f) instructs lawyers that they “should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.”

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

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

California: Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

Colorado: Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the

basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

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

District of Columbia: D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told “the effect of the association of lawyers outside the firm on the fee to be charged.”

Florida: Rule 4-1.5(a) prohibits any fee “generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar” or that is “clearly

excessive.” A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes “clear overreaching or an unconscionable demand,” or (2) a fee sought or secured “by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.” Florida also caps the percentage amount of any contingent fee.

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

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

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

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

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

Illinois: In the rules effective January 1, 2010, Rule 1.5(e)(1) provides that a division of a fee with a lawyer in a different firm is permissible if it “is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation.”

Maine: In the rules effective August 1, 2009, Maine includes two additional considerations in Rule 1.5(a): whether the client gave informed consent to the fee agreement and whether the fee agreement was in writing. In Rule 1.5(d)(3), Maine prohibits a lawyer from charging a fee based on “a percentage of the value of the estate” for administering an estate in probate.

Massachusetts: Rule 1.5(c) does not require a contingent fee to be in writing if it concerns “the collection of commercial accounts” or “insurance company subrogation claims,” but all other contingent fee agreements must be in writing and must contain greater detail than ABA Model Rule 1.5(c) requires. Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client’s consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

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

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

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

New York: In the rules effective April 1, 2009, Rule 1.5 contains numerous significant variations. For example, 1.5(a) relies on the definition of an excessive fee found in DR 2-106(B) of the old Model Code. Moreover, Rule 1.5(d) prohibits:

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated....

Comments 1A and 1B explain the purpose of Rule 1.5(d)(3) as follows:

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client’s matter; similarly, where the client has agreed to pay the lawyer’s cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual

costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. Whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3.

Comment 5A explains that “New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a ‘Statement of Client’s Rights.’” Rule 1.5(e) provides that a copy of this Statement must be provided to all domestic relations clients.

Finally, New York Court Rules supplement Rule 1.5(b) and provide that most fee agreements must be in writing. 22 N.Y.C.R.R. Part 1215 provides as follows:

Part 1215 Written Letter of Engagement

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a

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

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

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

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

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

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

§1215.2 Exceptions

This section shall not apply to

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

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

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

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

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

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

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

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

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

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

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

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

quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

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

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

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

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

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

Proposed Rule 1.5.1 [RPC 2-200]

“Fee Divisions Among Lawyers”

(XDraft #10, 6/28/10)

Summary: Proposed Rule 1.5.1 governs the division of fees among lawyers. Unlike Model Rule 1.5(e), which permits lawyers to divide fees only in proportion to the work each lawyer does or if the referring lawyer assumes responsibility for the matter, the California Rule, like the rules in many other states (see State Rule(s) Variations, below), permits a referring lawyer to divide a fee without providing services or assuming responsibility, so long as the lawyer complies with the Rule’s requirements. Following the second round of public comment, a single change was made to Comment [1] to clarify the Rule’s scope.

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 2-200

Statute

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

Case law

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

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

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 2
Abstain 2

Approved on Consent Calendar ☐

Approved by consensus ☐

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

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ **Not Controversial**

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5.1* Fee Divisions Among Lawyers

July 2010

(Draft rule revised following consideration of second round of public comment)

INTRODUCTION:

1. Proposed Rule 1.5.1 amends current California rule 2-200 and continues the policy that allows for payment of referral fees and for the division of fees between lawyers who are not in the same law firm. This subject is covered in ABA Model Rule 1.5(e), which the Commission decided not to adopt.
2. The key difference between ABA Model Rule 1.5(e) and rule 2-200 is that the ABA Rule does not permit “pure” referral fees while the California rule does. A “pure” referral fee is one in which the referring lawyer does not continue to represent the client in the matter being referred. The Model Rule requires that both lawyers represent the client in the matter and that the division occur either in proportion to their work on the matter or on the basis that both are responsible for the client’s matter. Current rule 2-200 allows for a referral fee where the referring lawyer is not involved in the client’s representation. The Commission concluded that the current rule should be retained with revisions.
3. The Restatement (Third) of the Law of Lawyering § 47, cmt. *b*, explains the rationale for the ABA Model Rule approach as follows:
“The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer’s qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.”

* Proposed Rule, Draft 10 (6/28/10).

INTRODUCTION (Continued):

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

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

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

INTRODUCTION (Continued):

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

7. Proposed Rule 1.5.1 is also a departure from current California rule 2-200. The proposed Rule will require that the agreement to divide a fee be in writing and that the client consent to the division after full disclosure at the time the lawyers enter into the agreement to divide the fee. These changes were made because an underlying reason for the rule is to assure that the client's representation is not adversely affected as a result of an agreement to divide a fee. Under the current rule, disclosure and client consent are not required until the fee is to be divided. The Commission concluded that deferring disclosure and client consent to the time the fee is divided denies the client a meaningful opportunity to consider the concerns the rule is intended address. A *minority* of the Commission disagrees with the majority. The minority concludes that the amount of the fee to be divided is an important consideration in the client's decision to consent to a division of a fee. In the minority's view the client's consent should be obtained prior to the division of the fee when the amount of the fee that is being divided is known, as the current rule provides.

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

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

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

* Proposed Rule 1.5.1, XDraft 10 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Fee Divisions Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
		Paragraph (a)(2) also substantially changes the requirements in current Rule 2-200 with respect to the timing of client consent. A division of fees raises concerns that should be disclosed to the client at the time the lawyers entered into the agreement to divide the fee. The concerns may include (1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based only on the agreement to divide the fees, (2) whether the lawyer dividing the fee will devote sufficient time to the client's matter in light of the fact that the lawyer is receiving a reduced fee, and (3) whether the client would prefer a different arrangement. Neither the Model Rule nor the current California rule mandates that the client be informed at the time the lawyers enter into the agreement to divide the fee. See <i>Mink v. Maccabee</i> (2004) 121 Cal.App.4th 835, 838 (the rule's requirement that the client's consent be obtained before the fee division "cannot reasonably be read to require the client's written consent prior to the lawyer's entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to the division of fees.") Both require a client's agreement to occur before the fee is divided, which could occur at the end of the case. The Commission concluded that allowing client consent to occur prior to the division and after the lawyers have agreed to divide the fee would not allow the client to assess the issues the Rule is intended address. If the agreement is entered into at the outset of the engagement and the division occurs after the matter has concluded, the client would have no meaningful opportunity to address any of the foregoing concerns. The arrangement could have an adverse effect on the lawyer-client relationship and the client would have no opportunity to avoid those consequences by refusing

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Fee Divisions Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
		to consent to the arrangement. For all of these reasons, the Commission concluded that the time for client consent needed to be advanced to the time the lawyers enter into the agreement to divide the fee. A minority of the Commission dissented from the Commission's decision to revise the timing of the disclosure and consent requirement. In their opinion, the client will have a better understanding of the consequences of the agreement to divide fees when the fee is about to be divided than at the beginning of the arrangement between the lawyers, because at the time the fee will be divided, the amount of fees to be divided will be known instead of speculative. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided. Paragraph (a)(2) also revises current Rule 2-200 by adding requirements for the disclosure to the client. Rule 2-200(A)(1) currently requires disclosure that a division will be made and the terms of the division. Paragraph (a)(2) adds a requirement that the identity of the lawyers who are parties to the division be included in the disclosure. This element is derived from concepts in the Model Rule.

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Fee Divisions Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(3) the total fee is reasonable.	(3) ~~the~~The total fee <u>charged by all lawyers</u> is ~~reasonable~~<u>not increased solely by reason of the agreement to divide fees.</u>	Proposed paragraph (a)(3) deviates from Model Rule paragraph (e)(3) in order to afford greater client protection. The Model Rule provides that the total fee must be reasonable. Under the Model Rule, clients can end up paying higher fees as a result of the division of fees, so long as the total fee is reasonable. Proposed paragraph (a)(3) prevents that result from occurring, so that the division of fees does not result in a higher cost to the client. The question of whether a lawyer may charge an unreasonable fee or an illegal and unconscionable fee is addressed in proposed Rule 1.5. It is unnecessary to repeat the limitation in this Rule. Proposed Comment [7] to this Rule informs lawyers that proposed Rule 1.5 also applies to the fee to be divided.

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

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

<u>ABA Model Rule</u> Rule 1.5(e) Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5.1 Fee Divisions Among Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) also applies to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.	Proposed Comment [2] replaces the balance of Model Rule Comment [7]. It explains the situations in which the proposed Rule applies.
	[3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of this Rule.	Proposed Comment [3] was added in response to comments from the Office of Chief Trial Counsel ("OCTC"). OCTC requested that the Rule make clear that each lawyer who is a party to the division has the obligation to assure the client is fully informed and consents to the arrangement. OCTC was concerned that each lawyer might attempt to avoid the obligations under the rule by claiming that the other was supposed to inform the client and obtain the client's consent. Proposed Comment [3] states that the proposed Rule requires both the lawyer dividing the fee and the lawyer receiving the fee to comply with the proposed Rule's requirements.
	[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the	Proposed Comment [4] explains the rationale for requiring disclosure and client consent at the time the lawyers enter into the agreement to divide the fee. It is intended to inform lawyers about the considerations to be addressed when fully informing the client about the agreement to divide the fee.

<u>ABA Model Rule</u> Rule 1.5(e) Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5.1 Fee Divisions Among Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.</u>	
	<u>[5] This Rule does not apply to a division of fees pursuant to court order.</u>	Proposed Comment [5] excludes divisions of fees pursuant to court order. The Commission concluded that the courts are in a position to protect client interests when issuing an order to divide fees. Lawyers who divide fees pursuant to the direction of a court should not be subject to discipline for complying with the order.
	<u>[6] This Rule does not subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).</u>	Proposed Comment [6] addresses an issue that arose about what act constitutes the grounds for discipline. As written the Model Rule, the current California rule and the proposed Rule all state the prohibition as being the division of the fee without complying with the rules' requirements. OCTC submitted a comment stating that OCTC considers the agreement to divide the fee to be the violation rather than the division. OCTC requested the Commission clarify this point in the proposed Rule. The Commission unanimously disagreed with OCTC's construction, but agreed that the proposed Rule should make clear when a lawyer is subject to discipline. Comment [6] provides that clarification. Numerous court decisions have unanimously held that an agreement to divide a fee made in violation of existing Rule 2-200 is void. (See <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142; <i>Margolin v.</i>

<u>ABA Model Rule</u> Rule 1.5(e) Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5.1 Fee Divisions Among Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		<i>Shemaria</i> (2000) 85 Cal.App.4th 891; <i>Scolinos v. Kolts</i> (1995) 37 Cal.App.4th 635.) Under the proposed Rule, that result would extend to any agreement not in writing, or about which a client has not been informed, or to which the client has not consented at the time the agreement is made. The Commission concluded that it would not be appropriate to subject lawyers to discipline for entering into a void agreement that does not result in the division of a fee.
	[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.	Proposed Comment [7] addresses the concept contained in Model Rule 1.5(e)(3) by making clear that the fee to be divided must comply with the restrictions on illegal and unconscionable fees in proposed Rule 1.5.

Rule 1.5.1: ~~Financial Arrangements~~Fee Divisions Among Lawyers

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:
- (1) The lawyers enter into a written agreement to divide the fee;
 - (2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and
 - (3) The total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.
- [3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of ~~the~~this Rule.
- [4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

COMMENT

- [1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by or on behalf of a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].
- [2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) ~~is also intended to apply~~ applies to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.
- [5] This Rule does not apply to a division of fees pursuant to court order.
- [6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).
- [7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

Rule ~~2-200~~ Financial Arrangements^{1.5.1: Fee Divisions} Among Lawyers

(Redline Comparison of the Proposed Rule to Current California Rule)

(Aa) ~~A member~~ Lawyers who are not in the same law firm shall not divide a fee for legal services ~~with a lawyer who is not a partner of, associate of, or shareholder with the member~~ unless:

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

~~(12)~~ The client has consented in writing thereto, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure ~~has been made in writing to the client~~ that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of such ~~the~~ division; and

~~(23)~~ The total fee charged by all lawyers is not increased solely by reason of the ~~provision for division of~~ agreement to divide ~~fees and is not unconscionable as that term is defined in rule 4-200.~~

~~(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

COMMENT

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

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

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

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

- [5] This Rule does not apply to a division of fees pursuant to court order.
- [6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).
- [7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

Rule 1.5.1: Fee Divisions Among Lawyers
(Commission's Proposed Rule – Clean Version)

- (a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:
- (1) The lawyers enter into a written agreement to divide the fee;
 - (2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and
 - (3) The total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.
- [3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of this Rule.
- [4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

COMMENT

- [1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by or on behalf of a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].
- [2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) also applies to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.
- [5] This Rule does not apply to a division of fees pursuant to court order.
- [6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).
- [7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

**Rule 1.5.1 Financial Arrangements Among Lawyers.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	D	Yes		Many of the Comments to this rule are more appropriate for treatises, law reviews, or ethics.	The Commission declined to eliminate any of the Comments. The current version of this Rule has been the subject of a number of reported decisions. The number of times the Rule has been litigated demonstrates that there needs to be more of an explanation about the Rule in the Comments than exists in the Discussion of the current Rule.
				Comment [4]	OCTC is concerned that Comment [4] appears more limited than the purposes stated in <i>Chambers v. Kay</i> p. 156-157 and, thus, could be confusing and misleading. If the purposes of the rule are to be stated, all the purposes should be stated.	The Commission does not think the concern is warranted. The purpose of the Comment is to provide the rationale for obtaining client consent at the time of the agreement rather than at the time of the division. It is not a general statement of purpose. The factors in the Comment come from <i>Chambers v. Kay</i> . The Commission did not see anything in the wording of the Comment that would create the confusion OCTC suggests.
				Comment [5]	OCTC disagrees with Comment [5]. There is nothing in the rule which would void or limit the rule regarding fee sharing by a court's approving a fee, which is what Comment [5] seems to be saying, although it provides no authority for this proposition. (OCTC believes this Comment is not in the Model Rules.) In <i>In the Matter of Harney</i> , the attorney argued that he could not be disciplined for his illegal fee	The Commission declined to change the Comment. The Commission added Comment [5] because the Commission believes that the courts are in a position to protect the client's interests in ordering the division. The matter pending before the Supreme Court concerns the current rule, which is changing. The Commission believes that courts should have the flexibility to allow divisions and should not be limited by the Rule in exercising that

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

**Rule 1.5.1 Financial Arrangements Among Lawyers.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	because a court had approved his fee. The Review Department rejected this claim. Likewise, an attorney is currently arguing to the Supreme Court that the State Bar Court erred in finding he violated Rule 2-200 because they are court awarded fees. (<i>In the Matter of Phillip Kay</i>, 01-O-1930, Supreme Court Case No. S180405.) Unless and until the Supreme Court agrees with this argument, the Comment should be stricken. OCTC strongly disagrees with Comment [6]. Comment [6]'s statement that the rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee is inconsistent with subparagraph (a)(2) of the rule, which states that attorneys must obtain the client's consent "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable." While there are civil cases that have held that Current Rule 2-200 does not apply until the actual division of fees, those cases addressed the civil enforceability of fee agreements between lawyers, not attorney discipline. Comment [6] would permit attorneys to violate the rule with no consequences. Further, Comment [6] would be overbroad, confusing, and misleading, implying that there	flexibility. The Rule continues the current prohibition on the division of a fee without client consent. The Rule does not state a prohibition on entering into agreement to divide a fee. The requirements for a written agreement and client consent are prerequisites for a division of a fee, not an independent basis for discipline. The Comment was added to make sure there was no confusion on this point. To revise the Comment as suggested would be inconsistent with the Rule. The Commission believes that the division of the fee should remain the trigger for the Rule's application. The Commission does not believe that the Comment is overly broad. It addresses the

**Rule 1.5.1 Financial Arrangements Among Lawyers.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					can be no disciplinary consequences for a failure to advise the clients of the agreement between the lawyers and obtaining the client's informed written consent to the fee sharing at the time the lawyers enter into the agreement to divide fees if the fees are not actually paid. However, the State Bar Court has found attorneys culpable of soliciting, assisting, or inducing a violation of Current Rule 1-120 and violating the duty to keep clients informed of significant developments under Current Rule 3-500 and B&P Code section 6068(m) when attorneys enter into an agreement to share fees without advising clients of the agreement and obtaining the client's informed written consent, even when the fees were not ultimately shared. (See e.g. <i>In the Matter of David D. Mangar</i>, Case No. 06-O-10183, Supreme Court Case No. S180863; <i>In the Matter of Philip E. Kay</i>, Case No. 01-O-1930, Supreme Court Case No. S180405. The Supreme Court approved the haring department's findings and ordered the disbarment of Mr. Mangar.) At the very least, the Comment should advise that attorneys may be disciplined for (1) failing to advise the client of the agreement at the time of the agreement, in violation of their duty to advise the client of significant	application of the Rule only. Revising the Comment as OCTC suggests would suggest that a prerequisite to a division of a fee was an independent basis for discipline, which is not the Commission's intent.

**Rule 1.5.1 Financial Arrangements Among Lawyers.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					developments under B&P Code 6068(m) and Rule 1.4 (Current Rule 3-500) (see <i>Chambers v. Kay</i>); and (2) assisting in, soliciting, and/or inducing a violation of the Rules of Professional Conduct or the State Bar Act in violation of Proposed Rule 8.4(a) (Current Rule 1-120).	
2	Rothschild, Toby	A	No	Comment [1]	Comment [1] seems to limit the restriction on fee divisions to fees "paid by a client." Does this mean that a fee paid by a third party on behalf of a client (such as a family member or an insurer) can be divided without regard to consent or written agreement? The comment should probably say "by or on behalf of a client."	The Commission revised Comment [1] along the lines suggested by the commenter.
3	San Diego County Bar Association	M	Yes		Some supported the new timing requirement for client consent, others prefer the current rule that imposes no strict timing requirement, still others suggest that the rule be changed to require disclosure to a client in a signed retainer agreement.	Commission did not make any revisions in response to this comment As the Commission explained in Comment [4], there are three client concerns associated with this rule: 1) whether the client is actually retaining the lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee, 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee, and 3) whether the client may prefer to negotiate a more favorable arrangement. These concerns cannot be address if the client's consent is not required until the fee is divided. If the division affect's the lawyer's

Rule 1.5.1 Financial Arrangements Among Lawyers. [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 1 Modify = 1 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						performance or client decides that the lawyer was not appropriate, it is too late to do anything about it. The rule was drafted to give the client the opportunity to address the issues in advance rather than after the fact. The proposed Rule recognizes that the agreement to divide a fee may not occur until after the client has signed a fee agreement. The Commission concluded that tying client consent to the time that the lawyers enter into the agreement affords the most client protection.

Rule 1.5: Fees

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 1.5(b) requires all fee agreements to be in writing when the fee will exceed \$1,000. Moreover, Rule 1.5(f) instructs lawyers that they “should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.”

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

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

California: Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

Colorado: Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the

basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

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

District of Columbia: D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told “the effect of the association of lawyers outside the firm on the fee to be charged.”

Florida: Rule 4-1.5(a) prohibits any fee “generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar” or that is “clearly

excessive.” A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes “clear overreaching or an unconscionable demand,” or (2) a fee sought or secured “by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.” Florida also caps the percentage amount of any contingent fee.

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

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

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

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

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

Illinois: In the rules effective January 1, 2010, Rule 1.5(e)(1) provides that a division of a fee with a lawyer in a different firm is permissible if it “is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation.”

Maine: In the rules effective August 1, 2009, Maine includes two additional considerations in Rule 1.5(a): whether the client gave informed consent to the fee agreement and whether the fee agreement was in writing. In Rule 1.5(d)(3), Maine prohibits a lawyer from charging a fee based on “a percentage of the value of the estate” for administering an estate in probate.

Massachusetts: Rule 1.5(c) does not require a contingent fee to be in writing if it concerns “the collection of commercial accounts” or “insurance company subrogation claims,” but all other contingent fee agreements must be in writing and must contain greater detail than ABA Model Rule 1.5(c) requires. Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client’s consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

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

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

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

New York: In the rules effective April 1, 2009, Rule 1.5 contains numerous significant variations. For example, 1.5(a) relies on the definition of an excessive fee found in DR 2-106(B) of the old Model Code. Moreover, Rule 1.5(d) prohibits:

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated....

Comments 1A and 1B explain the purpose of Rule 1.5(d)(3) as follows:

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client’s matter; similarly, where the client has agreed to pay the lawyer’s cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual

costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. Whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3.

Comment 5A explains that “New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a ‘Statement of Client’s Rights.’” Rule 1.5(e) provides that a copy of this Statement must be provided to all domestic relations clients.

Finally, New York Court Rules supplement Rule 1.5(b) and provide that most fee agreements must be in writing. 22 N.Y.C.R.R. Part 1215 provides as follows:

Part 1215 Written Letter of Engagement

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a

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

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

- (1) explanation of the scope of the legal services to be provided;
- (2) explanation of attorney’s fees to be charged, expenses and billing practices; and,

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

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

§1215.2 Exceptions

This section shall not apply to

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

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

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

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

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

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

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

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

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

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

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

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

quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

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

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

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

while a writing is said to be preferable, none is required.

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

Proposed Rule 1.6 [RPC 3-100; B&P §6068(e)]

“Confidentiality of Information”

(ALT3, XDraft #14, 6/28/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code § 6068(e); Evid. Code §§950 et seq.

Case law

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

☒ Other Primary Factor(s)

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

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 5
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

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

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.6* Confidentiality of Information

July 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

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

* Proposed Rule 1.6, ALT3, Draft 14 (6/28/10)

3. *Genesis of current California rule 3-100 and its continuation in proposed Rule 1.6.* In 2003, the Legislature passed and the Governor signed into law Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e) to provide for an exception that permits but does not require a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm. AB1101 also provided in Section 3 of the Act for the appointment of a task force by the State Bar President in consultation with the Supreme Court “to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.” The Legislature also identified in Section 3 a series of issues for the Task Force to address, including whether a lawyer must inform a client or a prospective client about the attorney's ability to reveal the client's or prospective client's confidential information to prevent a criminal act likely to result in death or substantial bodily harm, and whether the lawyer must take steps to dissuade a client from committing a criminal act before revealing the client's confidential information. In conformance with its statutory mandate, the Task Force drafted and proposed rule 3-100, which was adopted by the State Bar and approved by the Supreme Court, effective July 1, 2004. Current rule 3-100 is thus limited in scope to providing guidance to lawyers seeking to conform their conduct to sections 6068(e)(1) and (2). With one major exception, (see item #4, below), the Commission has, for the most part, retained the black letter and discussion paragraphs of rule 3-100. See paragraphs (a), (b)(1), (c), (d) and (e) of the black letter rule, and Comments [2]-[6], and [9]-[18], and the Explanation of Changes for each.
4. *Proposed change to language in public comment version of the Rule following public comment.* The Commission recommends a material change from the public comment draft of the Rule: the deletion of the second sentence of paragraph (a) in that draft. The second sentence had been added because of an apparent disjunction in language between the subdivisions of Bus. & Prof. Code § 6068(e), from which current rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, subdivision (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer to “reveal *confidential information relating to the representation* of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death

of, or substantial bodily harm to, an individual.” (Emphasis added). The Commission added a sentence to paragraph (a) of the public comment version of the Rule¹ to link the concepts of “confidence” and “secret” in subdivision (e)(1) to the concept of “confidential information relating to the representation” in subdivision (e)(2), which it understood to be coterminous with the language in subdivision (e)(1).

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

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

5. *Model Rule exceptions to confidentiality are inimical to California's strong policy favoring confidentiality. Soon after the financial debacles involving Enron, Global Crossing and WorldCom early this decade, the ABA adopted by a close margin controversial exceptions to confidentiality that permit a lawyer to reveal a client's confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. These provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. In addition, the Model Rule incorporates the concept of "implied authority," a dangerous catchall that threatens to swallow the duty of confidentiality. Accordingly, the Commission recommends rejection of Model Rule 1.6(b)(2) and (3), as well as the Model Rule's concept that the lawyer has "implied authority" to disclose and use confidential client information, even without the client's consent.*
6. *Minority. A minority of the Commission objects to several provisions of the proposed Rule. See Explanation of Changes for paragraphs (b)(3), (b)(4) and (b)(5).*
7. *Variation in Other Jurisdictions. Model Rule 1.6 has arguably been subject to more variation among the jurisdictions that have adopted it (or perhaps more accurately, have adapted it) than any other Model Rule, ranging from states that prohibit disclosures of any information except to prevent death or substantial bodily harm, to those that permit disclosure to prevent financial injury, or even some states that mandate disclosure to prevent death or substantial bodily harm, or even to prevent a criminal act likely to result in financial injury. See "Selected State Variations," Model Rule 1.6, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.*

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).	(a) A lawyer shall not reveal information ~~relating to the representation of a client~~ <u>protected by Business and Professions Code section 6068(e)</u> unless the client gives informed consent, ~~the disclosure is impliedly authorized in order to carry out the representation~~ or the disclosure is permitted by paragraph (b).	<u>COMPARISON TO MODEL RULE 1.6</u> Paragraph (a) is based on both Model Rule 1.6(a) and Cal. rule 3-100(A). The first sentence is taken from Cal. rule 3-100(A), revised to conform to the syntax and structure of the Model Rule. The Model Rule's concept of "implied authorization" has been stricken. The Commission recommends its rejection because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality.
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:	(b) A lawyer may, <u>but is not required to,</u> reveal information ~~relating to the representation of a client~~ <u>protected by Business and Professions Code section 6068(e)</u> to the extent <u>that</u> the lawyer reasonably believes <u>the disclosure is</u> necessary:	<u>COMPARISON TO MODEL RULE 1.6</u> The introductory clause of paragraph (b) is also based on both the introductory clause of Model Rule 1.6(b) and the first part of current rule 3-100(B). The language of current rule 3-100(B) restates section 6068(e)(2) verbatim. However, as explained in the Introduction, the Commission recommends substituting the term "information protected by Business and Professions Code section 6068(e)" for "confidential information relating to the representation of a client" as is provided in current rule 3-100(B). The remainder of current rule 3-100(B) is found in subparagraph (b)(1).

* Proposed Rule 1.6, ALT3, Draft 14 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
(1) to prevent reasonably certain death or substantial bodily harm;	(1) to prevent <u>a criminal act that the lawyer reasonably ~~certain~~ believes is likely to result in</u> death <u>of</u> or substantial bodily harm <u>to, an individual, as provided in paragraph (c);</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of Changes, introductory clause of proposed Rule 1.6(b), above. The language included in subparagraph (1) is taken verbatim from current rule 3-100, with the only change being the substitution of “lawyer” for “member.”
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;	~~(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;~~	COMPARISON TO MODEL RULE 1.6 The Commission recommends rejection of Model Rule 1.6(b)(2) and (b)(3), two exceptions to confidentiality that the ABA adopted in 2003. Both sections, which would permit a lawyer to disclose client information relating to the representation to prevent or rectify fraud, are inimical to California's strong policy on lawyer-client confidentiality and, in the view of the Commission, misguided attempts to protect the public that ultimately are more harmful to the public.
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;	~~(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;~~	COMPARISON TO MODEL RULE 1.6 See Explanation of Changes to Model Rule 1.6(b)(2).

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
(4) to secure legal advice about the lawyer's compliance with these Rules;	(4~~2~~) to secure legal advice about the lawyer's compliance with ~~these Rules~~<u>the lawyer's professional obligations</u>;	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(b)(2) is based on Model Rule 1.6(b)(4). The substitution of "the lawyer's professional obligations" for "these Rules" recognizes that, in California, a lawyer's duties to a client derive not only from the Rules of Professional Conduct, but also from statutes and case law.
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or	(5~~3~~) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; <u>relating to establish a defense to a criminal charge or civil claim against an issue of breach, by the lawyer based upon conduct in which or by the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a duty arising out of the lawyer-client relationship</u>; ~~or~~	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(b)(3) is based on Model Rule 1.6(b)(5), which has been modified to track the language of Cal. Evidence Code § 958, which provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." The exception in the Evidence Code to the lawyer-client privilege for a breach of duty arising from the lawyer-client relationship is substantially narrower than the corresponding exception in Model Rule 1.6(b)(5), which would permit the lawyer to reveal confidential information not only in controversies between the lawyer and client, but also between the lawyer and a third person. The breadth of Model Rule 1.6(b)(5) runs counter to California confidentiality policy and the Commission recommends its rejection. <u>Minority.</u> A minority of the Commission opposes the inclusion of paragraph (b)(3). Proposed paragraph (b)(3) is based on an exception to the lawyer-client privilege found in Evidence Code section 958. However, the minority takes the position that exception applies only when a court makes that determination. The minority maintains that paragraph (b)(3) – uniquely among all of the statutory privilege

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
		exceptions – would strip the client of that impartial determination by allowing the lawyer to determine when to disclose information the lawyer is required to maintain under section 6068(e)(1).
(6) to comply with other law or a court order.	(64) to comply with ~~other law or a~~ court order; or	COMPARISON TO MODEL RULE 1.6 Although the Commission recommends adoption of that part of Model Rule 1.6(b)(6) that permits compliance with a court order, it does not recommend adoption of the “other law” part of that provision. That phrase is too indeterminate to provide guidance to lawyers about when they might be permitted to reveal confidential client information and risks the unjustified disclosure such information. <u>Minority.</u> A minority of the Commission objects to the inclusion of subparagraph (b)(4) in the Rule. The minority believes a lawyer's duty is to resist the court order (per Section 6068(e)(1)) “at every peril to himself or herself.” A lawyer may not acquiesce in a court order. Rather, the lawyer is required to resist the order. That is what <i>People v. Kor</i>, cited at page 24 of the spreadsheet, says. “At every peril” does not merely require the lawyer to assert claims that the order is not authorized by other law or that the information is protected from disclosure. It requires the lawyer not to disclose, on pain of contempt. That duty is not cast aside as lightly as the proposed rule and Comment 18 suggest.
	(5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).	COMPARISON TO MODEL RULE 1.6 The Commission recommends adoption of proposed paragraph (b)(4), which refers lawyers to proposed Rule 1.14, which would

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
		permit a lawyer to reveal confidential information to the extent necessary to protect the interests of a client who has “significantly diminished capacity” and is “at risk of substantial physical, financial or other harm unless action is taken.” <u>Minority.</u> A minority of the Commission objects to proposed Rule 1.14, and thus to the inclusion of subparagraph (b)(5) in the Rule.
	<u>(c) Further obligations under paragraph (b)(1). Before revealing information protected by Business and Professions Code section 6068(e) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:</u>	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(c) carries forward current rule 3-100(C). In addition to the substitution of the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information,” see Explanation of Changes to paragraphs (a) and (b), the only changes made conform the rule to California rule style and substitute “lawyer” for “member.”
	<u>(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).
	<u>(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e) as provided in paragraph (b)(1).</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(d) In revealing information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.</u>	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including within paragraph (d)'s scope the additional exceptions in the proposed Rule (i.e., subparagraphs (b)(2), (b)(3) and (b)(4)), the only changes made are the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)," changes to conform the rule to California rule style, and the substitution of "lawyer" for "member."
	<u>(e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b) does not violate this Rule.</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).

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

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

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

² Proposed Rule, Discussion Draft 14 (6/28/10).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.	~~6068(e)–for the definition(1), which provides it is a duty of informed consent~~ <u>6068(e)–for the definition(1), which provides it is a duty of informed consent</u> lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.~~–This~~” <u>A lawyer’s duty to preserve the confidentiality of client information involves public policies of paramount importance. (=In re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371]. Preserving the confidentiality of client information</u> contributes to the trust that is the hallmark of the ~~client-lawyer-client~~ <u>client-lawyer-client</u> relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter~~ <u>detrimental subjects</u>. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. <u>Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client’s informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e). See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].</u>	In addition, the Commission has substituted “lawyer-client” for “client-lawyer” throughout the proposed Rules to conform the term to the usage in the Business & Professions and Evidence Codes. The substitution of “detrimental subjects” for “legally damaging subject matter” conforms the language in this Comment to the definition of “ information protected by Business and Professions Code section 6068(e)(1)” that appears in Comment [3], which in turn is based on long-standing California authority concerning the scope of the terms “confidence” and “secrets” in Bus. & Prof. Code § 6068(e). See also Explanation of Changes for paragraphs (a) and (b), which explain the Commission’s recommended use of the defined term, “information protected by Business and Professions Code section 6068(e)(1).”

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²	<u>Explanation of Changes to the ABA Model Rule</u>
[1] <i>Duty of confidentiality.</i> Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)	[1~~2~~] ~~<i>Duty of confidentiality.</i>~~ Paragraph (A~~a~~) relates to a ~~member's~~<u>lawyer's</u> obligations under Business and Professions Code section 6068, ~~subdivision~~ (e), which provides it is a duty of a ~~member~~<u>lawyer</u>: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A ~~member's~~<u>lawyer's</u> duty to preserve the confidentiality of client information involves public policies of paramount importance. <i>In Re Jordan</i> (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371]. Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client~~-lawyer-<u>client</u> relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter~~<u>detrimental subjects</u>. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A~~a~~) thus recognizes a fundamental principle in the ~~client~~-lawyer-<u>client</u> relationship, that, in the absence of the client's informed consent, a ~~member~~<u>lawyer</u> must not reveal information ~~relating to the representation~~<u>protected by Business and Professions Code section 6068(e)</u>.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes in previous row.

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
	See, e.g., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].	
[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.	~~[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.~~	<u>COMPARISON TO MODEL RULE 1.6</u> The Commission has substituted new proposed Comments [3] to [6] to define the term, "information protected by Business and Professions Code section 6068(e)." These comments use as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based on Model Rule 1.6, cmt. [3]. See Explanation of Changes for Comment [3], below.
[2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The	Information protected by Business and Professions Code section 6068(e). ~~[23] <i>Client-lawyer confidentiality encompasses the attorney-client privilege</i>As used in this Rule, the work-product doctrine and ethical standards of~~	<u>COMPARISON TO CAL. RULE 3-100</u> As noted, the Commission recommends substitution of new proposed Comments [3] to [6], using as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.	~~confidentiality. The principle of client-lawyer confidentiality applies to~~ "information ~~relating to~~ <u>protected by Business and Professions Code section 6068(e)</u>" ~~consists of information gained by virtue of the representation of a client, whatever its source, and encompasses matters communicated in confidence by the client, and therefore~~ <u>that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality, all as established defined in law, rule</u> <u>Business and Professions Code section 6068(e) is broader than lawyer-client privilege.</u> See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal. <u>App.</u>3d 614, 621 [120 Cal. Rptr. 253]. ~~The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.~~	loosely on Model Rule 1.6, cmt. [3]. The purpose of Comments [3] to [6] is to delimit the scope of a lawyer's duty of confidentiality, as well as provide a definition for "information protected by Business and Professions Code section 6068(e)". Because of California's strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Bus. & Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraphs (a) and (b)), the Commission views the expansion of rule 3-100, Discussion ¶. 2, as critical to providing guidance to lawyers in this important area and protection to clients.

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Scope of the Lawyer-Client Privilege</u> <u>[4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].
	<u>Scope of the Duty of Confidentiality</u> <u>[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established.</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.</u>	
	<u>Relationship of Confidentiality to Lawyer Work Product</u> <u>[6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.	[4~~7~~] Paragraph (a) prohibits a lawyer from revealing information ~~relating to the representation of a client~~ <u>protected by Business and Professions Code section 6068(e)</u>. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the <u>client's</u> representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of "information protected by Business and Professions Code section 6068(e)," a defined term, for the Model Rule's "information relating to the representation," and the addition of "client's" to modify "representation" for clarification.
Authorized Disclosure [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.	Authorized Disclosure [5~~8~~] ~~Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information <u>relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</u>	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [8] is based on Model Rule 1.6, cmt. [5]. The first two sentences of the Model Rule comment have been deleted because the Commission has rejected the ABA's theory of implied authority with respect to confidentiality because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. See Explanation of Changes for paragraph (a).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
Disclosure Adverse to Client [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.	Disclosure Adverse to Client <u>as Permitted by Paragraph (b)(1)</u> ~~[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.~~	<u>COMPARISON TO MODEL RULE 1.6</u> In place of Model Rule 1.6, cmt. [1], which is the Model Rule comment intended to provide guidance to lawyers with respect to Model Rule 1.6(b)(1), the Commission has substituted proposed Comments [9] to [18], which are carried over largely unchanged from current rule 3-100, Discussion ¶¶. 3 to 12. See Explanation of Changes for proposed Comment [9].
[3] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under	~~[39] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits <u>certain</u> disclosures otherwise prohibited~~	<u>COMPARISON TO CAL. RULE 3-100</u> As noted, the Commission has carried forward Discussion paragraphs 3 to 12 of current rule 3-100 largely unchanged. Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e)

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

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

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

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following: (1) the amount of time that the member has to make a decision about disclosure; (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them; (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful; (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member; (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and (6) the nature and extent of information that	faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~<u>such</u> information are the following: (1) the amount of time that the ~~member~~<u>lawyer</u> has to make a decision about disclosure; (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them; (3) whether the ~~member~~<u>lawyer</u> believes the ~~member's~~<u>lawyer's</u> efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful; (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~<u>lawyer</u>; (5) the extent of other adverse effects to the client that may result from disclosure	

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

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.	harm, <u>including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to</u> do both. The interests protected by such counseling ~~is~~<u>are</u> the client's ~~interest~~<u>interests</u> in limiting disclosure of ~~confidential~~<u>protected</u> information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the ~~member's~~<u>lawyer's</u> counseling or otherwise, takes corrective action – such as by ceasing the <u>client's own criminal act or by dissuading a third person from committing or continuing a</u> criminal act before harm is caused – the option for permissive disclosure by the ~~member~~<u>lawyer</u> would cease ~~as~~<u>because</u> the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~<u>lawyer</u> who contemplates making adverse disclosure of ~~confidential~~<u>protected</u> information may reasonably conclude that the compelling interests of the ~~member~~<u>lawyer</u> or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the ~~member~~<u>lawyer</u> should, if reasonable under the circumstances, first advise the client of the ~~member's~~<u>lawyer's</u> intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the ~~member~~<u>lawyer</u> should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider	

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

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reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are: (1) whether the client is an experienced user of legal services; (2) the frequency of the member's contact with the client; (3) the nature and length of the professional relationship with the client; (4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty; (5) the likelihood that the client's matter will involve information within paragraph (B); (6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and (7) the member's belief, if applicable, that good faith efforts to persuade a client not to	~~confidential~~<u>protected</u> information as provided in paragraph ~~(Bb)(1)~~ only if it is reasonable to do so under the circumstances. Paragraph ~~(Cc)~~(2) further recognizes that the appropriate time for the ~~member~~<u>lawyer</u> to inform the client may vary depending upon the circumstances. ~~{See paragraph comment [10] of this discussion.}~~ Among the factors to be considered in determining an appropriate time, if any, to inform a client are: (1) whether the client is an experienced user of legal services; (2) the frequency of the ~~member's~~<u>lawyer's</u> contact with the client; (3) the nature and length of the professional relationship with the client; (4) whether the ~~member~~<u>lawyer</u> and client have discussed the ~~member's~~<u>lawyer's</u> duty of confidentiality or any exceptions to that duty; (5) the likelihood that the client's matter will involve information within paragraph ~~(Bb)(1)~~; (6) the ~~member's~~<u>lawyer's</u> belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and	

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act on a threat have failed.	(7) the ~~member's~~lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.	
[8] <i>Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</i> Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.	<u>Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act</u> ~~[815] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.~~ Under Paragraph (d) requires that disclosure of ~~confidential-protected~~ information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential-protected~~ information to only those persons who the ~~member-lawyer~~ reasonably believes can act to prevent the harm. Under some circumstances, a ~~member-lawyer~~ may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the ~~member-lawyer~~. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the ~~member-lawyer~~.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comments [9] and [14].

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

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

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

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

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

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

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

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proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.	purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the <u>protected</u> information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.	
[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).	~~[15] [23] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(12) through (b)(65). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).~~	COMPARISON TO MODEL RULE 1.6 Comment [23] is based on Model Rule 1.6, cmt. [15]. The phrase, "(b)(2) through (b)(5)" has been substituted for "(b)(1) through (b)(6)" to conform to the structure of the proposed Rule and to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [11], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph. The remainder of the Model Rule comment has been deleted because the points made are better presented in the Discussion paragraphs of current rule 3-100 that have been carried forward. See Comments [9]-[18] and Explanations thereto.

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

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²	<u>Explanation of Changes to the ABA Model Rule</u>
prohibited by this Rule.	Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.	
[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)	~~[13] Other exceptions to confidentiality under California law. Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)~~	COMPARISON TO CAL. RULE 3-100 Discussion ¶. [13] to current rule 3-100 has been deleted as superfluous, as proposed Rule 1.6 is a comprehensive statement of the exceptions to confidentiality in California.
Former Client [18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.	Former Client ~~[18]~~^[26] The duty of confidentiality continues after the ~~client~~-lawyer-~~client~~ relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.	COMPARISON TO MODEL RULE 1.6 Comment [26] is nearly identical to Model Rule 1.6, cmt. [18], the only change being to change “client-lawyer” to “lawyer-client” to conform with the convention used in the Bus. & Prof. and Evid. Codes.
	<u>Government Lawyers</u> <u>[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].</u>	Comment [27] has no counterpart in the Model Rule. It has been added to provide a cross-reference to government lawyers seeking to determine the applicability of government employee whistle blower statutes to government lawyers.

Rule 1.6 Confidentiality of Information

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not reveal information protected by Business and Professions Code section 6068(e) unless the client gives informed consent or the disclosure is permitted by paragraph (b).
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);
 - (2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
 - (4) to comply with a court order; or
 - (5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- (c) *Further obligations under paragraph (b)(1).* Before revealing information protected by Business and Professions Code section 6068(e) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e) as provided in paragraph (b)(1).
- (d) In revealing information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b) does not violate this Rule.

Comment

- [1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and

1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Policies Furthered by the Duty of Confidentiality

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

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

- [3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)" consists of information gained by

virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)

Scope of the Lawyer-Client Privilege

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

Scope of the Duty of Confidentiality

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a

lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

- [6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. ~~(See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)~~
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

- [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information protected by Business and Professions Code section 6068(e) that is related to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

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

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

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

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

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

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected information as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [12] ~~of this Rule.~~

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

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

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

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

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

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of protected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's

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

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

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4 and Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal protected information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or

associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. See Comment [16]. Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b)(1);
- (6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

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

[15] Paragraph (d) requires that disclosure of protected information as permitted by paragraph (b)(1), when made, must be no more extensive

than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the protected information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Avoiding a Chilling Effect on the Lawyer-Client Relationship

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

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

- [17] When a lawyer has revealed protected information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer

and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, see Rule 1.16, unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. See Rule 1.16.

Other Consequences of the Lawyer's Disclosure

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

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

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

- [20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
- [21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.
- [22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

- [23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
- [25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

- [26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the

prohibition against using such information to the disadvantage of the former client.

Government Lawyers

- [27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].

Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not reveal information protected by Business and Professions Code section 6068(e) unless the client gives informed consent or the disclosure is permitted by paragraph (b).
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);
 - (2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
 - (4) to comply with a court order; or
 - (5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- (c) *Further obligations under paragraph (b)(1).* Before revealing information protected by Business and Professions Code section 6068(e) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e) as provided in paragraph (b)(1).
- (d) In revealing information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b) does not violate this Rule.

Comment

- [1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal

information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Policies Furthered by the Duty of Confidentiality

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

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

- [3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].

Scope of the Lawyer-Client Privilege

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

Scope of the Duty of Confidentiality

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the

duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

- [6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so

long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

- [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information protected by Business and Professions Code section 6068(e) that is related to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

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

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

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

- [10] Paragraph (b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial

bodily harm to an individual. A lawyer who reveals protected information as permitted under paragraph (b)(1) is not subject to discipline.

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

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected information as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [12].

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

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

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

- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

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

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

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct

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

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

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation.

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

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b)(1);
- (6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

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

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

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

Avoiding a Chilling Effect on the Lawyer-Client Relationship

- [16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal protected information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. See Comment [2]. To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal protected information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b)(1), or even choose not to

inform a client until the lawyer attempts to counsel the client under Comment [13]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

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

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

Other Consequences of the Lawyer's Disclosure

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

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

- [19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.
- [20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
- [21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.
- [22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.

Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

- [23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
- [25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include

the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

Government Lawyers

- [27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No		Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.	The Commission does not recommend the adoption of a government lawyer "whistle blower" exception in the proposed Rules. Previous attempts to effectuate such an exception by the State Bar, in cooperation with the legislature, and by the Legislature, have failed. The rejection of this proposed exception by two separate branches of government, the Court and the Executive, indicates that the policies underlying lawyer-client privilege and confidentiality trump the policies favoring such an exception. First, an attempt by the State Bar to include such an exception was rejected by the Supreme Court, which stated: "The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068(e)." See Supreme Court Order re Request for Rule Change filed by the State Bar, Case No. S104682 (2/27/02), available at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1836361&doc_no=S104682 [last visited 5/22/10] The Supreme Court's statement indicates that such an exception cannot be accomplished without a

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
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						concomitant amendment of Bus. & Prof. Code § 6068(e) by the Legislature. Second, two subsequent attempts by the Legislature to amend section 6068(e) to provide for a government lawyer “whistle blower” exception resulted in vetoes by two different governors. See Veto Message of Gov. Gray Davis re AB 363 (9/30/02),² available at: http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_vt_20020930.html [last visited 5/22/10] See also Veto Message of Gov. Arnold Schwarzenegger re AB 2713 (9/28/04),³ available at:

² In his veto message, Gov. Davis stated:

I am returning Assembly Bill 363 without my signature.

While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel.

The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients. For these reasons, I must return this bill without my signature.

³ In his veto message, Gov. Schwarzenegger stated:

I am returning Assembly Bill 2713 without my signature.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
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						http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2713_vt_20040928.html [last visited 5/22/10] Notwithstanding the foregoing, the Commission has provided some guidance in this area in proposed Rule 1.13, Comment [15], which provides: [15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Rule 1.6 or Business and Professions Code section 6068(e), a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.

Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.

For the reasons stated I am unable to support this measure.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.6 and the Comments to the Rule.	No response required.
3	Hazard, Geoffrey, Deborah Rhode and Zitrin, Richard (on behalf of law professors)	NI	Yes		The commenter notes that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004 and that the Board of Governors should take care to ensure that the Commission has not overstepped the bounds created by the legislature in drafting the original exceptions to confidentiality.	Although the comment is directed to the Board of the Governors, the Commission notes that the exceptions to confidentiality in paragraph (b) are either expressly provided for in Bus. & Prof. Code § 6068(e) or are settled in California law. More important, the Commission believes that that the proposed rule not only is within the Commission's charge, but also it is ultimately within the purview of the Supreme Court to determine whether the rule should be adopted.
4	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section	1. The Commission uses the language of 6068(e) by reference by using the defined term, "information protected by Business and Professions Code section 6068(e)." The Commission has deleted the reference to subdivision (1) of 6068(e).

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					6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1). 2. OCTC is further concerned that subparagraph (b)(1) does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e). 3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph. 4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this	2. The Commission has not made any change. First, there is no guarantee that the Legislature would place exceptions to § 6068(e)(1) in § 6068(e) or even in § 6068. In the past, proposed exceptions have appeared in different-numbered sections of the State Bar Act. Second, the experience of AB 1101, which resulted in the exception for death and substantial bodily harm that is in current rule 3-100 indicates that the Legislature is unlikely to enact any exceptions that would become operative before the Supreme Court has had an opportunity to approve a parallel rule. 3. Please see response to SDCBA, below. The provision is narrowly drafted and revisions to Comment [19] emphasize that a lawyer may reveal information only to the extent that it is necessary to establish a claim or defense. As the lawyer will be revealing such information only before a tribunal in which the lawyer-client controversy plays out, the necessary protections should be present. 4. the Commission notes that including the "other law" exception would effectively permit disclosures under stricken MR 1.6(b)(2) and (3), at least for publicly-traded companies under the Sarbanes-Oxley Act.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11 (a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC agrees that the term "court order" should be in this paragraph. 5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b). 6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our	No response necessary. 5. See response to Rule 1.14 comment. 6. The Commission does not believe any change need be made to paragraph (e), which provides only that "[a] lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule." If, after an appeal, an appellate court has determined that the lawyer must disclose what the lawyer has argued is protected under Rule 1.6, the court in effect is stating that the information is not protected under the Rule, and so the lawyer cannot rely on the rule to oppose disclosure. Regardless, refusal to disclose should not subject a

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
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					discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3-100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs clarification and it should be a violation to disobey a court order or law. 7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment [1] implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.	lawyer to discipline under a Rule that only permits disclosure. Further, the lawyer otherwise would be subject to discipline under other provisions of the State Bar Act. 7. As the Commission has noted with respect to other rules, the Comments to this Rule, many of which have simply been carried from current rule 3-100, provide important clarification of the Rule and guidance to lawyers in fulfilling this important duty. The Commission also wants to clarify that it did not "create" this Rule. The Rule carries forward rule 3-100, which is a creation of AB 1101 (2003-2004), and represents a cooperative undertaking among the three branches of government to provide guidance in this important area of attorney-client interaction. There should be no misunderstanding that it is the exclusive source of duties – or discipline – for lawyers.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence. 9. OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068(e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken. 10. Comment [15] is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it.	8. The Commission disagrees. The sentence is the classic definition of confidential information that has been used in California for decades. 9. The Commission has not made any changes. The specific comment to which OCTC refers, Cmt. [9], is in the Discussion to current rule 3-100 (¶. 3). The drafting of rule 3-100 was a cooperative venture among the Legislature, the Supreme Court, and the State Bar, as provided in AB 1101, which expressly provided for the appointment of a task force by the State Bar President in consultation with the Supreme Court "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." In addition, the bill identified a number of issues that should be addressed in the rule, which are the subject of the Comments [9] to [18] of the proposed Rule. 10. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					11. Comment [19] could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents? 12. OCTC is concerned that Comments [21] and [23] appear to allow a lawyer to disobey a court order to disclose information. As previously discussed, OCTC disagrees with that this position.	11. The Commission notes that Comment [19] provides only that a lawyer may disclose information without the client's permission in order to defend himself or herself against the client's allegations. Neither paragraph (b)(3) nor Comment [19] is intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client's permission. 12. The Commission disagrees with this assessment. The last sentence of Comment [21] provides: "Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order." See response concerning paragraph (e), at RRC Response, ¶. 6, above.
5	San Diego County Bar Association ("SDCBA") Legal Ethics Committee	M	Yes	1.6(a)	The Commission's proposal to define information protected from disclosure by Section 6068(e)(1) as "confidential information relating to the representation" could be read to weaken California's traditional protection of client confidences. The wording proposed by the minority is preferable and clearer: The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information" in this Rule.	The Commission changed the defined term from "confidential information relating to the representation" to "information protected from disclosure by Business and Professions Code section 6068(e)" to assuage concerns that Rule 1.6 might be viewed as narrowing the protections afforded to client information under section 6068(e).

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.6(b)(3)	This paragraph, although intended by the Commission to track Cal. Evid. Code Section 958, in fact goes far beyond the statutory exception. The exception set forth in 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. This determination is better left to an impartial court. Nonetheless, in the interest of uniformity, our recommendation is to replace proposed Rule 1.6(b)(3) with the provision of the ABA Model Rules, set forth in 1.6(b)(5).	The Commission did not make the suggested change. The Model Rule permits a lawyer to disclose confidential information not only in disputes with the client, but also in actions filed against the lawyer by third parties. The Commission does not understand how the Model Rule is narrower than proposed Rule 1.6(b)(3), which permits a lawyer to disclose confidential information only in controversies with the client. Further, the Model Rule does not provide for the intervention of "an impartial court," which appears to be the fault SDCBA finds with the Commission's proposal.
6	Santa Clara County Bar Association	M	Yes	MR 1.6(b)(2), (3)	We oppose the revisions proposes by the RRC in completely deleting subsection (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application.	The Commission did not make the suggested change. As noted in the Introduction to the Rule, MR 1.6(b)(2) and (3) are inimical to California's settled policy favoring strong confidentiality to better enable a lawyer to provide competent representation and compliance with the law: These provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Santos, Patrick T.	M	No		Commenter attached his 49-page Law Review Comment advocating for the adoption of an exception to Proposed Rule 1.6 in the case of wrongful incarceration, noting that currently Massachusetts is the only state which has a rule like it and the ABA is currently considering a counterpart.	The Commission recommends against the commenter's suggested adoption of an exception to confidentiality in proposed Rule 1.6 in situations involving wrongful incarceration. First, such an exception would undermine the policy underlying confidentiality of encouraging clients to be fully candid with a lawyer to enable lawyer to represent the client effectively. Second, as the commenter notes, only one state provides for such an exception, and the Model Rules have not been amended to include one. Finally, unlike the other exceptions the Commission has recommended in proposed Rule 1.6(b), an exception for wrongful incarceration is neither provided in Bus. & Prof. Code § 6068, nor well-settled in California decisional law.

Rule 1.6: Confidentiality of Information

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, Arkansas, Connecticut, Illinois, Maine, Maryland, New Hampshire, New Mexico, North Dakota, Pennsylvania, and Utah permit a lawyer to reveal information necessary to prevent the client from committing a criminal act “likely to result in substantial injury to the financial interest or property of another” (or words to that effect). Of these, Alaska, Arkansas, Connecticut, Illinois, Maine, Maryland, New Mexico, North Dakota, and Utah also permit revelation when the client’s act is only fraudulent, but not criminal. New Jersey, Vermont, and Wisconsin go one step further, imposing a duty to reveal the information under these circumstances.

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

Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Texas, Vermont, and Wisconsin mandate disclosure of information to prevent the client from committing serious violent crimes. However, mandatory disclosure applies in North Dakota only if the harm is “imminent,” and Florida’s provision applies to all crimes, not just violent ones.

Alaska: In the rules effective April 15, 2009, Alaska adds Rule 1.6(b)(1)(C), which permits disclosures in order to “prevent the wrongful execution or incarceration of another.” Alaska also adds Rule 1.6(c), which requires a lawyer to take reasonable precautions to guard against the inadvertent or unauthorized disclosure of a client’s confidential information.

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

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

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

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

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

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

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

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

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

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

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

District of Columbia: Rule 1.6 combines language from the ABA Model Code and the ABA Model Rules plus other language unique to D.C. Rule 1.6(c)(2) permits a lawyer to reveal client confidences "to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes" such acts will likely occur without revelation. Rule 1.6(d) is substantially the same as Model Rule 1.6(b)(2) and (3), although differently phrased. Rule 1.6(h) applies the obligations of the Rule "to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer."

Florida: Rule 1.6 provides that a lawyer "shall reveal" information the lawyer believes "necessary (1) to prevent a client from committing a crime or (2) to prevent a death or substantial bodily harm to another." In addition, Florida Rule 1.6(c) permits a lawyer to

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

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

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

Georgia's Rule 1.6(b)(1) permits a lawyer to reveal protected information which the lawyer reasonably

believes necessary “(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law” or “(ii) to prevent serious injury or death not otherwise covered” by subparagraph (i). Georgia adds the following Rules 1.6(b)(2)-(3) and (c), (d), and (e):

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

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

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

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

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

Illinois: In the rules effective January 1, 2010, Illinois adds Rule 1.6(c) and (d):

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers’ assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

Maine: Before making a disclosure under Rule 1.6(b), lawyers must try to convince the client not to engage in the conduct that will produce the applicable harm. Moreover, Rule 1.6(d) and Comment 2 explain that the rule applies only to a client’s confidences and secrets, not to the broader range of information (i.e., “all information relating to the representation of the client”) described in the Model Rule.

Massachusetts: Rule 1.6(b) provides as follows:

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

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

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

(Massachusetts was the first state to adopt an exception for preventing the wrongful execution or incarceration of another.)

Michigan essentially retains the language of DR 4-101 of the ABA Model Code of Professional Responsibility but deletes the self-defense exception in

DR 4-101(C)(4). Michigan also adds Rule 1.6(c)(3), which allows a lawyer to reveal "confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used."

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

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

(1) the client gives informed consent;

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

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

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

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

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

New Jersey: Rule 1.6(b) requires a lawyer to reveal confidential information "to the proper authorities . . . to prevent the client or another person (1) from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another" or "(2) from committing a criminal, illegal or

fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." Rule 1.6(c) permits a lawyer to reveal information as well "to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss."

New York: In the rules effective April 1, 2009, Rule 1.6 contains numerous variations as well as many new comments. For example, Rule 1.6(a) offers an elaborate definition of "confidential information," which provides as follows:

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Comment 4A elaborates on this definition as follows:

Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

Drawing on DR 4-101(B) of the old Model Code, Rule 1.6(a) provides that a disclosure of confidential information violates the rule only when the disclosure occurs "knowingly."

Rule 1.6(b) does not permit disclosures to prevent or rectify financial injuries, but it adds to the Model Rule by permitting disclosures when the lawyer reasonably believes necessary:

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; ...

Comment 6A offers a list of factors for lawyers to consider when deciding whether to disclose information under Rule 1.6(b), including:

(i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any

other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other

exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

Rule 1.6(c) is nearly identical to DR 4-101(D) of the old Model Code.

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

Ohio: Rule 1.6(b) permits a lawyer "to reveal the intention of the client or other person to commit a crime and the information necessary to prevent the crime," or to reveal confidential information "to mitigate substantial injury to the financial interests or property of

another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services." Ohio omits ABA Model Rule 1.6(b)(2).

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

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

client ultimately consents to representation by the purchasing lawyer."

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

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

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

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

attorney-client privilege or other applicable law; or

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

Texas: Rule 1.02(d)-(e) provides:

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

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

Texas Rule 1.05 divides "confidential information" into two categories — "privileged information," which means information protected by the attorney-client privilege, and "unprivileged client information," which

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

Vermont: In the rules effective September 1, 2009, Rule 1.6 imposes a duty to disclose confidential information "(1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

Virginia: Rule 1.6(a) contains the Code's definitions of "confidence" and "secret" without using these terms. A lawyer may reveal a client confidence "which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation." Rule 1.6(b)(3). The lawyer must "promptly" reveal "the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime," but if feasible must first give the client the opportunity to desist and must advise the client of the lawyer's obligation. If "the crime involves perjury by the client," the lawyer must advise the client that he or she "shall seek to withdraw as counsel." Rule 1.6(c)(1). Rule 1.6(c)(2) also requires the lawyer to promptly reveal "information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal." Information is clearly established when "the client acknowledges to the attorney that the client has perpetrated a fraud."

Proposed Rule 1.7 [3-310]

“Conflicts of Interest: Current Clients”

(ALT1, Draft # 3.1, 7/1/10)

Summary: Proposed Rule 1.7 is based on Model Rule 1.7 and states the basic conflict of interest standard for a lawyer in dealing with current clients. Provisions of the Rule are incorporated by reference in several other conflicts rules, including proposed Rule 1.9, which defines a lawyer’s duties to former clients, proposed Rule 1.10, which sets forth the principle of imputation of conflicts, and proposed Rule 1.11, which concerns special conflicts of interest involving former and current government lawyers. Several changes were made to Comment [22] following the second round of public comment to clarify the limited situation in which an open-ended waiver might be considered in compliance with the Rule.

Comparison with ABA Counterpart

Rule

Comment

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

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

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 3-310

Statute

Bus. & Prof. Code § 6131.

Case law

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 4
Abstain 0

Approved on Consent Calendar ☐

Approved by consensus ☐

Stakeholders and Level of Controversy

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

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Representatives of a large law firm urged the adoption of a provision concerning advance waivers of conflicts and several firms urged the adoption of a provision that would address “unforeseeable” (or “thrust upon”) conflicts. See “Public Comment” in Introduction.

☒ Very Controversial – Explanation:

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

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.7* Conflict of Interest: Current Clients

July 2010

(Draft rule following consideration of second round of public comment)

INTRODUCTION:

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

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

* Proposed Rule 1.7, ALT1, XDRAFT 3.1 (7/1/10).

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

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

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

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

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

The following statement was included In the Introduction that was circulated with the second round of public comment: “The Commission Chair encourages public comment on the specific issue of whether Rule 1.7 as recommended by the Commission and adopted by the Board is preferable to Rule 1.7 as drafted by the minority.” Comment was received from eight individuals or groups. None expressed a preference for the rule proposed by the minority.

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

Proposed Rule 1.7 Conflicts of Interest: Current Clients
Minority Position Against Adoption of Proposed Rule 1.7(a)(2)
Minority Dissent

Rule 1.7(a)(2) represents a sea change that will radically reduce client protection. Here is one of many possible examples: Imagine a situation in which a lawyer represents a client in a lawsuit, and one of the other parties is the lawyer's oldest friend, brother-in-law or lover, or someone to whom the lawyer owes money. Under the current California rules, the lawyer is absolutely prohibited from accepting that representation without first fully disclosing the facts to the client. This disclosure puts the client in complete control of the situation, by requiring the lawyer to disclose the relationship and its impact on the representation and allowing the client to decide whether to accept the lawyer, and if so with what limitations and protections. Under the proposed rule, it is highly unpredictable whether the client will receive this information. To the extent the disclosure occurs at all, it frequently will be too late to avoid injury to the client.

Paragraph 1.7(a)(2) states:

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

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7(a)(2) adopts an ABA Model Rule formula that focuses on the likelihood that a conflict of interest will affect a representation enough to hurt a client. Rule 1.7(a)(2) applies only when there is a "significant risk" that the circumstance will "materially limit" the lawyer's representation of a client. "Significant risk" and "materially limited" are not defined. There is no uniform standard for their application nationally.

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

Bar to enforce a preventative standard, which the current California rule affords.

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

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

To assist the Board its deliberations on Rule 1.7, the minority are providing the following draft that was previously circulated for public comment. The minority has revised the draft Rule in response to the comments the Commission received.

RULE 1.7 MINORITY DRAFT RULE

Rule 1.7: Conflict Of Interest: Current Clients

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

client without providing written disclosure to the client where:

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

(d) **Relationships with another Lawyer.** A lawyer shall not accept or continue representation of a client

without the client's informed written consent where the lawyer knows that:

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

Comment

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

[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, a lawyer should consider all of the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the

lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer; and (5) the duty to represent the client competently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.

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

[3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.12]. For conflicts duties to former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "written," see Rule 1.0.1(e) and (b). See also Comments [26] – [30] to this Rule.

Lawyer Acting in Dual Roles

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

Paragraph (a): Representation Adverse to Current Client

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

[5a] Paragraph (a)(1) encompasses those situations in which a lawyer is asked to act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the

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

[6] Paragraph (a)(1) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's

actions are directly adverse to a current client for purposes of this Rule.

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

[8] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a)(1). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish

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

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

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

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

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

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

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

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

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

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

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

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

[14] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about

allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).

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

[16] Reserved.

Paragraph (c): Lawyer Relationships and Interests

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

lawyer. Paragraph (c) applies in litigation and in non-litigation representations.

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

[19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (c)(4) does not require the lawyer to

investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to the matter, the lawyer must disclose the interest to the client and obtain the client's informed written consent to the lawyer's continued representation of the client.

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

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

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

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

Prohibited and Required Representations

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

[25] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied,

the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)

Disclosure and Informed Written Consent

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

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

make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

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

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

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

Consent to Future Conflict

[31] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does

not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [26] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's

choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comment[24] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Representation of a Class

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

Organizational Clients

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

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

Insurance Defense

[35] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against

an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

Public Service

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

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

* Proposed Rule 1.7, ALT1, Draft 3.1 (7/1/10). Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
General Principles [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).	General Principles [1] <u>Undivided</u> Loyalty and independent <u>professional</u> judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. <u>See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8 through 1.8.11, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.</u> For specific ~~Rules~~<u>rules</u> regarding certain concurrent conflicts of interest, see ~~Rule 1.8~~<u>Rules 1.8.1 through 1.8.11</u>. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "~~confirmed in writing~~<u>informed written consent</u>," see Rule 1.0.1(e) and (~~be-1~~), <u>and Comments [6] and [7] to that Rule.</u>	Comment [1] is based on Model Rule 1.7, cmt. [1], with the beginning and end of the Comment nearly identical to the Model Rule. Although there is no counterpart for it in the Model Rule, the Commission recommends including the middle section of the Comment, which identifies other duties besides loyalty and independent judgment, that factor into conflicts analysis. As Rule 1.7 is the first of four rules concerning conflicts, its placement in the first comment of the first rule in the series is appropriate. In addition to the middle section, the Commission recommends substituting "undivided loyalty" and "independent professional judgment" for the corresponding "loyalty" and "independent judgment," respectively. California case law repeatedly refers to a lawyer's "duty of undivided loyalty" and the term "independent professional judgment" is used throughout the proposed Rules. In the third sentence and last part of the Comment, the term "Rules 1.8.1 through 1.8.11" has been substituted for "Rule 1.8" because the the Board has adopted, the Commission's recommended numbering convention of assigning each counterpart provision to Model Rule 1.8 a separate rule number and title ("1.8.x"). The Commission recommended the foregoing approach because Model Rule 1.8 is largely a collection of unrelated provisions and the Commission's approach provides ease of reference and indexing. Finally, California's heightened "informed written consent" standard is substituted for the Model Rules "consent, confirmed in writing."

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

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).	~~avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~	
Identifying Conflicts of Interest: Directly Adverse [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is	<u>Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse</u> [6] ~~Loyalty~~<u>The duty of undivided loyalty</u> to a current client prohibits undertaking representation directly adverse to that client without that client's informed <u>written</u> consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the ~~client-lawyer-client~~ relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. <u>Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in</u>	The Commission recommends adding "Paragraph (a)(1)" to the title of this section of the Comment to call readers' attention to its applicability to that provision of the Rule. The Commission recommends substituting "undivided loyalty" "loyalty" because California case law repeatedly refers to a lawyer's "duty of undivided loyalty". The word "written" has been added to track California's heightened consent standard. The term "lawyer-client" is substituted for "client-lawyer" throughout the Rules to better track the phraseology in the Business & Profession and Evidence Codes. A middle section has been added to (i) include the holding of a seminal California Supreme Court case, <i>Flatt v. Superior Court</i>, involving a directly adverse conflict; and (ii) carry forward another example of direct adversity from current rule 3-310(C)(3). The Commission also recommends substituting for the Model Rule's sentence concerning a lawyer cross-examining a client a different sentence that more accurately reflects California law. See, e.g., <i>Hernandez v. Paicius</i> (2003) 109 Cal.App.4th 452, 134

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.	another matter. See <i>Flatt v. Superior Court</i> (1994) 9 Cal.4th 275. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, a directly adverse conflict when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns	Cal.Rptr.2d 756, disapproved on other grounds in <i>People v. Freeman</i> (2010) 47 Cal.4th 993, 103 Cal.Rptr.3d 723, 733 n.4. Finally, the Commission has recommended including the section at the end of the Comment which provides numerous other examples of situations that would not constitute "direct adversity". The Commission believes that including these examples will assist lawyers in identifying those situations in which they are required to obtain a client's informed written consent, enhancing both the administration of justice and client protection.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A]).</u>	
[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.	[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed <u>written</u> consent of each client. <u>Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.</u>	Comment [7] is based on Model Rule 1.7, cmt. [7]. The word "written" has been added to track California's heightened consent standard. The last sentence has been added to emphasize that paragraph (a)(1) applies (and thus informed written consent of each affected client must be obtained) even if the parties on different sides of a transaction have a common goal or interest.
	<u>[7A]If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].</u>	Comment [7A] has no counterpart in the Model Rule. It has been added to direct the reader's attention to paragraph (a)(2) and related comments when the lawyer seeks to represent two or more parties on the same side of a matter.

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.	interests <u>exists or</u> will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of ~~action~~<u>actions</u> that reasonably should be pursued on behalf of ~~the~~<u>each</u> client. <u>See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the lawyer knows or reasonably should know that: (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (ii) the previous relationship would substantially affect the lawyer's representation; (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.</u>	

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Lawyer's Responsibilities to Former Clients and Other Third Persons [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.	Lawyer's Responsibilities to Former Clients and Other Third Persons [9] ~~In addition to conflicts with other current clients,~~ <u>a</u> lawyer's duties of <u>undivided</u> loyalty and independence <u>of professional judgment</u> may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. <u>See, e.g., William H. Raley Co., Inc. v. Superior Court (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].</u>	Comment [9] is based on Model Rule 1.7, cmt. [9]. See Explanation of Changes for Comment [1]. The Comment also includes a citation to an important California Court of Appeal case.
Personal Interest Conflicts [10]The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed	Personal Interest Conflicts [10]The lawyer's own interests should not be permitted to have an adverse effect on <u>the</u> representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give ~~at~~<u>the</u> client detached advice. <u>A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a</u>	Comment [10] is based on Model Rule 1.7, cmt. [10]. A middle section has been added to provide specific examples of the kinds of personal interest relationships that can require compliance with paragraph (a)(2). As to the substitution of "1.8.1 through 1.8.11," see Explanation of Changes for Comment [1]. A reference to Rule 3.7 has also been added to call lawyers' attention to the fact that that specific rule might be applicable and not paragraph (a)(2).

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

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consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.	<u>relationship with another lawyer</u>, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed <u>written</u> consent. The ~~disqualification~~<u>prohibition on representation</u> arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.	
[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).	[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the ~~client-lawyer~~<u>client</u> relationship. See Rule ~~1.8(j)~~<u>1.8.10</u>.	Comment [12] is identical to Model Rule 1.7, cmt. [12], except that "lawyer-client" has been substituted for "client-lawyer" and "Rule 1.8.10" has been substituted for "1.8(j)," the Model Rule counterpart for proposed Rule 1.8.10.
Interest of Person Paying for a Lawyer's Service [13]A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether	Interest of Person Paying for a Lawyer's Service [13]A lawyer may be paid from a source other than the client, including a co-client, if the client ~~is~~<u>gives</u> informed ~~of that fact and consents~~<u>written consent</u> and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule ~~1.8(f)~~<u>1.8.6</u>. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a ~~payer~~<u>payor</u> who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including	Comment [13] is based on Model Rule 1.7, cmt. [13]. The term "written consent" has been added to track California's heightened consent standard. "Rule 1.8.6" has been substituted for "1.8(f)" because that is the rule number assigned the counterpart to Model Rule 1.8(f). "Payor" is the term traditionally used in California Rules. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].

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the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.	determining whether the ~~conflict~~ <u>is consentable</u> ~~lawyer has the ability to obtain the client's consent to the representation~~ and, if so, ~~that~~ <u>whether</u> the client has adequate information about the material risks of the representation. <u>See Comments [14]-[17A].</u>	
Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.	Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), <u>in some</u> ~~conflicts are nonconsentable, meaning that the~~ <u>situations a</u> lawyer ~~involved~~ cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of ~~consentability~~ <u>consent</u> must be resolved as to each client.	Comment [14] is based on Model Rule 1.7, cmt. [14]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].
[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).	[15] ~~Consentability~~ <u>A lawyer's ability to obtain consent</u> is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed <u>written</u> consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1-~~(competence)~~ <u>and Rule 1.3-(diligence)</u>.	Comment [15] is based on Model Rule 1.7, cmt. [15]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2]. The word "written" has been added to track California's heightened consent standard. The cross-reference to Rule 1.3 (diligence) has been stricken because the Commission has recommended and the Board adopted the inclusion of the concept of diligence in Rule 1.1.

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[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.	[16] Paragraph (b)(2) describes conflicts ~~that are nonconsentable~~ <u>to which a client cannot consent</u> because the representation is prohibited by applicable law. For example, ~~in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes~~ certain representations by a former government lawyer are <u>also</u> prohibited, despite the informed consent of the former client. ~~In addition~~ <u>See, decisional law in some states limits the ability of a governmental client e.g., such as a municipality, to consent to a conflict of interest</u> <u>Business & Professions Code section 6131.</u>	Comment [16] is based on Model Rule, cmt. [16]. For an explanation of the language substituted for “consentable,” see Explanation of Changes for Comment [2]. Most of the remainder of the Model Rule language has been stricken because it is simply generally guidance on what might be the law in some jurisdictions. It has been replaced by a specific example of a representation prohibited by California statutory law.
[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).	[17] Paragraph (b)(3) describes conflicts ~~that are nonconsentable~~ <u>for which client consent cannot be obtained</u> because of the ~~institutional interest~~ <u>interests of the legal system</u> in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. <u>See, e.g., Woods v. Superior Court (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); Klemm v. Superior Court (1977) 75</u>	Comment [17] is based on Model Rule 1.7, cmt. [17]. For an explanation of the language substituted for “consentable,” see Explanation of Changes for Comment [2]. The phrase “interests of the legal system” has been substituted for “institutional interest” to clarify what is intended and also to better track the language adopted in proposed Rule 1.0(a)(3), which states a purpose of the Rules is “To protect the integrity of the legal system and to promote the administration of justice.” A middle section has been added to the Comment to provide two specific examples from California case law. See also <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [lawyer may not represent both a closely-held corporation and

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	Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although ~~this~~ paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).	directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation)).
	[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Rule 1.6 and Business and Professions Code section 6068(e). A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.	Paragraph [17A] has no counterpart in the Model Rule. It has been added because there are two other important situations in which a lawyer is not able to obtain consent to a conflict: (i) when the lawyer is precluded by confidentiality obligations from providing sufficient disclosure to support informed consent; or (ii) the client lacks capacity or authority to give consent. Although the Model Rule addresses the former concept in Comment [19] to that Rule, the Commission concluded it was better placed in this section on "Prohibited Representations," with a cross-reference in Comment [19] to Comment [17A].

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

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In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.	~~properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~	
Consent Confirmed in Writing [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the	~~Consent Confirmed in Writing~~ [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, ~~confirmed~~ in writing. ~~Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.~~ See Rule 1.0. ~~1(b). See also Rule 1.0(n)~~ (writing includes electronic transmission). ~~If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b).~~ The requirement of a ~~writing~~ <u>written disclosure, (see Comment [18])</u>, does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon	The heading has been deleted because California does not follow the Model Rules' less-protective standard. Comment [20] is based loosely on Model Rule 1.7, cmt. [20]. Most of the first part of the Model Rule comment has been stricken because the Commission determined that California's more robust consent protocol should be described in the first comment to this section on informed written consent (Comments [18]-[20].) However, the Commission recommends adoption of the last part of the Model Rule comment because it provides valuable guidance.

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

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

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

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

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

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).	Comment [24] has no counterpart in the Model Rule. It has been added in recognition that, notwithstanding this Rule, a court has inherent authority to control the conduct of persons appearing before it.
[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.	[25] ~~When~~ This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent ~~a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.~~ Thus, the lawyer does not typically need to get the consent of ~~such a person~~ an unnamed class member before representing a client ~~suing the~~ who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.	Comment [25] is based on Model Rule, cmt. [25]. Several clarifying changes have been made.

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

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.	<u>duties to the other clients.</u> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the ~~common~~<u>joint</u> representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the ~~common~~<u>joint</u> representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake ~~common~~<u>joint</u> representation of clients where contentious litigation or negotiations between them are imminent or contemplated. ~~Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.~~ Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by ~~very good~~<u>likely</u>. Other relevant factors ~~are~~<u>include</u> whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.	sentence has been added to identify the basic concern underlying a lawyer's acceptance of a joint representation. The sentence beginning with "Moreover" has been deleted because it is a misleading statement of the duty of loyalty. Two grammatical changes have been made in the last and next-to-last sentence.

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

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

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

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

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

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

Rule 1.7 Conflict of Interest: Current Clients
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed written consent.

Comment

General Principles

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8 [through 1.8.11](#), 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "informed written consent," see Rule 1.0.1(e) and (e-1), and Comments [6] and [7] to that Rule.

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

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

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

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

[5] [RESERVED]

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

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

in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. ~~A directly adverse conflict may also arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client.~~ Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same

legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A].

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

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

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

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

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

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] A lawyer's duties of undivided loyalty and independence of professional judgment may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor

or corporate director. See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].

Personal Interest Conflicts

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

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

implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer who is related to another lawyer, e.g., as parent, child, sibling or spouse, or who is in an intimate personal relationship with another lawyer, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed written consent. The prohibition on representation arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), in some situations a lawyer

cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consent must be resolved as to each client.

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

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

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0.1(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Rule 1.6 and Business and Professions Code section 6068(e). A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.

Disclosure and Informed Written Consent

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

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

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0.1(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Duration of Consent

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

Revoking Consent

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

Consent to Future Conflict

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

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

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of

the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, joint representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

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

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

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

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

Nonlitigation Conflicts

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

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

[28] [RESERVED]

Special Considerations in Joint Representation

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

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

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

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

[31] [RESERVED]

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

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

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a).

Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Insurance Defense

[36] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (a) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct

action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

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

Public Service

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

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

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed written consent.

COMMENT

General Principles

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8 through 1.8.11, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "informed written consent," see Rule 1.0.1(e) and (e-1), and Comments [6] and [7] to that Rule.

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

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

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

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

[5] [RESERVED]

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

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

in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as

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

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

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

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

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

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

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

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

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

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

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

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0.1(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot

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

Disclosure and Informed Written Consent

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

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

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0.1(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), does not

supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Duration of Consent

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

Revoking Consent

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

Consent to Future Conflict

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply

with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on factors such as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education, language skills, and the

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

Conflicts in Litigation

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

representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

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

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

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

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

Nonlitigation Conflicts

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

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

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and

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

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

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third

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

[31] [RESERVED]

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

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

Organizational Clients

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

organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Insurance Defense

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

insurer's interest is only as an indemnity provider and not as a direct party to the action.

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

Public Service

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

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No	Comment [29A]	Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a <u>long-term, or continuing basis</u> to one or more <u>other</u> , especially small, agencies that lack or cannot afford their own counsel—a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking material limitation on the scope of the representation to one entity or the other. The conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent. While the draft Comments do mention conflicting instructions	The Commission recommends no change to Rule 1.7 in response this comment. The Rules generally apply to governmental lawyers as they do to all other lawyers. See <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 150. This is true both in general and with respect to the challenging topic of a client's advance consent to a future conflict of interest (see proposed Comment [22], which has been the subject of numerous comments to the Commission). Even if otherwise warranted, the Commission does not believe it is possible to draft an exception to address this specific concern that reliably could cover the wide variety of governmental relationships and representations. Any exception should come within a specific factual setting, either by the consent of the clients involved or by a court ruling. Also, the potential problem can arise outside of the governmental context, for example, where a client directs one of its lawyers to provide legal advice to a joint venture in which the client is involved.

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

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

TOTAL = 8 **Agree = 1**
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					and inconsistent interests (see draft Comment [29A],² for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to <u>inform</u> the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.	This suggestion apparently is intended to permit governmental lawyers to accept conflicting representations by providing information that falls short of the standard needed to obtain a client's informed consent (as defined in Rule 1.0.1(e)). The Commission does not agree that this would be appropriate in any situation. There are two additional problems with this proposal: (1) there does not seem to be any workable definition of a "small public agency" and (2) it is not in the interest of governmental lawyers or their clients to suggest through a dilution of standards that governmental lawyers are in any sense secondary to other lawyers. The Commission believes that conflicts of interest are no less important in non-litigation situations as they can involve a client's most important values and interests and can lead to or be intertwined with litigation.

² Although the commenter referred to Comment [29], the specific comment referenced is draft Comment [29A].

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

TOTAL = 8 **Agree = 1**
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		We fully support the rule as drafted as a significant improvement of the prior draft and over the current Rule 3-310. Adopting a rule that is fundamentally consistent with the ABA Model Rule will benefit firms and practitioners who are dealing with conflicts of interest across jurisdictions by providing uniformity. We understand the concerns of the dissent, but do not agree that the proposed rule will reduce client protection. We believe the key terminology in the rule, along with the extensive comments, are adequately explained to enable the practitioner to understand and apply the rule.	No response required.
3	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (on behalf of law professors)	M	Yes		We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This letter does not address the issue of whether Comment [22] of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Letter from Ethics Professors addressed this issue, and opposed the adoption of the Comment paragraph, then enumerated ¶ 33. The comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product	No response required. The Commission previously replied to the earlier comment letter and will not repeat its reply here, which the Commission believes remains correct. Also see the Responses to the SDCBA and to OCTC in this chart. The Commission believes the Comments provide much helpful guidance to lawyers and to courts and should be retained. The Comments are the product

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of much discussion and deliberation, the ultimate comments as revised were not as carefully vetted. Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.	of extensive drafting effort, including a careful review of the Model Rule Comments and of the countless changes in the Model Rule Comments in other jurisdictions. The Commission makes these recommendations only after consideration of public comment that itself led to numerous changes in the Comments.
4	MacNaughton, Richard		No	Comment generally	Unlike Los Angeles County, where there is the District Attorney and County Counsel, there is only one City Attorney for the City of Los Angeles. There are members of the City Council and other city officials (attached two articles and provided an example in his letter) who engage in questionable and illegal conduct. It strikes me that the City Attorney has an inherent conflict of interest. For example, the City Attorney has to provide legal advice to members of the City Council, and the City, and defend them both when sued. The City Attorney has a serious conflict of interest in investigating and/or prosecuting his own clients. If a City Council member is engaged in a fraud or wrongdoing, how does the City Attorney investigate the City Council	The Commission recognizes that city attorneys sometimes face challenging conflict of interest issues. See, e.g., Cal. State Bar Opn. 2001-156. However, the Commission is unable to see what Comment might be added to Rule 1.7 to provide additional guidance in this area. The Commission proposes no change as a result of this comment.

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

TOTAL = 8 **Agree = 1**
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					member? That leaves the public with no one to protect their interests. It seems to me that the structure of the City Attorney's Office conflicts with the Rules of Professional Conduct, but the Rules do not address this conflict. I do not expect you to deal with any specifics of any case. I mention the examples to highlight the type of conflict that seems to be inherent in the City Attorney's Office. If my observation is correct, it seems that the State Bar should have some Comment in the new Rules.	
5	Office of Chief Trial Counsel	D	Yes		1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 Comments. It says that there are too many Comments and many are too long and incorporate other Proposed Rules and Comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer's personal interests (or other fiduciary duties). The Proposed Rule and its Comments, however, make complex this simple proposition. 2. The Proposed Rule's use of the term "directly adverse" is vague, ambiguous, and	1. The Commission respectfully disagrees that conflicts of interest are simple. It further believes that attempting to state conflicts principles as generalities would leave lawyers without guidance, which would leave lawyers and their clients less protected. 2. This comment provides a good example of the complexity of conflicts of interest. Removing

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

TOTAL = 8
Agree = 1
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [6] & [7]	potentially too limiting and confusing. We believe that the term “directly adverse” will be subject to a great deal of interpretation and, therefore, litigation. The use of the modifier “directly” may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an “adverse” as opposed to “directly adverse” interest and may, therefore, fail to seek the appropriate client consent. The use of the term “directly” may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the Proposed Rule. Using the term “adverse” without the modifier “directly” may be clearer, less ambiguous and more appropriate. 3. OCTC recognizes that the Commission has tried to explain the term “directly adverse” in Comments [6] and [7]. However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between “adverse” and “directly adverse” interests and may, instead, add to the problems with enforcement of the rule. If the word “directly” is stricken from the Proposed Rule, then Comments [6] and [7] should also be deleted.	“directly” as requested would cause paragraph (a) to apply to all degrees and kinds of adversity, including economic adversity. This would mean, as an example, that a lawyer would violate paragraph (a) by representing a client who is suing another client’s tenant and whose success might injure the economic interests of the other client. It is essential that the Rule not permit this interpretation. 3. The Commission agrees that that Comment [6] can be shortened and has edited it accordingly. It does not believe that material change to Comment [7] is possible without affecting its accuracy or utility.

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

TOTAL = 8 **Agree = 1**
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	4. Comment [6] defines an attorney's cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one's own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such cross-examination on the client's interests and on the attorney's duty of loyalty and confidentiality to that client. Such analysis is necessary regardless of whether the modifier "directly" is included in the Proposed Rule.	4. The Commission disagrees. A lawyer's violation of the duty of loyalty does not depend on whether the lawyer's conduct affects the quality of the lawyer's representation of the client. The Commission has slightly revised Comment [6] to clarify this.
				Comment [6]	5. OCTC recommends striking the second sentence of Comment [6] because, if a client is adversely affected by an attorney's work on the matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest.	5. The Commission disagrees and has added a new second sentence to Comment [6] to clarify this.
				Comment [7]	6. OCTC recommends striking the modifier directly before adverse in Comment [7].	6. See the second paragraph of the RRC Response to the OCTC comments.

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

TOTAL = 8 **Agree = 1**
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [8]	7. Comment [8] is too long and confusing. OCTC recommends striking sentences 2-4. 8. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310(C). If the Commission wants to state that this rule is not intended to change the Current Rule, it should just state that. If it believes the language in the Comment is preferable to the language in the Proposed Rule, it should adopt the language in the Comment as the rule. It, however, should not attempt to do so by a Comment.	7. Sentences two - four are borrowed from the Model Rule Comment with some sharpening of language and are important in understanding the "material limitation" standard. However, the Commission has added additional language that makes the Comment excessively long, and it therefore has broken out the additional language as a separate Comment [8A]. 8. The Commission is not able to follow this comment and therefore has made no change on its account.
				Comment [9]	9. Comment [9] appears unnecessary in light of Proposed Rule 1.9 and the language in Proposed Rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney's other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should include in 1.7(a)(2) after the words "representation of one or more clients" words	9. The Commission believes that this topic is better handled by the Comment discussion and citation rather than in Rule format and has made no change.

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [10]	such as “or the attorney’s duties as a fiduciary to others.” 10. Comment [10] is unnecessary in light of Proposed Rule 1.7(a)(2).	10. The Commission believes this is an important part of the needed explanation of “material limitation” and has made not change.
				Comment [12]	11. Comment [12] is unnecessary in light of Proposed Rule 1.8.10.	11. This is a cross-reference to Rule 1.8.10. The Commission believes that cross-references of this kind are important in such a long and complex body of rules and has not made the requested changed.
				Comment [13]	12. Comment [13] is unnecessary in light of Proposed Rule 1.8.6.	12. The Commission disagrees and has made no change. Rule 1.8.6 addresses the fact of payment by someone other than the client, and Rule 1.7 addresses the lawyer’s potential conflict. The two are complementary.
				Comment [34]	13. Comment [34] seems unnecessary in light of Proposed Rule 1.13(a).	13. The Commission disagrees and has made no change. The first sentence is a cross-reference to Rule 1.13, provided for guidance, and the balance is an explanation not found in Rule 1.13.
				Comment [38]	14. Comment [38] seems unnecessary in light of Proposed Rules 6.3 and 6.4.	14. This Comment provides helpful cross-references. The Commission has retained them as previously explained.

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [14]-[17A]	15. Comments [14]-[17A] could be reduced and the language tightened.	15. These Comments provide important guidance on the Rule, and the Commission does not believe they can be materially shortened.
				Comments [23]-[25]	16. Comments [23]-[25] are too long and confusing.	16. See the preceding RRC Response.
				Comments [26]-[27]	17. Comments [26]-[27] are too long and confusing.	17. See the preceding RRC Response.
				Comments [29]-[29A]	18. Comments [29]-[29A] are too long and confusing.	18. See the preceding RRC Response.
				Comments [32]-[33]	19. Comments [32]-[33] are too long and confusing.	19. See the preceding RRC Response.
					Many of these Comments seem unnecessary or duplicative of other Comments. They should be reduced and tightened up.	
				Comment [19]	20. Comment [19] is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14]-[17A] in Comment [19] could be stricken.	20. This comment seems to be that the Commission should add a statement that a lawyer who cannot make the disclosure needed to obtain consent cannot accept the representation. The Commission believes the Rule and Comment already say this, and that there is not valid reason to lengthen the Comment by saying so again.

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

TOTAL = 8
Agree = 1
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [20]	21. OCTC recommends striking the first sentence of Comment [20], but supports the rest of the Comment.	21. The Commission is unable to understand this comment, which might have intended to reference a different paragraph, and accordingly has made no change.
				Comment [1]	22. Comment [1] lists the duties the conflict rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. If should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no Rule 1.8, but several separate rules under the 1.8 category. (See Rule 1.8.1 through 1.8.11.)	22. The Commission disagrees. The sentence the commenter objects to refers to the “conflicts rules” in the plural, meaning that collectively the conflicts rules are concerned with the described duties. One would not have to violate every conflict rule to have a conflict of interest, so the Commission has made no change. The Commission agrees that the reference to Rule 1.8 is incorrect and has changed it.
				Comment [30]	23. OCTC believes Comment [30] is an improvement and concurs that Rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment [30] does not specifically require this in order to have informed consent.	23. OCTC recommends that, in order for a lawyer to obtain informed consent to a joint representation that presents a potential conflict of interest, the lawyer be obligated to disclose the confidentiality issues discussed in Comment [30]. The Commission has not made this change because it is not prepared to say that this should be an absolute requirement in all such representations. It is satisfied, as stated in Comment [30] that this is a “particularly important factor”, and that consultation with the client is required under Rule 1.4.

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [22]	24. Comment [22] is too long and confusing. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.	24. Advanced waivers are permitted by several reported appellate decisions, and the Commission does not believe that it cannot outlaw them as requested by OCTC (nor does the Commission believe this would be appropriate). The Commission received extensive public comment for and against Comment [22] and believes that the current proposal provides important guidance to lawyers.
6	Paulsen, Bradley		No	1.7(a)(2) 1.7(b)(4)	The commenter has submitted a lengthy letter with attachments complaining about the conduct of certain plaintiffs' lawyers in the construction industry are violating the law and certain Rules of Professional Conduct in soliciting client homeowners. The commenter specifically refers to certain Rules of Professional Conduct, including proposed Rule 1.7(a)(2) and 1.7(b)(4), and asserts that the subject lawyers are in violation of these provisions. The commenter, however, does not suggest any revisions to the identified paragraphs of the Rule, instead noting that	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.

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

TOTAL = 8
Agree = 1
Disagree = 1
Modify = 4
NI = 2

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					"random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 claims."	
7	San Diego County Bar Association	M	Yes	Comments [22] and [25] [formerly numbered Comments [33] and [34] in the initial public comment draft (3/1/08)]	Delete Comment [34]³ regarding class representation because it should be addressed in a separate rule on class representation. Delete fourth sentence from the end of Comment [33]⁴ regarding advance consent because it does not accurately state the status of current law.	The Commission carefully considered the possible adoption of a separate rule on class actions (although there is no such Model Rule) but voted against doing so, in part because the topic is too extensive and varied to be handled in a rule format, and in part because of the ability to address some class action issues in existing rules. Doing so provides valuable guidance within the context of rules that apply – or do not apply - in class actions. This has been done in Comment [34] (now numbered Comment [25]). Also see Rule 1.4, Comment [4], Rule 1.8.7, Comment [1], and Rule 7.2, Comment [4]. The Commission reconsidered the fourth sentence from the end of Comment [33] (now numbered Comment [22]) (stating: "An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar.") and has concluded that it is an accurate statement of the law. Nevertheless, the

³ The subject comment was numbered Comment [34] in the initial public comment draft (3/1/08). It is now numbered Comment [25] in the current draft.

⁴ The subject comment was numbered Comment [33] in the initial public comment draft (3/1/08). It is now numbered Comment [22] in the current draft.

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

**TOTAL = 8 Agree = 1
Disagree = 1
Modify = 4
NI = 2**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Commission has revised Comment [22] to clarify with even more precision the factors to be considered in determining whether an "open-ended" consent complies with the Rule.
8	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	ABA Comment [5]	The commenters urge the adoption of Comment 5 to the ABA Model Rule 1.7, regarding "thrust upon" or "unforeseeable" conflicts because Comment 5 would provide guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset. Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm's client's adversary is acquired by another client of the firm during litigation, such as in the context of third-party discovery. The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney may have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the "thrust	The Commission disagrees with the commenters and did not add the additional requested Comment provision. The Commission concluded that there is such a large variety of thrust-upon conflict situations that might present themselves, likely including circumstances that the Commission cannot predict, that the development of rules in this area is better left to the developments of case law.

Rule 1.7 Conflicts of Interests: Current Clients. [Sorted by Commenter]						TOTAL = 8 Agree = 1 Disagree = 1 Modify = 4 NI = 2
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					upon defense" established by case law from other jurisdictions. Under that case law, when a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. See <i>Gould, Inc. v. Mitsui Min. & Smelting Co.</i> , 738 F. Supp. 1121 (N.D. Ohio, 1999).	

Rule 1.7: Conflict of Interest: Current Clients

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

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

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide

independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

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

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

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

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

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

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

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

(1) consultation with the lawyer,

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

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

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

(1) is prohibited by law or these rules;

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

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

Illinois: In the rules effective January 1, 2010, Illinois deletes the requirement that a client's consent to a conflict of interest be confirmed in writing.

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

New Jersey: Rule 1.7(b)(1), the counterpart to ABA Model Rule 1.7(b)(4), contains a proviso to the effect "that a public entity cannot consent to any such representation." In addition, New Jersey adds a sentence from the original 1983 version of ABA Model Rule 1.7

requiring the lawyer, when representing multiple clients in a single matter, to explain "the advantages and risks involved" in common representation.

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

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

New York: In the rules effective April 1, 2009, Rule 1.7(a) draws, in part, on DR 5-101(A) and 5-105(A)-(B) of the old Model Code, providing as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

The comments to the rule offer more detail than the Model Rule comments in several respects. For example, Comments 22 and 22A describe advance waivers of conflicts in detail, and Comments 34, 34A, and 34B all address conflicts involving a client's corporate affiliates.

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

Texas: Rule 1.06 provides as follows:

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

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

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

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

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

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

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

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

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

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

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

Rule 1.7 and the Restatement of the Law Governing Lawyers.

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

Proposed Rule 1.8.1 [3-300]

“Business Transactions with a Client and Acquiring Interests Adverse to the Client”

(XDraft #16, 7/1/10)

Summary: Proposed Rule 1.8.1 sets forth a lawyer’s duties when entering into a business transaction with a client or acquiring an adverse pecuniary interest. It largely tracks Model Rule 1.8(a), but retains concepts found in current California rule 3-300. Some revisions were made to the Rule comment following the second round of public comment to clarify the applicability of the Rule.

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

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-300

Statute

Case law

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 1
Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

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

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

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

☒ Very Controversial – Explanation:

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

See Introduction and Explanation for the resolution of these two issues.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

July 2010

(Draft rule revised following consideration of second round of public comment.)

INTRODUCTION:

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

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

The Comment to the Proposed Rule addresses two issues that were the subject of considerable public comment: (1) responsibility for the disclosure requirements of the Rule when the client is actually represented by independent counsel; and (2) applicability of the Rule to fee agreement modifications. As explained below, on the latter issue, the Board of Governors adopted a recommendation of a minority of the Commission that limits the applicability of Rule 1.8.1 to modifications that confer on a lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client; and added a new paragraph (g) to Rule 1.5 (Fees for Legal Services) which prohibits a lawyer from making a material modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so.

* Proposed Rule 1.8.1, XDraft 16 (7/1/10).

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

The applicability of proposed Rule 1.8.1 to fee agreement modifications. The Commission concluded that modifications to lawyer-client engagement agreements occur in many lawyer-client relationships and are frequently beneficial to the client. The Commission believed that imposing the Rule 1.8.1 protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship and could deter modifications to engagement agreements in cases where the modification would benefit the client. In addition, the Commission concluded that existing California case law protects the client in situations involving overreaching or undue influence that are not readily susceptible to regulation by a disciplinary rule. The Commission's view was considered by the Board of Governors at its January 7 – 9, 2010 meeting, together with an alternate approach developed by a minority of the Commission. The minority approach limited the applicability of Rule 1.8.1 to modifications that confer on a lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client; but also added a new paragraph (g) to Rule 1.5 (Fees for Legal Services) which prohibits a lawyer from making a material modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Following discussion at its January 2010 meeting, the Board adopted the minority approach on the issue of fee modifications.

Addressing material modifications that are adverse to a client's interests in Rule 1.5. Beginning with two premises – (1) that only material modifications that are adverse to a client's interests require the special attention of a disciplinary rule; and (2) that a lawyer advising the client to seek the advice of an independent lawyer and be given a reasonably opportunity to do so is generally viewed as the most effective means of protecting a client in business dealings with the client's lawyer –new paragraph (g) to Rule 1.5 was adopted by the Board:

(f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

The foregoing paragraph applies to a "material" modification that is "adverse to the client's interests," even if the modification does not confer on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, as that term has been construed by the courts. By limiting the application of paragraph (g) to "material" modifications that are "adverse to the client's interests," the Rule will not prevent or discourage modifications intended to benefit the client. By requiring the lawyer to advise the client "to seek the advice of an independent lawyer of the client's choice" and be "given a reasonable opportunity to seek that advice," the client is given the protections in dealing with the lawyer. Placing the provision in Rule 1.5 is believed to be the logical place that lawyers will look for guidance on all things concerning fees, including fee modifications. The explanatory comments provide guidance to lawyers on what constitutes a "material" modification that is "adverse to the client's interests. See proposed Comments [3] and [3A] to Rule 1.5.

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

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

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

MEMO

To: RRC

From: Ellen Peck
Bob Kehr

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

Date: December 13, 2009

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

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

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

Example One: A lawyer bludgeons a client into increasing the lawyer's contingency fee by threatening to abandon the client at a critical moment in a lawsuit. Under this duress, the client agrees to increase the lawyer's contingency compensation. That lawyer would be disciplined under current law for an act of moral turpitude under Bus. & Prof. C. § 6106. Depending on the amount of the new contingency, the lawyer also might be subject to discipline under Rule 1.5 for entering into an agreement to charge an unconscionable fee. The new requirement would not protect the client because the client in effect has been blackmailed and had no meaningful opportunity to consult or take the advice of independent counsel, and the lawyer already is subject to easily available discipline.

Example Two: Another contingency lawyer has agreed to represent a client on a standard 40% contingency. The client receives a "final" settlement offer during last-minute settlement negotiations, but the client refuses the offer because the client believes it would result in an insufficient net recovery. The lawyer agrees to reduce his

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

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

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

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

Our original November 29, 2009 Memo:

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

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

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

Common sense:

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

- Substantive changes that are for the benefit of the client but not the lawyer.
 - o Contingency fee example --- lawyer accepts a representation, but at a 50% contingency because there is a lack of case authority to support the client's position in the proposed lawsuit, and the lawyer reasonably believes there is a substantial risk that the contingency will not occur. Some time later, the lawyer reports to the client the happy news of the publication of a supportive appellate decision. The client replies by asking the lawyer to reduce the fee. The lawyer is a *mensch*, agrees to reduce the fee to 40%, but does not comply with Rule 1.8.1. If the Rule were to apply to fee modifications, that logically should include a fee reduction as well as a fee increase even though the lawyer had a binding fee agreement and had no legal obligation to entertain the client's request (Should the lawyer have recommended to the client that a better figure would be 35%? Would an independent lawyer have advocated 35%?). This lawyer is subject to professional discipline, is subject to the threat of discipline if the client later demands the lawyer reduce the fee still further, and the lawyer arguably might lose the entire fee.
 - o Hourly fee example --- client suffers a financial reversal and requests a reduction in the billing rate. The lawyer has various legitimate alternatives, including among others, terminating the representation and leaving the client without representation (because of the client's inability to perform the fee agreement), humiliating the client by demanding that he borrow from relatives (or sell his wife's wedding ring, etc.), and keeping the current billing rate with a portion of the accumulating fee to be accrued with interest. The lawyer rejects all these alternatives and agrees to a reduction as requested by the client; the consequences are the same as in the contingency example. Should the fee reduction have been greater? Should the timing of payment been changed in some way? Should the lawyer have advised the client of these and other reasonably identifiable alternatives to the fee reduction requested by the client?

- Non-substantive changes that are for the benefit of the client but not the lawyer. Lawyer and client enter into an hourly fee agreement that requires the client to pay fees within 30 days after receipt of each monthly bill. The lawyer accedes to the client request for a short delay in the payment of a single statement. Again, the lawyer is subject to discipline, to the threat of discipline, and potentially to the loss of the entire fee.
- The negotiation with a current client of a new fee agreement for a new matter in which the current client seeks to retain the lawyer. If the existence of a lawyer-client relationship is the watershed event, then logically any fee negotiation between lawyer and a current client should be included, even if it is in a new matter. Nothing in principal distinguishes a new matter from an existing matter.
- The agreement between lawyer and client to apply an existing fee agreement to a new matter. Again, if the existence of a lawyer-client relationship is the watershed event, then the client would be entitled to all the protections of Rule 1.8.1 when discussing the application of an existing fee agreement to a new matter. Should the price or terms be different because the two matters are not the same, because the lawyer's level of experience in the second matter is less, or for some other reason?
- Billing rates provided for in an initial fee agreement. Example --- Lawyer agrees to represent a client in what is hoped to be (and turns out to be) a long-term relationship not limited to a single matter. Because hourly billing rates increase with time due to factors such as inflation and the increasing skill of young lawyers, and to avoid Rule 1.8.1, the lawyer's initial fee agreement states that the client will be billed at each lawyer's and each paralegal's normal billing rates. The lawyer's firm provides a notice of new rates that is sufficient to satisfy the standard of *Severson & Werson v. Bolinger*, 235 Cal. App.3rd 1569, 1673 (1991). The lawyer arguably would be subject to discipline under Rule 1.8.1.

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

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

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

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

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

California Probate Code § 16004(c) provides:

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

The Law Revision Commission Comment states:

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

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

Plaintiff contends on appeal that the presumption of invalidity codified in section 2235 of the Civil Code does not apply. We agree.

In contracting with his client, where there is a pre-existing attorney-client relationship, the attorney is charged with a rebuttable presumption of undue influence and thus invalidity of the contract. (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 272 P.2d 11; *Denton v. Smith* (1951) 101 Cal.App.2d 841, 226 P.2d 723.) This rule is based on section 2235 of the Civil Code, which reads as follows:

'All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. The presumptions established by this section do not apply to the provisions of an agreement between a trustee and his beneficiary relating to the hiring or compensation of the trustee.'

The last sentence was added in 1963. By its terms, it broadly excludes all agreements relating to hiring or compensation, including those made after the fiduciary relationship is established. Prior law had created an exception only where there was no pre-existing fiduciary relationship. Thus, in *Setzer v. Robinson* (1962) 27 Cal.2d 213, 216, 18 Cal.Rptr. 524, 526, the Supreme Court said: 'The presumption of 'insufficient consideration' and 'undue influence' created by Civil Code, section 2235, is not applicable to a contract by which the relation of attorney and client is originally created and the attorney's compensation is fixed. 'The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's length.' (*Cooley v. Miller & Lux*, 156 Cal. 510, 524, 105 P. 981; see also *Cooley v. Miller & Lux*, 168 Cal. 120, 131, 142 P. 83; *Youngblood v. Higgins*, 146 Cal.App.2d 350, 352, 303 P.2d 637; 5 Am.Jur., Attorneys at Law, s 189, p. 375.) . . . No attorney could safely or reasonably negotiate any fee agreement with a prospective client without some preliminary investigation of the facts of the case and a disclosure to the prospective client of the legal steps which in his judgment must be taken. If by the very fact of such investigation and disclosure

the relationship of attorney and client would thereby be created, the attorney would be placed in the impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not.'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fourth, if the process of obtaining a fee modification involves fraud, overreaching or duress, the lawyer is still subject to disciplinary investigation and potentially to professional discipline: See e.g., Bus. & Prof. C., 6106 [prohibiting fraud and dishonesty]; *Matter of Brockway* (Rev. Dept. 2006) 4 Cal.State Bar Ct. Rptr. 944, 959-960 [overreaching constituted moral turpitude where lawyer used complex legalese in fee agreement with clients, for whom English was a second language, to exempt himself from providing legal services of consequence to them]; *Goldstone v. State Bar* (1931) 214 Cal. 490, 498-499 and *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403 [fraud or overreaching by an attorney regarding fees is cause for discipline]; and *Matter of Shalant* (Rev. Dept. 2005) 4 State Bar Ct. Rptr. 829, 837-838 [the process by which modification negotiated was abusive to the client constituting moral turpitude¹].

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

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

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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:	~~(a)~~ A lawyer shall not enter into a business transaction with a client¹ or knowingly acquire an ownership, possessory, security¹ or other pecuniary interest adverse to a client¹ unless <u>each of the following requirements has been satisfied</u>:	Model Rule 1.8(a) has been reformatted to become the introductory paragraph. It retains the language in current rule 3-300, which, is the same as the text of Model Rule 1.8(a) with the exception of the language added at the end of the sentence. The Commission decided to retain the additional language in rule 3-300, which emphasizes a lawyer's responsibility to satisfy all of the Rule's requirements.
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;	~~(1)~~ ~~a) the~~ The transaction <u>or acquisition</u> and <u>its</u> terms ~~on which the lawyer acquires the interest~~ are fair and reasonable to the client and are fully disclosed and transmitted in writing <u>to the client</u> in a manner that <u>reasonably</u> can be ~~reasonably~~ understood by the client; <u>and</u>	Paragraph (a) is an amalgamation of Model Rule 1.8(a)(1) and current California rule 3-300(A). The Model Rule language was modified to refer to both a transaction and an acquisition of an adverse pecuniary interest. The Commission believes that the Model Rule reference to terms "on which the lawyer acquires the interest" narrows the focus to the terms of an acquisition, rather than all of the aspects of the acquisition. The deletion of the Model Rule language and replacement with the term "acquisition" broadens the scope of the Rule and affords greater client protection. The change conforms to the current California rule. The Commission added the words "to the client" to clarify that the client is the person to whom the terms are transmitted. The change conforms to the language in the current California rule. The word "reasonably" was moved to correct grammar. The word "and" was added at the end of the paragraph to emphasize that the requirements are conjunctive.

* Proposed Rule 1.8.1, Draft 16 (7/1/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. [CONTINUED...]	~~Business Transactions Between Client and Lawyer~~ <u>Scope of Rule</u> [1] A lawyer's legal ~~skill and training~~ <u>and skill, together with</u> the relationship of trust and confidence <u>that arises</u> between a lawyer and client, create the possibility ~~of overreaching~~ <u>that a lawyer, even unintentionally, will overreach or exploit client information</u> when the lawyer ~~participates in~~ <u>enters into</u> a business, ~~property or financial~~ transaction with ~~the client, for example, a loan or sales~~ <u>acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or a lawyer investment on behalf</u> <u>acquisition and the importance of having independent legal advice. See, e.g., Beery v. State Bar (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121]. This Rule also requires that the transaction or acquisition be fair and reasonable to the client.</u>	Comment [1] is a modified version of the first sentence of Comment [1] to the Model Rule and an elaboration of concepts related to the first sentence of the Model Rule Comment. The Comment is intended to explain the purpose of the Rule in light of California law. The Commission departed from the Model Rule Comment because the Model Rule Comment does not explain what client interests are protected by the Rule. The Commission concluded that explaining the underlying reasons for the Rule would assist lawyers in applying the Rule. The first sentence of Model Rule Comment [1] was modified to clarify that the Rule applies even if the possibility of overreaching is unintentional. The sentence also was revised to inform lawyers that the two principle considerations underlying the Rule are overreaching and exploitation of client information. The second sentence explains those two considerations in more detail. The rest of the Comment explains how the basic considerations that underlie the Rule are implemented in the Rule.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. [However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).]	Comment [2] is new. The Comment clarifies that the Rule does not apply to a transaction or acquisition of an adverse pecuniary interest that predates the lawyer-client relationship, except in specified circumstances. It also explains that while Rule 1.8.1 does not apply, other rules may apply to the lawyer's interest. The Model Rule Comments do not address this point. However, because both the California Rule and the Model Rule apply to transactions and acquisitions of adverse pecuniary interests with a client, the Rules do not apply when the party to the transaction or acquisition is not a client at the time the transaction or acquisition occurs. The Commission concluded that adding the Comment would assist lawyers in understanding and applying the Rule.
[...COMMENT [1] CONTINUED] <i>Business Transactions Between Client and Lawyer</i> [1] The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. [CONTINUED...]	Business Transactions ~~Between Client and Lawyer~~With Clients ~~[1] The requirements of paragraph (a) must be met~~This Rule applies even when the transaction is not ~~closely~~ related to the subject matter of the representation, as when a lawyer drafting a will for a client ~~learns that the client needs money for unrelated expenses and offers~~agrees to make a loan to the client.~~The Rule applies to lawyers engaged in pay expenses that are not related to the sale of representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are~~ related to the practice of law, ~~for example, the sale of titlesuch as~~ insurance, ~~brokerage~~ or investment ~~products or~~ services to ~~existing clients of~~	Comment [3] is a modified version of the second and third sentences of Model Rule Comment [1]. The Commission modified the second sentence of the Model Rule Comment to delete the reference to "closely" related transaction in order to clarify that no relationship between the representation and the transaction is required. The Commission also simplified the example given in the second sentence of Model Rule Comment [1] to avoid an inference that the Rule applies only when a lawyer, in the course of representing a client, learns about information leading to a transaction. The third sentence of the Model Rule Comment was revised to avoid the suggestion that the lawyer must be engaged in the business of selling goods and services related to the practice of law in order for the Rule to apply and to clarify that the Rule

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	~~the lawyer's legal practice. See Rule 5.7a client.~~	applies to any sale of law-related goods or services. The fourth sentence of the Model Rule Comment was deleted because such transactions are currently prohibited under proposed Rule 1.8.9.
[...COMMENT [1] CONTINUED] [1] It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.	~~[14] It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the~~<u>This Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, for example where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking or and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such</u><u>The Rule also does not apply to similar types of standard commercial transactions, for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply</u>	Comment [4] is an expansion of the sixth and seventh sentences of Comment [1] to the Model Rule. It is intended to include all of the types of transactions that California authorities have recognized are not covered by the Rule and to explain the reason why the Rule does not apply to the types of transactions. The first sentence of Comment [4] was added to introduce the concept that the Comment addresses. The second sentence combines the basic concepts in the two Model Rule Comment sentences in order to state the general rule. The Commission concluded that stating the general rule at the outset would assist lawyers in understanding the examples that follow. The third sentence of the Comment is a slightly modified version of the examples given in the Model Rule Comment. The fourth sentence includes examples of standard commercial transactions identified in State Bar Formal Opinion 1995-141. The Comment was drafted to explain the reason why the types of transactions described are not subject to the Rule. The fifth and sixth sentences are derived from the second paragraph of the Discussion to current Rule 3-300. The Commission expanded the discussion to clarify the circumstances in which this exception applies.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the ~~restrictions in paragraph (lawyer's client makes the same investment on the same terms. When a) are unnecessary lawyer and impracticable~~ a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.</u>	
	<u>[5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].</u>	Comment [5] has no counterpart in the Model Rule. The first sentence is derived from the Discussion to the current California Rule. The Commission expanded the discussion in the current rule to give guidance regarding when a agreement by which a lawyer is retained by a client confers an ownership, possessory, security or other pecuniary interest adverse to a client. The second sentence is new. It refers lawyer's to Rule 1.5, where the Commission recommends that obligations and guidance with respect to fee agreement modifications be placed. See proposed Rule 1.5 & comments [3] – [3C] thereto. The third sentence provides a specific reference to proposed Rule 1.5, Comment [3B], which is intended to provide guidance, by reference to case law and specific rules and statutes, to lawyers on fiduciary duties that might govern fee agreements even when neither this Rule nor Rule 1.5 applies.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[6] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future. This Rule also does not apply to an agreement with a client for a contingent fee in a civil case, unless the agreement confers on the owner an ownership, possessory, security, or other pecuniary interest adverse to the client.	Comment [6] has no counterpart in the Model Rule. The first sentence clarifies that an advance deposit for fees and costs is not an ownership, possessory, security or other adverse pecuniary interest. The Commission concluded that the addition was warranted because the current California Rule is silent on the subject, and an advance for fees and costs could be construed as taking an interest in the client's property. The Commission concluded that adding the sentence would clarify the scope of the Rule. The second sentence clarifies that a contingency fee agreement is not subject to the Rule, unless the agreement confers an ownership, possessory, security or other pecuniary interest adverse to the client. The current California Rule does not address whether a contingent fee is an ownership, possessory or security interest in the client's property. In light of the fact that a contingent fee agreement has characteristics that could be construed as such an interest and the benefit such arrangements offer for clients, the Commission concluded that clarification was warranted.
	<u>Adverse Pecuniary Interests</u> [7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. <i>Hawk v. State Bar</i> (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example,	Comment [7] has no counterpart in the Model Rule. The Comment explains what constitutes an adverse pecuniary interest under the Rule. The Comment also helps clarify that the new Rule does not abrogate existing law on the subject.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. See <i>Fletcher v. Davis</i> (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58]. An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. See <i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; <i>Kapelus v. State Bar</i> (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].	
	<u>Full Disclosure to the Client</u> [8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.	Comment [8] does not have a counterpart in the Comment to the Model Rule. The proposed rule includes the Model Rule requirement that the disclosure be transmitted “in a manner that reasonably can be understood by the client.” The Model Rule’s Comment addresses other elements of the Rule, but does not address this element. The Commission concluded that because this is an important element of the Rule, it should be discussed in the Comment. The Comment alerts lawyers that the application of this element of the Rule will depend on the circumstances.
[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a	[29] Full disclosure under Paragraph (a)(1) requires that a lawyer to provide the client with the same advice regarding the transaction itself be fair or	Comment [9] addresses what the full disclosure element of the Rule requires. The Commission rejected most of Comment [2] to the Model Rule. Model Rule Comment [2] largely restates the

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).	<u>acquisition that the lawyer would provide to the client</u> ~~and that its essential terms be communicated to the client, in writing,~~ in a <u>manner that can be reasonably understood.</u> ~~Paragraph (transaction with a) third party. <i>Beery v. State Bar</i> (21987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires that a lawyer to inform the client also be advised, in writing, of all of the desirability terms and all relevant facts of seeking the advice~~ <u>transaction or acquisition, including the nature and extent of independent legal counsel, the lawyer's role and compensation in connection with the transaction or acquisition.</u> It also requires ~~that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by~~ <u>to fully inform</u> the client, ~~both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, or acquisition and facts that might discourage the existence of reasonably available alternatives and should explain why~~ <u>client from engaging in the advice of independent legal counsel is desirable</u> <u>transaction or acquisition.</u> See <u>Rule 1.0</u> ~~<i>Rodgers v. State Bar</i> (e1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; <i>Clancy v. State Bar</i> (definition of informed consent 1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; <i>Brockway v. State Bar</i> (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836]. The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client~~	requirements of the Model Rule with little elaboration. The Commission concluded that discussion in the Model Rule Comment regarding disclosures to the client is vague, limited and incomplete and lacks reference to the principles governing disclosure in general. California has a well developed body of law in this area, which better explains the nature of the duty than the Model Rule Comment.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.	was fully advised. Hunnicutt v. State Bar (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; Felton v. Le Breton (1891) 92 Cal. 457, 469 [28 P. 490, 494]. ~~[3]~~¹⁰ The risk to a client is ~~greatest~~^{heightened} when the client expects the lawyer to represent the client in the transaction ~~itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7~~^{acquisition itself}. Under ~~that~~^{this} Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction ~~or acquisition~~, such as the risk that the lawyer will structure the transaction ~~or acquisition~~ or give legal advice in a way that favors the lawyer's interests at the expense of the client. ~~Moreover~~^{Because the lawyer has an interest in the transaction or acquisition}, the lawyer must ~~obtain the client's informed consent~~^{also comply with Rule 1.7(a)(2)}. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from ~~seeking~~^{representing} the ~~client's consent to~~^{client in} the transaction ~~or acquisition~~.	Comment [10] is adapted from Comment [3] of the Model Rule. The Commission changed the reference in first line of the Model Rule Comment from “greatest” to “heightened.” The Commission concluded that the reference to “greatest” was an overstatement and could be misconstrued to suggest that the Rule had less application in all other situations or that all other situations do not pose comparable risks, which is not the case. Although the second part of the first sentence of the Comment to the Model Rule is deleted in this Comment, its subject is addressed in Comments [11] and [12] The remaining changes are to conform the Comment to the terminology in the draft Rule, which distinguishes between business transactions and acquisitions of adverse pecuniary interests. The terminology was added in order to clarify that the Comment applies to both. The sentence regarding the applicability of Rule 1.7(a)(2) was revised to account for differences between the Model Rule and the proposed new California Rule, which does not require a client's informed consent.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[11]There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.</u>	Comment [11] addresses considerations when the lawyer continues to represent a client after entering into the transaction or acquisition. The Comment elaborates on the a more limited discussion of this subject in Comment [2] to the Model Rule and is directed to situations where the lawyer continues to represent the client with respect to the transaction or acquisition or the client expects the lawyer to do so. In addition, the Comment accounts for a decision by the State Bar Court and other authorities that hold that a lawyer's disclosure obligations under the current California Rule includes discussing the possible effect of a transaction or acquisition on the lawyer-client relationship. The Commission concluded that Comment [2] to the Model Rule does not clearly include disclosure of the effect of the transaction or acquisition on the lawyer-client relationship as part of the Rule's disclosure requirement. Including such disclosure in the Rule affords greater client protection because of the broad scope of the disclosure requirement in the proposed Rule and because the disclosure would be part of a protocol that includes the opportunity for review by independent counsel. At the same time, the Commission determined that lawyers are still required to comply with Rule 1.7, when that Rule applies. In light of these considerations, the Comment also addresses a lawyer's disclosure obligation when the lawyer knows or reasonably should know that the client expects the lawyer to continue representing the client with respect to the transaction or acquisition after the transaction or acquisition is consummated. The Comment clarifies that the lawyer has an affirmative obligation to disclose either that the lawyer will not represent the client or the risks of the lawyer's dual role when the lawyer will continue to represent the client.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.</u>	Comment [12] expands on the discussion at the end of Comment [10] above, which, in turn, is derived from Comment [2] to the Model Rule. It addresses the situation in which the lawyer continues to represent the client in matters other than with respect to the transaction or acquisition. As in the case of Comment [11], the Comment incorporates a requirement that the lawyer disclose the effect of the transaction or acquisition on the lawyer's representation of the client in other matters as part of the Rule's disclosure obligation. It also clarifies that the lawyer also is required to comply with Rule 1.7 where applicable.
	<u>Opportunity to Seek Advice of Independent Counsel</u> <u>[13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal</u>	Comment [13] addresses the requirement that a lawyer encourage the client to seek the advice of independent counsel. Since the California Rule departs from the Model Rule in this regard and imposes a more client protective standard, the Commission concluded that the requirement should be addressed in the Comment. The Comment also clarifies what constitutes independent

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.</u>	counsel, which the Model Rule does not address. The elements described in the Comment are derived from California court decisions.
[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.	~~[4] If a lawyer is not required to advise the client is independently represented to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for to make full disclosure is satisfied either by a written disclosure by to the lawyer involved client in writing of all material facts related to the transaction or by acquisition when the client's independent counsel lawyer knows or reasonably should know that the client has not been informed of such facts.~~ The fact that the client was independently represented in the transaction <u>or acquisition</u> is relevant in determining whether the ~~agreement was~~ <u>terms of the transaction or acquisition are</u> fair and reasonable to the client as paragraph (a)(1) further requires.	Comment [14] is an adaptation of Comment [4] to the Model Rule. It reiterates the limitation of the lawyer's duty to advise a client to seek the advice of independent counsel when the client is represented by such counsel. However, the Commission narrowed the limitation to only the advice to seek independent counsel. The Model Rule exempts the lawyer from all of the requirements of paragraph (b) of the Rule, which would include the duty to afford a client a reasonable opportunity to obtain the advice of independent counsel. The Commission also modified the portion of the Comment dealing with a lawyer's obligation to provide legal advice to the client when the client is represented by independent counsel. The Model Rule Comment states that the full disclosure requirements in the Rule are satisfied either by written disclosure by the lawyer in the transaction or by independent counsel. The Commission modified the Comment to state that the lawyer in the transaction is not required to give legal advice to the client when the client has independent counsel, but must disclose all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has been informed of such facts. A majority of the Commission concluded that the language in the Model Rule Comment is too broad in that it potentially would exempt a lawyer from disclosing material facts that are not known to the client if independent counsel has provided a disclosure to

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		the client in writing. The Commission modified the Comment to require the lawyer who is subject to the Rule to disclose all material facts the lawyer knows or reasonably should know are not known to the client. However, a majority of the Commission also considered the reference to disclosure by either the lawyer in the transaction or independent counsel unworkable. As a result of the lawyer-client privilege between the client and the client's independent counsel, the lawyer subject to the Rule will lack information regarding what the client and independent counsel discuss, which, in turn, could limit the value of the advice the lawyer could give the client. The lawyer-client privilege in the client's relationship with independent counsel would prevent the lawyer subject to the Rule from knowing the content of the disclosure or the advice the client is receiving from independent counsel. Requiring the lawyer subject to the Rule to give the client legal advice when the client is already receiving advice from independent counsel interferes with the client's relationship with independent counsel and may invade the confidential relationship between the client and independent counsel. In addition, the Rule exists because the lawyer in the transaction or acquisition has a conflict of interest as a result of the lawyer's interest in the transaction or acquisition. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest. When the client is represented by independent counsel, the client receives that protection. In the view of a majority of the Commission it does not make sense to require the lawyer who has a conflict to continue to advise the client, when the client is being advise by a lawyer who does not have the conflict. As a result, the

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		Commission voted not to require the lawyer in the transaction or acquisition to provide legal advice to the client when the client is represented by independent counsel in the matter. The foregoing modification was the subject of considerable debate at the Commission. A minority of the Commission believe that the lawyer in the transaction should be required to make full disclosure to the client, including providing legal advice, when the client is represented by independent counsel. The minority maintains that not limiting the lawyer's disclosure obligation assures that the client receives full disclosure. It assures that the client does not suffer if the independent lawyer fails to advise the client properly. In this situation, the client has two lawyers and is entitled to advice from, the loyalty of, and candor, from both of them.
* * * <i>Imputation of Prohibitions</i> [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.	<u>* * *</u> <i>Imputation of Prohibitions</i> ~~[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.~~	Comment [20] of the Model Rule is deleted. The subject of this Comment is addressed in proposed Rule 1.8.11, which is the counterpart to Model Rule 1.8(k).

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

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

A lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be understood by the client; and
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

COMMENT

Scope of Rule

- [1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's

own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121].) This Rule also requires that the transaction or acquisition be fair and reasonable to the client.

- [2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a personal interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).

Business Transactions With Clients

- [3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

- [4] This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.
- [5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of

the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other ~~Rules~~rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

- [6] ~~An~~This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future ~~is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule.~~ This Rule ~~is also does~~ not ~~intended to~~ apply to an agreement with a client for a contingent fee in a civil case, unless the agreement confers on the owner an ownership, possessory, security, or other pecuniary interest adverse to the client.

Adverse Pecuniary Interests

- [7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. ~~(See~~ *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58].~~)~~ An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. ~~(See~~ *Rodgers v. State Bar* (1989) 48 Cal.3d

300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].

Full Disclosure to the Client

- [8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.
- [9] Full disclosure under paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection with the transaction or acquisition. It also requires the lawyer to fully inform the client of risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) ~~Except in a disciplinary proceeding, the~~ The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. [*Hunnecutt v. State Bar* \(1988\) 44 Cal.3d 362 \[243 Cal.Rptr. 699\]](#); *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].

- [10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. Because the lawyer has a personal interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(a)(2). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition.
- [11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a

personal interest in the subject matter of the representation as a result of the transaction or acquisition.

- [12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

Full Disclosure and Consent

Opportunity to Seek Advice of Independent Counsel

- [13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.
- [14] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with

respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

Rule ~~3-300-Avoiding~~1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to ~~a~~the Client

(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- ~~(A)~~(a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner ~~which should~~that reasonably ~~have been~~can be understood by the client; and
- ~~(B)~~(b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing ~~that~~by the ~~client may~~lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- ~~(C)~~(c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

Discussion:COMMENT

~~Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.~~

Scope of Rule

- [1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121]. This Rule also requires that the transaction or acquisition be fair and reasonable to the client.
- [2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a personal interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).

Business Transactions With Clients

- [3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.
- [4] This Rule ~~3-300 is~~ does not ~~intended~~ apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply where the ~~member~~ lawyer and client each make an investment on terms offered to the general public or a significant portion thereof. ~~For as~~ when, for example, ~~rule 3-300 is not intended to apply where A,~~ a ~~member~~ lawyer invests in a limited partnership syndicated by a third party. ~~B,~~ A's and the lawyer's client, makes the same investment on the same terms. ~~Although A~~ When a lawyer and B ~~are a client~~ each ~~investing~~ invest in the same business on the same

terms offered to the public or a significant portion thereof, ~~A did~~ and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" ~~B for~~ the client for purposes of ~~the rule~~ this Rule.

~~Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.~~

- [5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].
- [6] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future. This Rule also does not apply to an agreement with a client for a contingent fee in a civil case, unless the agreement confers on the owner an ownership, possessory, security, or other pecuniary interest adverse to the client.

Adverse Pecuniary Interests

- [7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. See *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58]. An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].

Full Disclosure to the Client

- [8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.
- [9] Full disclosure under paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant

facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection with the transaction or acquisition. It also requires the lawyer to fully inform the client of risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836]. The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Hunnecutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].

- [10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. Because the lawyer has a personal interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(a)(2). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition.
- [11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that

the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

- [12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

Opportunity to Seek Advice of Independent Counsel

- [13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.
- [14] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

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

(Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be understood by the client; and
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

COMMENT

Scope of Rule

- [1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's

own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121]. This Rule also requires that the transaction or acquisition be fair and reasonable to the client.

- [2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a personal interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).

Business Transactions With Clients

- [3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

- [4] This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.
- [5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of

the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

- [6] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future. This Rule also does not apply to an agreement with a client for a contingent fee in a civil case, unless the agreement confers on the owner an ownership, possessory, security, or other pecuniary interest adverse to the client.

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- [7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. See *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58]. An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].

Full Disclosure to the Client

- [8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.
- [9] Full disclosure under paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection with the transaction or acquisition. It also requires the lawyer to fully inform the client of risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836]. The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Hunnecutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].
- [10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the

lawyer's interests at the expense of the client. Because the lawyer has a personal interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(a)(2). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition.

- [11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.
- [12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's

independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

Opportunity to Seek Advice of Independent Counsel

- [13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.
- [14] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the

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

TOTAL = 6 **Agree = 2**
Disagree = 1
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Balin, William and Andrew Dilworth	M	No		Proposed Rule 1.8.1, Comments [5] and [6], together with Proposed Rule 1.5, leave a gap that allows an attorney to add language to an existing contract that materially adversely affects the rights of the client without compelling the attorney to make the appropriate disclosures and to obtain the requisite written consent. Comment [5] to the Proposed Rule specifically excludes the original agreement by which a client hires a lawyer as well as any “modification of such an agreement.” Comment [6] states that the Rule “is not intended to apply to an agreement with a client for a contingent fee in a civil case.” However, we can envision at least two scenarios in which a change in the fee agreement will not give the attorney “an ownership, possessory, security or other pecuniary interest adverse to the client” yet would materially impact the client's rights with a concomitant advantage to the attorney. The first instance is where the attorney, in mid-representation, asks the client to change a contingent fee agreement to an hourly fee agreement, or vice versa. The second	The Commission and the Board of Governors addressed this concern in proposed Rule 1.5(g), (formerly 1.5(f)), which prevents a lawyer from making a material modification to a fee agreement that is adverse to a client, unless the client is represented by counsel with respect to the modification or is advised by the lawyer in writing to seek the advice of such counsel and is afforded a reasonable opportunity to do so. Comments [3], [3A], [3B] and [3C] to Rule 1.5 explain that Rule 1.5(g) applies in the scenarios the commenter describes. Rule 1.5(g) adequately addresses the issue raised by the commenter without subjecting modifications to the rigorous protocol of this Rule, which could deter modifications that would be beneficial to a client.

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					instance is where the attorney asks the client to modify the agreement by adding a clause making all disputes subject to binding private arbitration. We are concerned that Proposed Rule 1.5, subdivision (f) does not provide sufficient protections for clients under the scenarios outlined above, while the application of Proposed Rule 1.8.1 to such scenarios is specifically precluded. We also note that there are no Comments in Rule 1.5 that address subdivision (f). We therefore recommend changing or adding a Comment to Rule 1.8.1 that applies the Proposed Rule to modifications in a fee agreement that are adverse to the client's interests. While we view the protections of Proposed Rule 1.5 as insufficient to protect the interests of clients in the situations outlined above, we urge the Commission, at a minimum, to add a Comment to Rule 1.5 that clearly applies the Proposed Rule to situations in which an attorney materially alters an existing fee agreement to the detriment of the client, such as in the instances we have outlined.	There are four Comments in Rule 1.5 that concern subdivision (g), Comments [3], [3A], [3B] and [3C]. The Commission believes that Rule 1.5(g) and the related Comments provide sufficient protections for a client. Rule 1.5(g) is directed to the kind of circumstances that present the concerns the commenter raises. It requires the client either to be represented by independent counsel with respect to the modification or advised in writing to seek the advice of such counsel and be afforded an opportunity to obtain that advice. It applies to significant changes that benefit the lawyer in a manner that is contrary to the client's interests. Comment [3B] refers lawyers to other fiduciary duties that apply to such modifications as well. These provisions provide adequate protections for the client. They are directed to the specific concerns of the commenter.
2	COPRAC	A	Yes	Comment [6]	The first sentence of Comment [6] does not make it entirely clear that the Rule is not applicable to a deposit or advance. The	The Commission revised the Comment along the lines recommended by the commenter.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					second sentence of Comment [6] makes this point more directly as to contingent fee agreements. Accordingly, if the RRC intends that this Rule not apply to an advance or deposit, then perhaps a more accurate expression of that would be to frame the statement as the RRC had done in the second sentence, that is, to say, "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future."	
3	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	D	Yes		"...draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation." "Any <u>subsequent modification</u> of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken <u>on ongoing fiduciary duties to the client</u>. Thus a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client..."	The Commission disagrees. The Supreme Court has recognized that the procedures in this Rule are an extensive protocol. (<i>Santa Clara County Attnys Assn v. Woodside</i> (1994) 7 Cal.4th 525, 545) Failure to comply with the Rule can result in the voiding of a transaction that is subject to the Rule. Making the Rule applicable to modifications of agreements by which a lawyer is retained by a client could discourage modifications that could benefit the client. At the same time, there are some kinds of modifications that should be subject to heightened scrutiny. In response to these competing interests, the Commission and the Board of Governors have addressed the issue in Rule 1.5(g). Rule 1.5(g) adequately addresses the issue raised by the commenter without subjecting modifications to the rigorous protocol of this Rule, which could deter

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	“...current draft...simply eliminates these requirements, and excludes modifications of fee contracts from the rule. This proposed language adds the italicized language to the existing comment: ‘This Rule is not intended to apply to an agreement by which a lawyer is retained by a client <u>or to the modification of such an agreement.</u>’” “...the draft sets up a <u>conflict between common law principles of fiduciary duty and the ethics rules themselves.</u> “ “The phrase relating to modifications of fee contracts in Comment 5 must be stricken.”	modifications that would be beneficial to a client..
				Comments [13]-[14]	Definition includes corporate general counsel who may not be California counsel and need not be schooled in California rules and contracts. “Thus, independent counsel not hire for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.	There is no requirement that a California ethics expert is the only lawyer who can qualify as independent counsel or that a corporation’s general counsel is not qualified to act as independent counsel under the Rule. Nor does the Commission believe it is necessary for a lawyer subject to the Rule to advise a client to seek the advice of independent counsel when the client has such counsel in place. Comment [13] requires that independent counsel must represent the client with respect to the transaction or acquisition.
				Comment [14]	“...having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA language in MR	The Commission does not agree with this comment. Under Comment [14] of Model Rule 1.8, the written disclosure requirement is met when such disclosure is made by the lawyer subject to the Rule or the

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					1.8(a)(2) and Comment 4 should replace the ill-advised Commission language."	client's independent counsel. The Model Rule Comment, therefore, does not require the lawyer subject to the Rule to advise the client if the advice is given by the independent lawyer. The Commission was concerned that the Model Rule Comment does not protect clients adequately when the lawyer in the transaction knows material facts that independent counsel has not communicated to the client. Comment [14] provides greater client protection than the Model Rule Comment by requiring such disclosure by the lawyer in the transaction. At the same time, there are practical problems with a requirement that either the lawyer in the transaction or the independent lawyer advise the client. The lawyer in the transaction would have to invade the lawyer-client relationship and lawyer-client privilege between the client and independent lawyer in order to demonstrate compliance with the Rule. The Commission believes that the interests the Rule protects with respect to assuring the client is fully advised about the transaction or acquisition are served when the client has independent counsel, subject to a requirement that the lawyer in the transaction disclose material facts the lawyer knows or reasonably should know have not been disclosed to the client.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Office of Chief Trial Counsel	M	Yes		There are too many Comments and many are too long and incorporate other Proposed Rules and Comments. They seem more appropriate for treatises, law review articles, and ethics opinions. Comment [6] While OCTC believes modifications normally apply to this rule, it supports the compromise adopted that states in most cases modifications will be governed by Proposed Rule 1.5(f). The first sentence of Comment [6] seems unnecessary. Comment [9] Comment [6]'s last sentence should make clear that a contingent fee could fall within this rule if the lawyer obtains a proprietary interest in the client's property. For example, if an attorney represents a client in a civil lawsuit over the shares of a company and if the agreement states that if successful the lawyer obtains a percentage of the shares and not	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required. The Commission believes that the first sentence of Comment [6] is necessary. There has been a question in the past regarding whether an advance fee is an ownership, security, possessory or other pecuniary interest. The first sentence of the Comment clarifies the application of the Rule in a situation where clarification is necessary. The Commission agrees with this comment and revised the second sentence in Comment [6] along the line suggested by the comment.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [10]-[14]	just a percentage of the worth of the shares the attorney's agreement should come within Proposed Rule 1.8.1. The Commission rejected ABA Rule 1.8(i) because they believed Proposed Rule 1.8.1 was sufficient. Thus, when we are discussing an actual interest in the subject of the representation, and not just monetary percentage, Proposed Rule 1.8.1 should apply, even for contingency agreements. The last sentence of Comment [9] should be stricken as it is legally incorrect. If the Commission is stating or implying that in a disciplinary proceeding the attorney does not have the burden of showing that the transaction or acquisition and its terms were fair and reasonable or just and that the client was fully advised, the Commission is wrong. It is well established that the attorney in a disciplinary proceeding has the burden of showing that the transaction is fair and reasonable and was fully known and understood by the client. (See, <i>Rodgers v. State Bar</i>; <i>Huniecutt v. State Bar</i>; <i>Clancy v. State Bar</i>; <i>In the Matter of Hagen</i>; <i>In the Matter of Peavey</i>; <i>In the Matter of Gillis</i>.) Comments [10]-[14] could be shortened and tightened.	The Commission has revised the sentence to eliminate the exception for disciplinary proceedings. The Commission reviewed the Comments and does not agree that they should be revised. Comments

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						[10] through [12] deal with conflict of interest issues related to business transactions, either when the lawyer will represent the client in connection with the transaction or in another matter. Comment [10] is derived in part from Model Rule Comment [3] Comments [10] through [12] were added because compliance with the Rule includes addressing conflicts in the lawyer-client relationship; however, such considerations are not immediately apparent on the face of the Rule. Because there are different considerations when a lawyer is representing the client with respect to the subject of the transaction and in matters that are not the subject of the transaction, the two situations are addressed in separate comments. The Commissions believes that some explanation of the circumstance and issues in the two situations is necessary to give lawyers useful guidance for compliance with the Rule. Comments [13] addresses the requirements for independent counsel. Comment [13] is derived from existing law regarding the minimum requirements for an independent counsel. Clarification on this point is necessary In light of comments the Commission received indicating disagreement over the criteria for independent counsel. The Commissions believes that this is not an issue that should be left uncertain in the Rule.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Comment [14] concerns when a lawyer who is subject to the Rule must make disclosures to the client. It is a variation on Model Rule Comment [4]. The Commission believes that the Model Rule Comment does not protect a client adequately. Deleting the Comment would result in lawyers and courts referring to the Model Rule Comment. The Commission does not believe that there is a way to rewrite the Comment without detracting from its import.
5	San Diego County Bar Association	M	Yes	1.8.1(a)	1.8.1(a) fair and reasonable requirement should apply at the time of the transaction or acquisition. Also, change Comment [9] to reflect this.	Commission did not make the requested revision. Paragraph (a) tracks the current rule, which has been in place for years. The recommended change would be a substantive revision. It cannot be said that the consideration whether a transaction is fair and reasons cannot account for what transpired in the transaction. The comment does not offer a rationale that would justify this change.
				Comment [4]	Add sentence at end of Comment [4] that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because of the client's confidence in the lawyer's judgment."	Commission did not make the requested revision. The last sentence in Comment [4] states that the exception applies "when the lawyer does not advise, influence or solicit the client with respect to the transaction..." The quoted language adequately addresses the concern raised in the comment.
				Comment [5]	Comment [5]: delete words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6.	Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	Comment [6]: first two sentences (including citation to Seltzer) are misleading because some courts have not found negotiation of a retainer to be an arms-length transaction.	overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in this rule between modifications that involve overreaching or undue influence and those that do not. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as an “extensive protocol.” Imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client. The Commission and the Board of Governors addressed this concern in proposed Rule 1.5(g), which is directed to material modifications that are adverse to a client. The proposed Rule is tailored to the types of modifications where the need is the greatest to assure that there is no overreaching or undue influence. Commission did not make the requested revision. The first two sentences in the Comment correctly state the law

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [8]	Add sentence at end of Comment [8] that states: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."	Commission did not make the requested revision. The reference to "objectively reasonable <u>under the circumstances</u> " addresses the concern raised in the comment. No further change is required.
				Comment [9]	Revise of the first two sentences of comment [9] as follows: The requirement for full disclosure in writing in paragraph (a) ~~requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. <i>Beery v. State Bar</i> (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121].~~ It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition.	Commission did not make the requested revision. The proposed revision does not accurately state the law. The first sentence of the draft comment is an accurate statement.
				Comment [10]	Comment [10] should say "the lawyer must also comply with Rule 1.7(b) and 1.7(d)." (Not only 1.7(d)).	Commission did not make the requested revision. However, the Commission added the following language at the beginning of the sentence: "Because the lawyer has an interest in the transaction or acquisition..." The language was added in order to clarify why citation to Rule 1.7(d) is appropriate.

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [13]	Requests for improved clarification that the Commission insert “before the transaction or acquisition is completed” after “must” in the fourth sentence: “The lawyer must <u>before the transaction or acquisition is completed</u> either (i) inform the client ...” and also substitute “1.7” for “1.7(d)” in the last sentence of the Comment.	The Commission agrees with the first of the two requested changes and added the following words at the beginning of the fourth sentence “Before entering into the transaction or making the acquisition...” The Commission did not make the second requested change. Rule 1.7(d) is the appropriate rule to cite with respect to a lawyer’s interest in the subject matter of a representation.
				Comment [16]	Delete Comment [13] entirely.	Agree with change. Comment deleted.
					Since the ABA Rule has a comment on imputation, the Commission should add a Comment [16] which would read as follows: “The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client.”	Commission did not make the requested revision. Comment [16] has been deleted.
6	Santa Clara County Bar Association	A	Yes	Comment [5]	Comment [5] should include a reference to the new formal ethics interim number 05-001, which analyzes the meaning of an “attorney’s interest” in applying this rule; the formal ethics opinion is consistent with the proposed change to this rule regarding modification of attorney fee agreements.	The Commission disagrees. The Rules do not include citations to bar association ethics opinions.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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

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

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

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

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

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

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

And Rule 4-210 provides in part as follows:

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

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

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.8.2 [RPC 3-100 and 3-310]
“Rule 1.8.2 Use of Current Client's Information Protected
by Business and Professions Code section 6068(e)”
(XDraft #5, 6/16/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-100; 3-310

Statute

Bus. & Prof. Code §6068(e)

Case law

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

Massachusetts; Virginia; Oregon; and Illinois

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.2* Use of Current Client's Information Protected by Business and Professions Code section 6068(e)

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

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

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

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

* Proposed Rule 1.8.2, XDraft 5 (6/16/10).

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.	~~(b)-~~ A lawyer shall not use ~~information relating to representation of a client~~<u>current client's information protected by Business and Professions Code section 6068(e)</u> to the disadvantage of the client unless the client gives informed <u>written</u> consent, except as permitted ~~or required~~ by these Rules <u>or the State Bar Act</u>.	Rule 1.8.2 is similar to Model Rule 1.8(b) but substantive changes have been made to enhance client protection. The letter designation of the Model Rule paragraph has been deleted because, unlike Model Rule 1.8, which gathers together many divergent concepts in separate paragraphs in a single rule, the Commission has made each paragraph of that Rule a separate, standalone rule. The phrase "information relating to the representation" has been replaced by "information relating to a client." Because this Rule applies to information of current clients, to which lawyers owe an undivided duty of loyalty, the Commission determined that information protected under this Rule should not be limited to that related only to the client's representation. The Commission has added the requirement that the client give informed <i>written</i> consent to the lawyer's use of information relating to the representation to the client's disadvantage. The Commission determined that mandating informed <i>written</i> consent, which requires that the lawyer's disclosure of adverse consequences to the client be provided to the client in writing, provides an extra layer of protection by adding the formality of a writing. For example, current California rule 3-310 requires a client's informed written consent before a client is deemed to have waived a conflict of interest. The phrase, "or required," has been deleted because there are no provisions in the Rules or the State Bar Act that <i>require</i> a lawyer to violate his or her duty of confidentiality.

* Proposed Rule 1.8.2, XDraft 5 (6/16/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)	<u>Explanation of Changes to the ABA Model Rule</u>
		As the Commission has throughout its proposed rules, a reference to the State Bar Act, which is also part of the regulatory landscape in California, has been added. <u>Minority: "Informed <i>Written</i> Consent".</u> A minority of the Commission notes that current rule 3-100 requires only the client's informed consent to <i>disclose</i> the client's confidential information relating to the representation. The minority notes that the heightened written disclosure requirements for waiving conflicts of interest are appropriate in the conflicts context, because the adverse effects of a lawyer's conflicted representation are not necessarily apparently to a person who is not experienced in the use of legal services. That is not true of the use of the client's information to the client's disadvantage, where the potential adverse consequences will be readily apparent to the client. <u>Approaches in Other Jurisdictions.</u> There is little divergence from the Model Rule in other jurisdictions. Some jurisdictions, e.g., Massachusetts and Virginia, retain the ABA Model Code's prohibition on the use of client information to the advantage of the lawyer or a third person. Oregon permits use to the client's disadvantage only if the client's informed consent is "confirmed in writing." The current, pre-Ethics2000 Illinois Rules do not include Model Rule 1.8(b), but the Illinois State Bar has recommended its adoption.

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e) Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.	<u>[1] ~~[5]~~ Use of information ~~relating~~ <u>protected by Business and Professions Code section 6068(e), whether or not confidential,</u> to the disadvantage of the client</u> violates the lawyer's duty of loyalty. ~~Paragraph (b)~~ <u>See Rule 1.6, Comments [3] to [6]. This Rule</u> applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, <u>to the disadvantage of the client</u>. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. ~~Paragraph (b)~~ <u>This Rule</u> prohibits disadvantageous use of ~~client~~ <u>information protected by Business and Profession's Code section 6068(e)</u> unless the client gives informed <u>written</u> consent, except as permitted ~~or required~~ by these Rules <u>or the State Bar Act</u>. See Rules ~~1.2(d),~~ 1.6, 1.9(c), ~~3.3,~~ 4.1(~~ba~~)(2), ~~8.1~~ and ~~8.3~~ <u>Business and Professions Code section 6068(e)</u>.	The Comment to proposed Rule 1.8.2 is substantially similar to Model Rule 1.8(b), comment [5]. Aside from necessary housekeeping revisions such as renumbering the comment and substituting "this Rule" for "paragraph (b)," the first sentence has been modified to emphasize that regardless of whether the client information in which a lawyer traffics is confidential, the lawyer will still violate his duty of loyalty and thus this rule if the information is used to the client's disadvantage. The first sentence has also been revised to conform to the change that the Commission recommends to the black letter rule. See Explanation of Changes to the Rule. The clause, "to the disadvantage of the client," has been added in the second sentence to emphasize that the Rule prohibits the disadvantageous use of client information. The more stringent "informed written consent" standard has been added in keeping with California practice. See Explanation of Changes to the Rule. The phrase "or required" has been deleted to conform to the Rule. The comment cross-references the three proposed rules the Commission contemplates will permit use or disclosure client information that might be to the disadvantage a client: Rules 1.6, 1.9(c), and 4.1(a)(2). The other rules referenced in the Model Rule comment do not comport with California policy on confidentiality. The Commission has rejected those rules to the extent they permit a lawyer to violate the duty of confidentiality.

* Redline/strikeout showing changes to the ABA Model Rule

Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)
(Commission's Proposed Rule – XDraft5 (6/16/10) – CLEAN VERSION)

A lawyer shall not use a current client's information protected by Business and Professions Code section 6068(e) to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

Comment

- [1] Use of information protected by Business and Professions Code section 6068(e), whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty. See Rule 1.6, Comments [3] to [6]. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of information protected by Business and Profession's Code section 6068(e) unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules 1.6, 1.9(c), 4.1(a)(2), and Business and Professions Code section 6068(e).

**Rule 1.8.2 Use of Current Client's Confidential Information Relating to the Representation [3-100, 3-100.5]
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel ("OCTC"), State Bar of California	M	Yes		OCTC supports the rule and especially the use of informed written consent. Comment [1], however, seems unnecessarily long. The examples could either be stricken or tightened.	The Commission disagrees that Comment [1], which closely tracks Model Rule 1.8, cmt. [5], is unnecessarily long. The Commission has determined that it provides appropriate guidance on a lawyer's use of a client's information.
2	San Diego County Bar Association	A	Yes		We approve of the new rule in its entirety.	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: Conflict of Interest: Current Clients: Specific Rules

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

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

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

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

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

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

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

And Rule 4-210 provides in part as follows:

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

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

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

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

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

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

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.3 [4-400]

“Gifts from Clients”

(XDraft #5.1, 10/18/09)

Summary: Rule 1.8.3, which is based on Model Rule 1.8(c), addresses a lawyer’s duties with respect to gifts from a client. See Introduction for details as to how proposed Rule 1.8.3 differs substantively from Model Rule 1.8(c).

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-400

Statute

Probate Code § 21350(b)

Case law

McGee v. State Bar (1962) 58 Cal.2nd 423

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

Public commenters took issue with the Commission's proposed substitution of "induce" for the Model Rule's "solicit". Other commenters criticized broadening the Rule to include "attempts to induce". See Public Comment Chart, comments from San Diego County Bar Association and Ross Simmons. The Commission has replaced the "attempt to induce" standard with the Model Rule's "solicit" and believes that change may assuage the commenters' concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.3* Gifts from Clients

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.8.3 is based on Model Rule 1.8(c), and is intended to replace current California rule 4-400. Proposed Rule 1.8.3 reorganizes ABA 1.8(c), and includes several changes that improve client protection and conform the rule to California law. First, the Rule retains the current California rule prohibition against “inducing” a gift, which provides broader protection than the Model Rule, in addition to the Model Rule standard, which prohibits “solicitation” of gifts. Second, rather than restate in the rule the scope of related persons excluded from the gift prohibition, reference instead is made to Probate Code § 21350(b), which defines “a person who is related by blood or marriage.” See proposed paragraph (b). Third, to conform to California law, the Commission has included a requirement in Comment [2] that an unrelated client have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule 1.8(c), cmt. [7] merely states that the client “should” have such advice.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted Model Rule 1.8(c), some with minor variations. See State Variations chart, below.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

* Proposed Rule 1.8.3, XDraft #5,1 (10/18/09).

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.	(a) <u>A lawyer shall not:</u> (c) ~~A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.~~	Proposed Rule 1.8.3 is based on Model Rule 1.8(c), but has been reorganized into three subparts to improve its readability.
	(1) <u>induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or</u>	The Commission has retained the prohibition in current California rule 4-400, which prohibits “inducing” a client gift, and has also added the Model Rule’s “solicit” standard. Together, they provide broader client protection than the Model Rule, which simply prohibits “solicitation” of a gift. In response to public comment, the Commission has removed the “attempting to induce” standard proposed in the public comment draft because it is too vague a standard for a disciplinary rule.

* Proposed Rule 1.8.3, XDraft 5.1 (10/18/09).

BLUE UNDERLINE indicates that language has been added to the ABA Model Rule.

~~REDLINE STRIKEOUT~~ shows text that has been deleted from the ABA Model Rule.

~~Green STRIKEOUT~~ indicates that text from the ABA Model Rule has been moved and

Green UNDERLINE shows the new location where that language has been placed in the proposed Rule.

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,</u>	Subparagraph (2) is taken verbatim from Model Rule 1.8(c).
	<u>unless the lawyer or other recipient of the gift is related to the client.</u>	The closing clause of paragraph (a) is taken verbatim from Model Rule 1.8(c).
	<u>(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).</u>	Rather than restate in the Rule a description of people excluded from the Rule's coverage, as does Model Rule 1.8(c), the Commission recommends including a reference to Probate Code § 21350, which includes a statutory definition of "a person who is related by blood or marriage."

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.3 Gifts from Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Gifts to Lawyers [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).	~~Gifts to Lawyers~~ ~~[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).~~	See Explanation of Changes for Comment [1], below.
	<u>[1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].</u>	Comment [1] is based on Model Rule 1.8(c), cmt. [6], but has been substantially revised to make it more concise and provide greater clarity. In particular, the Commission has changed the example to better illustrate the point of the Comment. Reference to Supreme Court authority confirming imposition of discipline where a lawyer induces a substantial gift has been included.

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.3 Gifts from Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.	~~[7]~~ If ~~effectuation—of~~effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client ~~should~~must have ~~the detached advice that~~independent representation by another lawyer ~~can—provide~~in accordance with <u>Probate Code, sections 21350 et seq.</u> The sole exception ~~to this Rule~~ is where the client is a relative of the donee.	Comment [2] is based on Model Rule 1.8, cmt. [7]. Other than changing the text of the Model Rule comment for clarity, the Commission has retained the California requirement that an unrelated client actually have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule Comment [7] merely states that the client “should” have such advice. Thus, the proposed Comment provides greater client protection.
[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.	~~[8]~~ This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to ~~the general conflict of interest provision in Rule 1.7(a)(2).—when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.~~ In ~~obtaining the client's informed consent to~~disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.	Comment [3] largely tracks the language in Model Rule 1.8, cmt. [8], except it deletes an explanation of what the referenced rule 1.7 states. The Commission has not recommended the adoption of the “materially limit” standard in Model Rule 1.7, so including the description would be inaccurate. <i>Minority.</i> A minority of the Commission believes this explanation for deleting most of the second sentence from Model Rule, cmt. [2], illustrates the lack of public protection under proposed Rule 1.7(d) for conflicts described in this Comment that can materially affect a lawyer's duty of loyalty and professional judgment. Contrary to the rule in virtually every other jurisdiction, proposed Rule 1.7(d) imposes no obligation to obtain the client's consent where the lawyer seeks to have himself named or have a partner or associate in the firm named as executor, trustee or to another “potentially lucrative fiduciary position” no matter how significant the risk that the recommendation, or the appointment, will materially limit the lawyer's professional judgment. See Minority Report to proposed Rule 1.7.

Rule 1.8.3 Gifts From Client

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not:
- (1) induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
 - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in California Probate Code section 21350(b).
- sections 21350 et seq. The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to ~~the general conflict of interest provisions in~~ Rule 1.7(d)(a)(2). In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

COMMENT

- [1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. ~~(See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code,

Rule ~~4-400~~1.8.3 Gifts From Client

(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not: ~~A member shall not~~

- (1) induce or solicit a client to make a substantial gift, including a testamentary gift, to the ~~member~~lawyer or ~~to the member's parent, child, sibling, or spouse, except where the client is a person~~ related to the ~~member~~lawyer, or
- (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in California Probate Code section 21350(b).

~~Discussion:~~ COMMENT

- [1] ~~A member may accept~~ Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift ~~from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in~~ such as by sending the preparation of an instrument memorializing client a gift which wedding announcement. Discipline is otherwise permissible ought not to be subject to professional discipline. On the other hand, appropriate where impermissible influence occurred, discipline is

~~appropriate~~occurs. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code, sections 21350 et seq. The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to Rule 1.7(a)(2). In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Rule 1.8.3 Gifts From Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not:
- (1) induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
 - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in California Probate Code section 21350(b).
- sections 21350 et seq. The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to Rule 1.7(a)(2). In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

COMMENT

- [1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code,

Rule 1.8.3 Gifts from Client. [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes	Comment [1]	The first sentence of Comment [1] seems unnecessary in light of the clear language of the Proposed Rule.	The Commission did not make the suggested change. The first sentence operates as a topic sentence for the discussion that follows.
3	San Diego County Bar Association (Ross Simmons)	M	Yes		Rule should track ABA Model Rule 1.8(c) but replace the term “solicit” with “induce.” Greater instruction needed as to the terms “substantial” and “modest” as used in the rule and Comments [1] and [2]. Rule should not include the phrase “attempt to induce” because it adds an unnecessarily broad sweep to the rule and is too subjective, making compliance and enforcement little more than conjecture. Statement in Comment [1] that lawyers may accept modest gifts should include the qualifier that is found in the Model Rule that the transaction must meet general standards of fairness. Add a Comment [4] which would state: “The term ‘close, familial relationship’ apart from those expressly set out in the Rule, is intended to similarly situated	This language was revised and the term “induce” is used. The language was revised and the term “modest” is no longer used. The Commission agreed, and removed “attempts to induce” from the Rule. The Commission removed the discussion regarding “modest” gifts. Commission did not make the requested revision, in part, because the Probate Code references are adequate and controlling.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8.3 Gifts from Client. [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable)." Add a Comment [5] which would state: "In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term 'induce,' however, is intended to be broader than the term 'solicit.'"	The Commission did not make the requested revision, in part, because it has removed "attempt to induce" from the Rule.
4	Santa Clara County Bar Association ("SCCBA")	M	Yes		Change the last sentence of 1.8.3(a) to read "unless the lawyer or other recipient of the gift is related to the client or the client has had independent advice from another lawyer." This eliminates the need for Comment [2] as currently drafted. Comment [2] can read: "It is the intent of this rule that it be applied consistent with PC 21350 et seq."	Commission did not make the requested revision, in part, because the language of the Rule is accurate as drafted and Comment [2] provides additional guidance that should be helpful to lawyers who are unfamiliar with Cal. Probate Code section 21350.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.5 [4-210]

“Payment of Personal or Business Expenses Incurred by or for a Client”

(XDraft # 8, 10/6/09)

Summary: Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provides a more detailed statement in order to afford better client protection and protect the integrity of the legal system. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-210.

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 3
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.5* Payment of Personal or Business Expenses Incurred by or for a Client

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provide a fuller and more detailed statement in order to afford better client protection and protect the integrity of the legal system. The proposed Rule also clarifies points that are alluded to only in general terms by the Model Rule, or not at all. These include expanding the reach of the Rule to include promises made in advance and not just the lawyer's actual advancement of funds, adding a definition of "costs", limiting a lawyer's right to advance costs to those that are "reasonable", and clarifying that a lawyer may loan money to a client with certain limitation including compliance with the business transactions Rule. The proposed Rule operates to limit the risk of a conflict of interest between a lawyer and client that can result from the lawyer's heightened interest in the outcome of matter when the lawyer has advanced the costs and expenses of litigation. See Explanation of Changes for paragraph (a). The Rule also prohibits a lawyer from "purchasing" a client's loyalty by the lawyer promising loans or other remuneration to ensure that the client retains the lawyer by making clear that such promises or guarantees are prohibited, (see Explanation of Changes to paragraph (a)), and prohibiting the making of loans until after the lawyer has been retained. (See Explanation of Changes for subparagraph (a)(2).)

Variation in Other Jurisdictions. Every state has adopted a rule that places restrictions on a lawyer making loans or advancing costs and expenses to a client. Mississippi permits a lawyer to advance "reasonable and necessary medical expenses associated with the treatment of an injury giving rise to the litigation" and "reasonable and necessary living expenses." See State Variations, below.

* Proposed Rule 1.8.5, XDraft #8 (10/6/08).

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:	~~(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:~~	Model Rule 1.8(e) is intended to avoid several risks. First, a lawyer's promise to provide financial assistance to a client could amount to bidding for clients, which traditionally has been deemed unacceptable. Also, the lawyer's resulting financial stake could create a conflict of interest for the lawyer and interfere with the lawyer's exercise of independent professional judgment on behalf of the client. The Commission agrees with these goals, but it has rejected the Model Rule in favor of a substantially more detailed version.
	<u>(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:</u>	Model Rule 1.8(e) prohibits a lawyer from providing financial assistance, but by its terms it is not limited to financial assistance to a client. The Commission does not believe that the risks addressed by the Rule arise when a lawyer provides financial assistance to a non-client. Paragraph (a) excludes a lawyer's assistance to non-clients. Paragraph (a) also moves the prohibition forward in time, recognizing that it is the promise to provide financial assistance and not the financial assistance itself that triggers the client solicitation concerns of the Rule. Paragraph (a) also expands the prohibition to assistance by the lawyer law firm.
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and	~~(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and~~	Model Rule subparagraph (e)(1) addresses a lawyer's advancement of court costs and of litigation expenses. The Commission has moved this topic to subparagraph (3) where it is stated more fully.

* Proposed Rule 1.8.5, XDraft 8 (10/6/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
	(1) <u>pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;</u>	There is no Model Rule counterpart to subparagraph (a)(1). It recognizes that a lawyer might be asked to use client funds, which might come under the lawyer's control in the future, to pay the client's personal or business expenses. This could happen, for example, if a lawyer agrees to pay a client's medical provider out of the recovery. Because the risks addressed by this Rule are not involved when a lawyer does so, subparagraph (a)(1) expressly permits this arrangement.
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.	(2) <u>after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;</u>	There is no Model Rule counterpart to subparagraph (a)(2). The Model Rule implicitly permits a lawyer to loan money to a client. Subparagraph (a)(2) makes this explicit, and by doing so it permits reference to the business transactions Rule in order to provide guidance to lawyers in how to fulfill their duties.
	(3) <u>advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and</u>	Subparagraph (a)(3) is consistent with Model Rule 1.8(e)(1) but is stated more fully. It adds a definition of "costs" and, to eliminate a potential loophole in the Model Rule, limits costs to those that are reasonable.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
	(24) ~~a lawyer representing an indigent client may~~ pay court costs and <u>reasonable</u> expenses of litigation on behalf of <u>an indigent or pro bono client in a matter in which the lawyer represents</u> the client.	Subparagraph (a)(4) is based on Model Rule 1.8(e)(2). As the Commission did in subparagraph (3), it limits costs to those that are reasonable. Also, it expands the provision to include pro bono clients as well as indigent clients. Lawyers should be encouraged to support pro bono clients as well as indigent clients.
	(b) <u>A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.</u>	The Model Rule has no counterpart to paragraph (b). Paragraph (b) is intended to avoid having a lawyer's gift to a client come within the scope of the Rule, so long as the gift was not bargained for.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Financial Assistance [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.	Financial Assistance ~~[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.~~	To provide for a more complete explanation of the Rule, and to accommodate the Commission's changes in the Model Rule, the Commission has restated the Model Rule's single Comment paragraph as three paragraphs. The proposed Rule's comment generally is consistent with the Model Rule Comment except where the proposed Rule differs in substance, as described above.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.</u>	See above. Comment [1] is taken from Restatement (3d), Law Governing Lawyers § 33.
	<u>[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rules 1.7(b)(2) and 1.8.1. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12.</u>	See above. Comment [2] adds a reference to Rule 1.7(d)(4), which addresses a lawyer's potential conflict because of the lawyer's financial or other interest in the subject of the representation.
	<u>[3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.</u>	See above. Comment [3] clarifies the meaning of "costs" in order to avoid any suggestion that it is limited to taxable costs.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:
- (1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and
 - (4) pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

COMMENT

- [1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.
- [2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rules [1.7\(b\)\(2\)](#) and 1.8.1 ~~and make a disclosure under Rule 1.7(d)(4) concerning the effect the proposed agreement might have on the lawyer's representation of the client.~~ Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.
- [3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.

Rule ~~4-210~~1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

(Redline Comparison of the Proposed Rule to Current California Rule)

(Aa) A ~~member~~lawyer shall not directly or indirectly pay or agree to pay, guarantee, ~~represent, or sanction a representation~~represent that the ~~member~~lawyer or ~~member's~~lawyer'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~~lawyer may:

- (1) ~~With the consent of the client, from paying~~pay or ~~agreeing~~agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, ~~with the consent of the client;~~~~or~~
- (2) ~~After employment~~after the lawyer is retained by the client, ~~from lending~~agree to lend money to the client ~~upon~~based on the client's ~~written~~ promise ~~in writing~~to repay ~~such~~the loan; ~~provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;~~
- (3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or ~~of~~ otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. ~~Such costs~~ "Costs" within the meaning of this ~~subparagraph~~paragraph (a)(3) ~~shall be~~are limited to all reasonable expenses of litigation~~or, including court costs, and~~ reasonable expenses in ~~preparation~~preparing for litigation or in providing ~~any other~~ legal services to the client; ~~and~~
- (4) pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client.

(b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

(B) ~~Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.~~

Comment

[1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.

[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rules 1.7(b)(2) and 1.8.1. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

[3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:
- (1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and
 - (4) pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

COMMENT

- [1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.
- [2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rules 1.7(b)(2) and 1.8.1. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.
- [3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client.
[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	Office of Chief Trial Counsel	A	Yes	Comment [3]	Comment [3] should be in the Proposed Rule and not a Comment.	It appears to the Commission that OCTC believes that it cannot discipline a lawyer under a Rule if the meaning of the Rule is confirmed by reference to a definition contained in a Comment. The Commission does not agree and has not made the requested change. The current California rules as well as the Model Rules have definitions that sometimes are found in Comments. This fact has not and will not affect the ability to impose discipline on a lawyer. The choice of location largely has been determined as a matter of drafting convenience and clarity and not for any substantive reason. Placing a definition in a Comment amounts to nothing more than explaining a term in a Rule, just as is done when the explanation is not in the form of a definition. Moreover, most if not all of such explanations could have been written as definitions and most if not all of the Comment definitions could have been written without appearing to be definitions.
2	San Diego County Bar Association	A	Yes		Support as drafted.	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: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.6 [3-310(F)] “Third Party Payments”

(XDraft #9, 6/28/10)

Summary: This proposed rule follows Model Rule 1.8(e) and current RPC 3-310(F) in requiring client consent when a lawyer is paid by anyone other than the client. However, it expands on the Model Rule by requiring “informed written consent”, and it expands on the Model Rule and the current RPC by moving the consent forward to before the lawyer enters an agreement with or charges the payor. See Introduction. Following the second round of public comment, non-substantive changes were made to the Comment to conform to revisions that have been made to Rule 1.7 and edits for clarity in response to the public comment.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 3-310(F)

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

California Commission on Access to Justice; Legal Aid Association of California

Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.6* Third Party Payments

July 2010

(Draft rule following consideration of second round of public comment)

INTRODUCTION:

ABA Model Rule 1.8(f) and proposed Rule 1.8.6 begin from the same premise: a lawyer has a potential conflict of interest when the lawyer is compensated by someone other than the client. However, proposed Rule 1.8.6 expands in important ways on the protection afforded a client by the Model Rule. The Model Rule requires compliance before a lawyer *accepts* compensation from someone other than the client; the proposed Rule extends this by also requiring compliance before a lawyer *enters into an agreement with or charges* someone other than the client. The proposed revision is designed to include in the Rule events that would create the conflict of interest the Rule is intended to address. Proposed Rule 1.8.6 also requires a higher standard of lawyer conduct than is found in the Model Rule because proposed Rule 1.8.6 requires that the lawyer obtain the client's consent in writing. To facilitate access to justice, the proposed Rule also excepts from the Rule certain legal services provided by government agencies or through non-profit organizations. The latter exception was added following the initial round of public comment. The only changes made following the second round of public comment were nonsubstantive changes to the Comment to conform to revisions that have been made to proposed Rule 1.7 and edits for clarity in response to the public comment.

* Proposed Rule 1.8.6, XDraft 9 (6/28/10).

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.6 Third Party Payments	<u>Explanation of Changes to the ABA Model Rule</u>
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:	(f) A lawyer shall not <u>enter into an agreement for, charge, or</u> accept compensation for representing a client from one other than the client unless:	Both the ABA and proposed California versions of this Rule recognize the potential conflict of interest that arises for a lawyer who accepts payment from someone other than the lawyer's client. However, California's proposed Rule makes one substantive addition to the Model Rule to extend the reach of the Rule for better client protection. The Model Rule restricts only the acceptance of compensation from someone other than the client. The proposed Rule recognizes it is not only the fact of the payment – which might be delayed or deferred for various reasons - but also the lawyer's expectation of payment from the non-client that could lead the lawyer to look to the interests of the payor rather than to those of the client. The proposed Rule therefore forbids not only the acceptance of payment, as does the Model Rule, but also prohibits the lawyer (i) from entering into an agreement with the non-client for payment of the lawyer's fee or (ii) actually charging the other person: the lawyer may not do any of these three things without first complying with the proposed Rule. <u>Approaches in Other Jurisdictions.</u> There are a number of jurisdictions that have varied the wording or organization of the Model Rule without fundamentally altering the thrust of the Rule. These jurisdictions include Mississippi, North Dakota, Virginia, Washington D.C., and Wyoming.
(1) the client gives informed consent;	(a1) the client gives informed <u>written</u> consent <u>at or before the time the lawyer has</u>	Paragraph (a) provides for client consent. However, it does so with two substantive variations from the Model Rule. <i>First,</i>

* Proposed Rule 1.8.6., XDraft 9 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.6 Third Party Payments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;</u>	paragraph (a) utilizes California's more client-protective requirement that the consent be written. This additional requirement adds a safeguard for the client by placing the lawyer's disclosure and the client's consent in a relatively permanent form that the client can review and discuss with others before giving consent, and the formality of the writing underlines the importance of the lawyer's request for consent. This provision also provides appropriate protection for the compliant lawyer by making it harder for a client to claim that the lawyer made an inadequate disclosure or that the client gave no consent. <i>Second</i>, paragraph (a) includes a timing requirement for obtaining the client's written consent. This is important for the client to be able to maintain supervision and control over the lawyer's conduct. In addition, as in the current California rule [3-310(F)], certain public agency representations are excluded from the Rule. This exclusion has been expanded in response to public comment to include lawyers who provide legal services through non-profit organizations. See Comment [2], below. <u>Approaches in Other Jurisdictions.</u> Montana has included the requirement of "written" consent, and a number of states have excluded insurance and in some cases other situations in which a third-person compensates the lawyer. These states include Connecticut, Louisiana, Ohio, Wisconsin, and perhaps Minnesota (its Rule and Comment do not make this clear, but it appears likely). The Commission recommends limiting the exclusions to the public agency, <u>charitable</u>, and insurance situations. The first two are included in the Rule itself because that can be done simply without altering the Model Rule syntax; the latter exclusion is included only in a Comment because this allows the Rule to adhere more closely to the lay out of the Model Rule, and the Comment that is proposed is similar to the language in the

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.6 Third Party Payments	<u>Explanation of Changes to the ABA Model Rule</u>
		Discussion to California's current rule, language that appears already to be well understood. See proposed Comment [4].
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	(~~2~~<u>b</u>) there is no interference with the lawyer's independence of professional judgment or with the ~~client~~-lawyer-<u>client</u> relationship; and	No change in the Model Rule language is proposed for this paragraph.
(3) information relating to representation of a client is protected as required by Rule 1.6.	(~~3~~<u>c</u>) information ~~relating to representation of a client is~~ protected ~~as required~~ by <u>Business and Professions Code section 6068(e) and</u> Rule 1.6 <u>is protected.</u>	Paragraph (c) identifies the duty of confidentiality as a special concern. The proposed version broadens the Model Rule's reference to Rule 1.6 to include California's statutory duty of confidentiality.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Third Party Payments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Person Paying for a Lawyer's Services [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).	Person Paying for a Lawyer's Services ~~[11] Lawyers are frequently~~ <u>A lawyer might be asked to represent a client</u> ~~under circumstances in which a third~~ <u>when another client or other</u> person will ~~compensate pay the lawyer's fees~~, in whole or in part. ~~The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests~~ <u>This Rule recognizes that</u> ~~differ from those~~ <u>any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to</u> the client, including ~~interests in minimizing the amount spent on the representation and in learning how the representation is progressing~~ <u>duties of undivided loyalty</u>, ~~lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment, there is informed consent from competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(a)(2) and Rule 1.7, Comments [29] through [33], regarding joint representations. The~~	Model Rule, Comment [11] and the Commission's proposed Comment [1] cover much the same ground. However, the Commission's proposed draft eliminates discursive Model Rule language that does not explain the meaning or application of the Rule. The proposed draft also contains a more specific statement of the duties of lawyers, including references to pertinent portions of the basic conflict of interest Rule, proposed Rule 1.7. No substantive change is intended.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Third Party Payments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>lawyer also must comply with Rule 1.7(b)(2) when there is a significant risk that the lawyer's representation of the client will be materially limited because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).</u>	
[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is	~~[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is~~	The Commission recommends deleting Model Rule 1.8, cmt. [12], and replacing it with Comments [2] to [5], which more thoroughly address the concepts set forth in the Model Rule comment, and also address issues unique to California.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Third Party Payments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.	~~nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.~~	
	[2] Paragraph (a) exemptions reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt under paragraph (a) nevertheless must comply with paragraphs (b) and (c).	The Commission in response to public comment added an exception for lawyers when providing legal services through non-profit organizations. New Comment [2] has been added to clarify the reason for the exceptions to the Rule.
	[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.	Comment [3] clarifies the application of this Rule in a common situation that could prove confusing. Because a settlement agreement or court order obligating someone other than the client to pay the lawyer's fees would come at or near the end of the lawyer's representation of the client in the matter, the concerns addressed by this Rule either do not exist or are highly attenuated.
	[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. See <i>San Diego Navy Federal Credit Union v. Cumis Insurance Society</i> (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].	Comment [4] clarifies the application of this Rule in the insurance context when the insurer appoints counsel to represent an insured. Under a large and well-developed body of California case law, this Rule normally will not apply to the arrangement under which an insurance company compensates counsel for its insured. This Comment also clarifies that, although this Rule normally does not apply in the appointed counsel situation, there

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Third Party Payments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever there is a significant risk that the representation of the insured will be materially limited by the lawyer's responsibilities to the insurer. See Rule 1.7(a)(2) and Comments [36] and [37].</u>	are circumstances in which the appointed counsel will have a potential or actual conflict of interest and, if so, the lawyer must comply with Rule 1.7. A similar comment can be found in the Discussion to current rule 3-310.
	<u>[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.</u>	As noted, the Commission has expanded paragraph (a) to include a timing requirement that states when a lawyer must obtain the client's written consent to the lawyer's fee arrangement with another person: either before the lawyer enters the fee arrangement or as soon thereafter as is reasonably practicable. Comment [5] provides a common example of when the lawyer might not be able to obtain client consent before entering the fee arrangement. Under those circumstances, the lawyer may obtain client consent "as soon thereafter as is reasonably practicable." In response to public comment, the Commission has added a second example of when a lawyer might not immediately be able to comply with the Rule's timing requirements.

Rule 1.8.6 Third Party Payments ~~Not From Client~~
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;
- (b) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
- (c) information ~~relating to representation of a client is protected as required by Rule 1.6 and~~ protected by Business and Professions Code section 6068(e) and Rule 1.6 is protected.

Comment

- [1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent

professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7 ~~(b)~~ (a)(2) and Rule 1.7, Comments ~~[1229]~~ [1333] and through [1333], regarding joint representations. The lawyer also must comply with Rule 1.7 ~~(d)~~ (b)(2) when there is a significant risk that the lawyer's representation of the client will be materially limited ~~has a potential conflict of interest~~ because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

- [2] ~~Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with its requirements. These exemptions~~ reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt ~~from compliance with~~ under paragraph (a) nevertheless must comply with paragraphs (b) and (c).

- [3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.
- [4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. ~~(See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)~~ Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever ~~the lawyer has a potential or actual conflict of interest~~ there is a significant risk that the representation of the insured will be materially limited by the lawyer's responsibilities to the insurer. See Rule 1.7(a)(2), and Comments ~~[35]~~[36] and [37].
- [5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this

occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 3-310(F) 1.8.6 Avoiding the Representation of Adverse Interests Third Party Payments

(Comparison of the Current Proposed Rule to Current California Rule)

~~(F)~~ A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

~~(1b)~~ There~~there~~ is no interference with the ~~member's~~lawyer's independence of professional judgment or with the ~~client-lawyer~~client relationship; and

~~(2c)~~ Information relating to representation of the client is information protected ~~as required by~~ Business and Professions Code section 6068, ~~subdivision (e); and~~ Rule 1.6 is protected.

~~(3)~~ The member obtains the client's informed written consent, ~~provided that no disclosure or consent is required if:~~

~~(a) such nondisclosure is otherwise authorized by law; or~~

~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

Discussion: Comment

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.~~

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the~~

~~representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

~~Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).~~

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

~~In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.~~

~~There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)~~

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same

matter, see Rule 1.7(a)(2) and Rule 1.7, Comments [29] through [33], regarding joint representations. The lawyer also must comply with Rule 1.7(b)(2) when there is a significant risk that the lawyer's representation of the client will be materially limited because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[2] Paragraph (a) exemptions reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt under paragraph (a) nevertheless must comply with paragraphs (b) and (c).

[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[4] ~~This Rule Paragraph (F)~~ is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208

Cal.Rptr. 494]. Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever there is a significant risk that the representation of the insured will be materially limited by the lawyer's responsibilities to the insurer. See Rule 1.7(a)(2) and Comments [36] and [37].

[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6 Third Party Payments (Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;
- (b) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
- (c) information protected by Business and Professions Code section 6068(e) and Rule 1.6 is protected.

Comment

- [1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A

lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(a)(2) and Rule 1.7, Comments [29] through [33], regarding joint representations. The lawyer also must comply with Rule 1.7(b)(2) when there is a significant risk that the lawyer's representation of the client will be materially limited because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

- [2] Paragraph (a) exemptions reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt under paragraph (a) nevertheless must comply with paragraphs (b) and (c).
- [3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

- [4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494]. Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever there is a significant risk that the representation of the insured will be materially limited by the lawyer's responsibilities to the insurer. See Rule 1.7(a)(2) and Comments [36] and [37].
- [5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6 Third Party Payments [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC believes that a Comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.	The Commission disagrees and did not make the requested change. It concluded that a comment along the lines suggested would not explain the Rule but instead would be a best practices guide.
				Comments [1] & [2]	Comments [1] and [2] should be tightened.	The Commission has reconsidered Comments [1] and [2]; it does not see how Comment [1] might be tightened effectively but has substantially shortened Comment [2] without changing its meaning.
				Comment [3]	Comment [3] should be in the Proposed Rule.	This recommendation apparently is based on the idea that a definition must be in a Rule to serve as

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8.6 Third Party Payments [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						the basis for discipline. The Commission does not believe that ever has been true (various definitions are included in the official Discussion to the current California Rules and in the Model Rules without any problem of which the Commission is aware). The Commission also believes that this should not be true because a Comment's definition of a term amounts to an explanation of the Rule, and that is the purpose of the Comments. For these reasons, the Commission disagreed with OCTC's suggestion and did not make the requested change.
3	Paulsen, Bradley	M	No	Rule and Comment [1]	Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner's Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800. Commenter is aware of a situation in which a home had suffered a severe mold problem that, on average, would cost \$10,000 to repair. Commenter was told by a homeowner in the neighborhood that the case settled for approximately \$500 per home to the homeowners. This owner was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing the Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Group to deceive the homeowner with a small	These comments are concerned with issues concerning the enforcement of the Rules, which that is a subject beyond the purview of the Commission.

Rule 1.8.6 Third Party Payments [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.	
4	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer’s fees or expenses, but a lawyer shall not impose a lien upon any part of a client’s files, except upon the lawyer’s own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer’s work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer’s sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.7 [3-310(D)] “Aggregate Settlements”

(XDraft #10, 6/27/10)

Summary: Proposed Rule 1.8.7 carries forward the Model Rule and current California concept that a lawyer has a conflict when jointly represented clients are asked to approve an aggregate settlement of their claims or liabilities. This proposal includes the informed written consent requirement normally found in California’s conflict rules but otherwise is substantially the same as the Model Rule. The only substantive change following the second round of public comment was to delete Comment [4], which was not necessary to understanding the Rule’s applicability.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 3-310(D)

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 3

Abstain 2

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

There was public comment received that criticized the requirement of informed written consent, which requirement also appears in current rule 3-310(D).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.7* Aggregate Settlements

July 2010

(Draft rule following consideration of second round of public comment)

INTRODUCTION:

ABA Model Rule 1.8(g) and proposed Rule 1.8.7 both treat as a potential conflict of interest a lawyer's representation of two or more clients in arranging a settlement of claims, whether civil or criminal. Proposed Rule 1.8.7 largely tracks the first sentence of Model Rule 1.8(g). The only substantive difference is the substitution of California's more client-protective "informed written consent" requirement. That requirement also appears in current California Rule 3-310(D) and the Commission determined that it should be carried forward into proposed Rule 1.8.7. The Commission has slightly modified the second sentence of Model Rule 1.8(g) because it is an incomplete statement of the disclosure necessary to obtain informed client consent. In addition, the proposed comment expands upon Model Rule 1.8, cmt. [13] and includes a more robust discussion of the disclosure necessary under this Rule, increasing the likelihood of lawyer compliance with the Rule and enhancing client protection.

Minority. A minority of the Commission objects to the higher "informed written consent" that the Commission recommends be adopted. The minority takes the position that, while laudable, requiring an informed written consent, which itself requires written disclosures, will likely result in the demise of the last minute settlements that often take place at the court house, with resulting prejudice to the clients involved. They take the position that the Model Rule's standard of an "informed consent, in a writing signed by the client," provides adequate protection to clients. See the complete dissent, below.

Variation in Other Jurisdictions. Every state has adopted some version of Model Rule 1.8(g). See Explanation of Changes for the Rule for a brief discussion of some variations. See also selected STATE VARIATIONS excerpt, below.

* Proposed Rule 1.8.7, XDraft 10 (6/27/10).

Proposed Rule 1.8.7 Aggregate Settlements

Minority Dissent

This Rule requires “informed, written consent” to any aggregate settlement. The idea behind this Rule is noble, but its implementation in many instances will be very problematical; and if literally enforced, the Rule will preclude many settlements.

It must be common ground for all experienced civil litigators -- and probably in multi-person criminal cases as well -- that while ideally, settlements are arranged prior to trial call or its immediate time frame, in fact many settlements are made literally at the courthouse door. Not always are all of multiple clients -- especially multiple plaintiffs -- in immediate attendance. While it is an ideal concept that both the amount and the internal allocation (which is exempt from the Rule's requirement) of a settlement be discussed in detail with all clients in advance, the fact is that these last minute settlements do occur and often involve different terms from those recently discussed, and that in virtually all cases they satisfy the litigants. Experienced lawyers will have had thorough discussions with their clients about the range of possible settlements beforehand and will be acting with their clients' advance general authorization -- i.e., authorization which involves a range of options. But the facts of life are that there may be unanticipated last minute developments, both about the case itself and about a changing settlement picture, which frequently result in settlements. And those settlements will relate to just one of several options which the lawyer may have discussed with his/her clients: Is the lawyer to provide

multiple versions of the informed written consent, encompassing all authorized or desired options?

While it is surely the intent of the Rule that the “informed written consent” can be provided orally by the clients on the court record, this is not always possible. First, not all clients may be present in court. Second, the settlement may take place away from a court reporter and in circumstances which do not lend themselves to a full on-the-record report. Third, the “informed” part of the consent picture (a) requires disclosure of often privileged, confidential information which cannot and should not be spread on a record, and (b) would be of enormous benefit to the opposition by disclosing the weaknesses and evaluations of the parties' case, which could be greatly abused if for any reason the settlement failed. Indeed, upon hearing such a candid disclosure, the opposing party may have second thoughts and may try to scuttle the settlement: such things have happened before.

An “informed” written consent, in the experience of this minority, commonly requires numerous pages of written exposition, which should be carefully prepared and reviewed before signing. That is not something that can be done quickly; but settlements are often done in the twinkling of an eye.

We understand that it is the intent of this Rule that in class action settlements, only the named class

representatives must provide their informed written consent, though we do not see that in the Comments, where it should be stated.

Adoption of this Rule will surely have one of two serious negative consequences, perhaps both: Last minute

settlements, or settlements which require quick acceptance to “seize the moment,” will disappear; and the Rule will almost surely lead to non-compliance and violations. Neither is good for the profession or for the clients it serves.

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.	~~(g)~~ A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an ~~aggregated~~ aggregate agreement as to guilty or <i>nolo contendere</i> pleas, unless each client gives informed ~~in a writing signed by the client~~ written consent. The lawyer's disclosure shall include, <u>among other things</u>, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.	<u>Changes to the Model Rule.</u> Proposed paragraph (a) is substantially the same as MR 1.8(g). For consistency, the term "aggregate" is used in relation to both civil and criminal matters throughout this Rule and its Comment. Instead of the Model Rule phrase "informed consent, in a writing signed by the client," the Commission recommends retaining California's more client-protective requirement of "informed written consent." Unlike the Model Rule language, "informed written consent" requires by definition a written disclosure. It is noteworthy that the Restatement of Law of Aggregate Litigation § 3.17(a) (Tent. Draft No. 1 4/2008) requires that each claimant "be able to review the settlements of all other persons subject to the aggregate settlement," indicating the predicate of a written disclosure to permit "review." Moreover, current California rule 3-310(D), the counterpart to Model Rule 1.8(g), requires "the informed written consent of each client," which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place. The statement of the lawyer's disclosure duty in the second sentence of Model Rule 1.8(g) does not provide adequate client protection. Therefore, the phrase, "among other things" has been added to the sentence, and a more expansive explanation of disclosure under this Rule appears in the comment. See Comments [2] and [3]. <u>Approaches in Other Jurisdictions.</u> Several other jurisdictions have added other exceptions to the Model Rule. Some jurisdictions exclude settlements in class actions (Louisiana and N.D.) or, more broadly, any settlement that is approved by the court (N.Y. and Ohio) or that is in the court's written record (Maryland). Minnesota removes criminal matters

* Proposed Rule 1.8.7, XDraft 10 (6/27/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
		from the Rule. Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not revised their rules since the Ethics 2000 revisions were published). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Connecticut requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Model Rule 1.8, cmt. [13]. See below.	<u>[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(a)(2) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or <i>nolo contendere</i> plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.</u>	Comments [1], [2], and [3] substantially expand on the single Comment paragraph found in the Model Rule but are intended to be consistent with it. These three paragraphs supplement the discussion of what an aggregate settlement is and what information about the proposed settlement a lawyer is obligated to provide to the client. This fuller explanation should aid lawyer compliance and thus add to client protection.
Model Rule 1.8, cmt. [13]. See below.	<u>[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.</u>	See Explanation re Comment [1].

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Comment * * * Aggregate Settlements [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.	Comment Aggregate Settlements ~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~ [3] This Rule permits a lawyer in a civil matter to	See Explanation re Comment [1].

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).	

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[No corresponding provision]	[4] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).	There is no Model Rule counterpart for proposed Comment [5]. The Commission added this Comment in response to public comment, with which the Commission agrees, to clarify that a court's record of client approval of the terms of a settlement is a "written" disclosure and consent, as the Rule requires.

Rule 1.8.7 3-310(D) Aggregate Settlements
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

COMMENT

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(ba)(2) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

- [2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.
- [3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule ~~1-01.0.1~~1.0.1(e) (definition of informed consent).

[4] ~~The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.~~

[5] A lawyer's obligation to make a written disclosure and obtain written consent ~~is~~may be satisfied when the lawyer makes the required disclosure, and the clients give consent, in court and on the record ~~in court before a licensed court reporter that transcribes the disclosure and consent.~~ See the definition of "written" in Rule 1.0.1(n).

Rule ~~3-310(D)~~ Avoiding the Representation of Adverse Interests 1.8.7 Aggregate Settlements

(Comparison of the Current Proposed Rule to Current California Rule)

~~(A) For purposes of this rule:~~

- ~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~
- ~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~
- ~~(3) "Written" means any writing as defined in Evidence Code section 250.~~

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

- ~~(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or~~
- ~~(2) The member knows or reasonably should know that:
 - ~~(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~
 - ~~(b) the previous relationship would substantially affect the member's representation; or~~~~

~~(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

- ~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~
- ~~(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~
- ~~(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~

~~(D)~~ A ~~member~~lawyer who represents two or more clients shall not ~~enter into~~participate in making an aggregate settlement of the claims of or against the clients ~~without the, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives~~ informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each client~~person in the settlement.~~

~~(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:~~

~~(a) such nondisclosure is otherwise authorized by law; or~~

~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

~~Discussion:~~ COMMENT

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in~~

~~different cases, unless representation of either client would be adversely affected.~~

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer

resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(a)(2) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain *the informed written consent of each client* as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which

expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0.1(e) (definition of informed consent).

[4] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

~~In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action. There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)~~

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)~~

Rule 1.8.7 [3-310(D)] Aggregate Settlements (Commission's Proposed Rule – Clean Version)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(a)(2) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0.1(e) (definition of informed consent).

[4] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).

Rule 1.8.7 Aggregate Settlements. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes	Comment [4]	The last sentence of Comment [4] contains certain awkward language that may be corrected by replacing “. . . this Rule does not prevent the lawyer from assisting the jointly-represented clients <i>from agreeing</i> at any time to a procedure” with “. . . this Rule does not prevent the lawyer from assisting the jointly-represented clients <i>in reaching an agreement</i> at any time on a procedure. . . .”	The commenter's point is moot because the Commission has deleted Comment [4].
				Comment [5]	Comment [5] states: “A lawyer’s obligation to make a written disclosure and obtain written consent <i>is satisfied</i> when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent.” COPRAC believes it would be more accurate to change “is satisfied” to “may be satisfied.” This is because, read in isolation, the Comment as currently phrased would improperly suggest that disclosure and consent in court before a licensed court reporter on the record is the <i>only</i> way to satisfy the disclosure and consent requirements of this Proposed Rule.	The Commission generally agrees and has made the suggested change with a slight rewording.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8.7 Aggregate Settlements. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					We recommend deleting the portion of the Comment that states: "before a licensed court reporter that transcribes the disclosure and consent" as unnecessary and inconsistent with practices in some courts which use audio tapes instead of court reporters for the record.	The Commission agrees and has made the suggested change.
2	Office of Chief Trial Counsel ("OCTC")	M	No		1. The commenter supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, the commenter finds the rule as written and the Commission's Comments somewhat confusing, especially Comment [4], which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment. 2. The commenter agrees with the definition of aggregate package deals in criminal cases in comment [1]. However, the commenter asserts there are too many comments and they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment [2] seems unnecessary in light of proposed rule 1.4. Comment [3] is too long and could be tightened.	1. No response required. The commenter's point is moot because the Commission has deleted Comment [4]. 2. No response required. As already noted, the Commission disagrees that there are too many comments. Each comment is necessary to provide adequate guidance to lawyers in this area of the law.

Rule 1.8.7 Aggregate Settlements. [Sorted by Commenter]							TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
3	San Diego County Bar Association Legal Ethics Committee	M	Yes		The second sentence of the Rule states: “The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” SDCBA criticizes “among other things” as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed. It points out the need for a conforming change to Comment [3] if the second sentence is removed.	The Commission disagrees and did not make the requested change. The phrase “among other things” is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer’s ability to make a disclosure sufficient to obtain “informed written consent”, but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain “informed written consent”. Including the Model Rule sentence does provide some guidance.	

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer’s fees or expenses, but a lawyer shall not impose a lien upon any part of a client’s files, except upon the lawyer’s own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer’s work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer’s sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.8 [RPC 3-400]

“Limiting Liability to Client”

(XDraft #6, 10/10/09)

Summary: Proposed Rule 1.8.8 carries forward the substance of current rule 3-400 and rejects the approach in Model Rule 1.8(h)(1) that permits a lawyer to obtain a client's waiver of the lawyer's prospective malpractice liability if the client is represented by independent counsel. Otherwise, the Rule largely tracks the remainder of the Model Rule.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☒ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-400

Statute

Business and Professions Code § 6090.5

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 1
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.8* Limiting Liability to Client

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.8.8 is based on Model Rule 1.8(h), but incorporates the principles of current California Rule 3-400 on limiting liability to a client. The major difference between the proposed Rule and Model Rule 1.8(h) is found in paragraph (a) in that the proposed Rule does not have an exception for limiting prospective liability for malpractice if the client is represented by independent counsel. Paragraph (a) is more client-protective by not permitting lawyers in any circumstances to obtain prospective waivers of future malpractice claims. Paragraph (b) of the proposed Rule is substantially similar to the equivalent Model Rule paragraph. The Comments to the proposed Rule have been substantially shortened to eliminate excess verbiage that adds little to comprehension of the Rule.

The Commission concluded that its proposed Rule offers substantially more public protection than does the Model Rule and has clearer and more easily understood language. See Explanation of Changes for paragraph (a).

Variations in other Jurisdictions. Most jurisdictions have adopted Model Rule 1.8(h) without substantial change. Two states have added provisions relating to the reporting of complaints to the appropriate disciplinary authorities, a prohibition that is covered by statute in California (Business and Professions Code § 6090.5). A reference to that code section has been added to the Comment pursuant to a suggestion by the Los Angeles County Bar Association.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 to its own separate rule number.

* Proposed Rule 1.8.8, XDraft 6 (10/10/09).

<u>ABA Model Rule</u> Rule 1.8(h)	<u>Commission's Proposed Rule*</u> Rule 1.8.8 Limiting Liability to Client	<u>Explanation of Changes to the ABA Model Rule</u>
(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or	~~h)~~A lawyer shall not: <del>(1)</del>~~a) make an agreement~~<u>Contract with a client</u> prospectively limiting the lawyer's liability to ~~a client for malpractice unless the client is independently represented in making for the agreement,~~<u>lawyer's professional malpractice</u>; or	Proposed paragraph (a) rejects the advance waiver of a client's possible future malpractice claim. As explained in Restatement § 54, Comment b: "Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement." In addition, a lawyer who recognizes some particular risk in a proposed representation should direct his or her efforts to explaining that to the client, not to obtaining a limitation on the lawyer's liability.
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.	~~(b)~~ <u>Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:</u> <u>(1) represented by independent counsel concerning the settlement; or</u> (2) ~~settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is~~ advised in writing ~~that~~<u>by the lawyer to seek the advice of an [independent lawyer] of the desirability of seeking</u>~~client's choice regarding the settlement~~ and is given a reasonable opportunity to seek ~~the~~<u>that</u> ~~advice of independent legal counsel in connection herewith.~~	The proposed language of paragraph (b) is substantially similar to that of the Model Rule but offers more client protection by mandating that the lawyer advise the client to seek independent counsel rather than advise of the desirability of doing so. Paragraph (b)(1) has been added in recognition that, if the client is already represented by independent counsel, the lawyer should have no duty to advise the client to seek independent counsel.

* Proposed Rule 1.8.8, XDraft 6 (10/10/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
Limiting Liability and Settling Malpractice Claims [15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.	~~[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.~~ <u>[1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.</u>	The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule.

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
Limiting Liability and Settling Malpractice Claims [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.	~~[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph~~<u>Rule</u><del> does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement</del><u>e.g., Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; Lawrence v. Walzer & Gabrielson (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6].</u><del> Nor does this paragraph</del><u>Rule</u><del> limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.</del>	The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule. The Commission added a pointer on the permissibility of entering into an agreement with the client to arbitrate a legal malpractice claim, citing cases.

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
	[3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code section 6090.5.	This Comment was added to make certain that lawyers are aware of the statutory prohibition on agreements that purport to preclude the reporting of complaints to the State Bar.
	[4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule 1.2.)	This paragraph clarifies the meaning of the Rule by describing important limitations on its scope, and by reminding that Rule 1.2 allows a lawyer to limit the scope of a representation.

Rule 1.8.8 [3-400] Limiting Liability to Client
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
 - (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
 - (1) represented by independent counsel concerning the settlement; or
 - (2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.
- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code ~~§~~ [section](#) 6090.5.
- [4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2.

COMMENT

- [1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.
- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

Rule 1.8.8 ~~3-400~~ Limiting Liability to Client
(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not:

- ~~(A)~~(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
- (1) represented by independent counsel concerning the settlement;
or
- ~~(B)~~(2) ~~advised—Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed~~ in writing ~~that~~by the client ~~may~~lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:COMMENT

- [1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling *a claim or potential claim for malpractice.*
- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207

Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code section 6090.5.
- [4] This Rule ~~3-400—~~isdoes not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~isdoes~~ it ~~intended to~~ prevent a ~~member~~lawyer from reasonably limiting the scope of the ~~member's employment or~~lawyer's representation. See Rule 1.2.

Rule 1.8.8 [3-400] Limiting Liability to Client
(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
 - (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
 - (1) represented by independent counsel concerning the settlement; or
 - (2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.
- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code section 6090.5.
- [4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2.

COMMENT

- [1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.
- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

Rule 1.8.8 Limiting Liability to Client. [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	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC would recommend that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's model rules limiting liability because it does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of 3-300 (ABA Model Rule 1.8(a)). (See Hazard & Hodes, "The Law of Lawyering, 3rd Edition § 12.19.) Comments [1] and [2] seem more appropriate for treatises, law review articles, and ethics opinions.	The proposed rule follows Model Rule 1.8(h) fairly closely; the Model Rule has no such requirement. Since the proposed rule requires that the client be represented by counsel or be advised to seek such counsel, there appears to be no compelling reason to also require that any such settlement be fair and reasonable. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.9 [4-300]
**“Purchasing Property at a Foreclosure or a Sale Subject
to Judicial Review”**

(XDraft #3, 2/09/10)

Summary: Proposed Rule 1.8.9, for which there is no Model Rule counterpart, carries forward current rule 4-300's prohibition on lawyers' (i) purchasing property at various legally required sales such as foreclosure, execution, receiver's and similar sales, or (ii) representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer. Unlike the current rule, however, the proposed Rule does not regulate probate sales. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☒ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☒ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-300

Statute

Probate Code §§ 9880-9885.

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The Commission's decision to remove probate sales from the scope of the current rule, under which participation in such sales is prohibited, might be viewed as lessening client protection because the Probate Code permits lawyer's participation in such sales under certain conditions.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.9* Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.8.9 prohibits lawyers' either purchasing property at various sales under legal process, such as foreclosure, execution, receiver's and similar sales, or representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer.

There is no equivalent Model Rule, but the Commission believes that such a rule is a necessary public protection device, as it has been for many years.

There is only one substantive change to the current rule that the Commission proposes. The current rule applies to probate sales as well as to other types of sales; but Probate Code sections 9880-9885 specifically allow such transactions under specified and detailed provisions including disclosure and court approval. This conflict between statute and rule has existed for a number of years. Consequently, the Commission proposes that the statute provides sufficient public protection and that therefore the Rule need not address probate sales. However, a cross reference to the pertinent Probate Code sections is provided so as to identify the issue and the statute controls for any interested parties.

Minority. This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. As set forth in more detail in the dissent to this proposal, it thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the

* Proposed Rule 1.8.9, XDraft #3 (2/09/10).

INTRODUCTION (Continued):

judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates

A Note on the Rule Number. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each such concept its own separate rule number.

Proposed Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Rules Revision Commission – Minority Dissent

This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. It thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates.

California has always strictly prohibited an attorney from purchasing assets at a probate or other judicial sale if the attorney represents a party to the matter. This prophylactic rule is intended to remove any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. In *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 16, the Court disbarred an attorney for purchasing property that was an asset of an estate in which he was an attorney for the executrix. The Court emphasized the conflicts of interest inherent in this situation:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price

on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, [former] Rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and allowed petitioner to overreach or exercise undue influence upon his client.

Id., 1 Cal. 3d at 15. Attorneys should not be allowed to purchase, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See, e.g., *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 [attorney's wife bought at judicial sale. Held act of moral turpitude and breach of fiduciary duty.]; *Sodikoff v. State Bar* (1975) 14 Cal. 3d 422 [attorney bought asset through his corporate alter ego: six months suspension].

It is astounding that the majority of the Commission recommends continuing the absolute prohibition as to foreclosure, receiver's, trustee's, or judicial sales but would permit lawyers to purchase in probate sales. In probate, the executor, executrix, administrator, heir, or beneficiary is often less able to protect herself or himself than in the other types of sales. A widow, widower,

orphan, or surviving parent may have no experience in sales of business, real property, or other assets. Often, they are unsophisticated. Particularly when a close relative, spouse, or lover has died, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not. The author of this dissent has met with surviving spouses and parents, and months later they admit that they were in such shock that they did not even remember that we met, let alone what we discussed. Nevertheless, the majority of the Commission who voted to change this rule would deprive vulnerable people of the protections of existing law but continue those protections for commercial receivership sales, foreclosure sales and the like.

Permitting attorneys in probate cases to loot estates would be inexcusable. An attorney who has the opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom to sell, under what circumstances, and at what price, may perform a valuable service. However, an attorney who has a direct interest in the sale because he or she is a buyer is more likely to perform a huge disservice. The attorney's own financial, business, property, and personal interests will conflict with the interests of the client and with the interests of the heirs, beneficiaries, and creditors of the probate estate. The attorney may find it very difficult to set his or her personal interests aside, and those

interested in the estate will not receive advice based upon independent professional judgment. This will occur precisely when they are most vulnerable.

Particularly in probate cases, the courts are uniquely dependent upon the integrity of counsel. Many matters are unopposed, so no advocate urges that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative has no idea what the consequences of a sale at a given price may be and is dependent on the attorney to ascertain what is in the personal representative's or the heirs' best interests. Permitting lawyers to buy assets from probate estates will impair the ability of clients to obtain independent advice and representation and will cut the courts off from advocacy by someone without a personal stake in the outcome.

The heirs, beneficiaries, and creditors of the probate estate will not adequately be protected by court procedures. For example, because the executrix trusts the attorney, she and the beneficiaries or heirs consent to the petition for approval of the sale without obtaining any independent advice. The petition comes on for an unopposed hearing before a judge who may not have time to examine the merits, let alone give attention to the lawyer's conflicts of interest.¹ Now, when a lawyer alleges in a petition that a sale is in the best interests of the estate and those beneficially interested in the estate, the probate judge can assume that the lawyer is

¹ On October 7, 2009, the San Francisco probate department heard 55 matters on its 9:00 calendar. At three minutes a case, only contested matters can receive much attention.

advocating for the executrix, heirs, and creditors and not from self interest. In the future, if proposed rule 1.8.9 is adopted, no one will be advocating for them who does not have an inherent conflict of interest. This rule will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give them objective advice and who cannot objectively represent them in court. When an attorney for a personal representative appears on the petition for authority to sell property, he or she will be advocating that the property should be sold to the attorney or to the attorney's relative or partner, but not to a bona fide purchaser. The attorney will be advocating what is in his or her own interest when, instead, the lawyer should be advocating what is in the best interests of the estate and those beneficially interested in it. The administration of justice will have been corrupted.

The type of transaction that would be promoted by the proposed new rule is inherently abhorrent. It will victimize clients and other members of the public who are inherently vulnerable.

Deviating from established norms of our profession is not justified by the lobbying that the probate bar did to induce the Legislature to permit lawyers to buy at a probate sale. The fact that the Legislature included permission for lawyers to buy at probate sales does not make that wrongful practice right. Probate Code section 9881 does not serve as a substitute for rules of ethics or of discipline and does not absolve the lawyer of the duty to address the significant conflicts of interest when buying from a probate estate.

The Supreme Court has inherent jurisdiction to control conduct of lawyers in probate cases. See Bus. & Prof. Code §§ 6077 & 6103. The Supreme Court can require attorneys to adhere to stricter standards than the Legislature may require. Legislative standards are only minimal standards that must be applied for discipline, and the Supreme Court retains inherent power to make its rules more strict than the Legislature requires. See, e.g., *Stratmore v. State Bar* (1975) 14 Cal. 3d 887, 889-90.

In 1990, Commission for the Revision of the Rules recommended adoption of current Rule 4-300. In its report, the Commission expressly pointed out to the Board of Governors and to the Supreme Court the conflict between that rule and then new Probate Code sections 9880 through 9885. The Commission recommended that the Supreme Court adopt Rule 4-300 because it affords clients protection from predatory lawyers in situations where clients, for emotional or other reasons, will likely have difficulty exercising independent or objective judgment. The Board of Governors and the Supreme Court agreed. That was the ethical and correct position, and it would be the ethical and correct position to take today.

The Commission should be embarrassed by proposing to enrich lawyers by blessing inherent conflicts of interest that jeopardize the public. The Board of Governors should reject this new rule.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<u>Explanation of Changes to the California Rule 4-300</u>
	(Aa) A ~~member~~lawyer shall not directly or indirectly purchase property at a ~~probate,~~ foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated ~~by reason of personal, business, or professional relationship~~ with that ~~member or with that member's~~lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.	Since there is no comparable ABA Model Rule, this Explanation will only address changes to the existing California Rule, 4-300. The Commission believes that this Rule protects the public against self-dealing by lawyers who are performing professional functions in connection with various forms of property sales under legal processes, such as receiver's, trustee's, or judicial sales, and should be continued. The Commission is not aware of any reasons why the ABA has not addressed this subject; but it believes that the possibility for self-dealing or abuse in these situations is apparent wherever a lawyer performs professional functions concerning a public or semi-public sale under legal process. Thus, proposed Rule 1.8.9 retains virtually all of current California rule 4-300, with one significant exception. Lawyers' roles in probate sales have been regulated both by rule 4-300 and by statute (Probate Code §§ 9880-9885). The current rule completely prohibits lawyers' self-dealing (directly or indirectly through family members etc.) in such transactions; but the Probate Code allows such transactions upon court order, given after notice to all interested parties as specified in the Code. After extensive consideration whether to continue the current rule's total prohibition of that which the legislature has decided to allow with specified conditions, the Commission decided that the statutory provision afforded adequate public protection in probate sales transactions, and has deleted that part of current rule 4-300 from the proposed Rule.

* Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule</u>* Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<u>Explanation of Changes to the California Rule 4-300</u>
		The only other changes to part (a) are that the qualification which describes the nature of the "affiliation" which precludes participation in such a sale was eliminated as unnecessary and perhaps too limiting, and that "lawyer" was substituted for "member."
	(B) A ~~member~~lawyer shall not represent the seller at a ~~probate~~, foreclosure, ~~receiver~~receiver's, ~~trustee~~trustee's, or judicial sale ~~in an action or proceeding~~ in which the purchaser is a spouse or relative <u>or other close associate</u> of the ~~member~~lawyer or of another lawyer in the ~~member's lawyer's~~ law firm ~~or is an employee of the member or the member's law firm.~~ (Amended by order of Supreme Court, operative September 14, 1992.)	See Explanation of Changes for paragraph (a).
	(c) <u>This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].</u>	New paragraph (c) excepts probate sales from the Rule and cross-references the specific provision of the Probate Code. See Explanation to part (a) of this proposed rule. Paragraph (c) also adds the caveat that although probate sales might be regulated under the statute, a lawyer's participation in such transactions is still subject to other rules.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Comment	<u>Explanation of Changes to the California Rule 4-300</u>
	<u>[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.</u>	Comment [1] has been added to caution lawyers that failure to comply with the conditions of the Probate Code as to probate sales is a violation of this Rule.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

COMMENT

- [1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

**Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree = 1
Modify = 0
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	D	Yes		OCTC opposes the change to this rule. Current Rule 4-300 prohibits all such transactions, but subparagraph (c) of the Proposed Rule permits lawyers to directly or indirectly purchase property as specifically authorized by Probate Code sections 9880 through 9885. However, it is not clear that Probate Code section 9881 was intended to permit the personal representative's attorney to purchase property of the estate personally. OCTC has serious concerns about permitting a member to either directly or indirectly purchase estate property pursuant to Probate Code sections 9880-9885. They include: (1) whether the transaction is truly fair and in the best interest of the client; (2) its impact on the public's confidence in the profession; (3) whether such transactions undermine or may undermine the attorney's duty of undivided loyalty to the client; (4) whether the attorney is looking for a deal rather than representing his or her client's best interest; and (5) the appearance of or actual overreaching by the attorney against potentially unsophisticated and/or grieving parties or family members.	The Commission had considered at length the disparity between current Rule 4-300 and the Probate Code section, and decided that although the great majority of the Commission felt that the rule was better than the statute, the Commission should not create or continue an inconsistency with the statutory regime.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree = 1
Modify = 0
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	If the Commission strikes subparagraph (c) then Comment [1] should be stricken.	
2	San Diego County Bar Association	A	Yes		Rule 4-300 conflicted with Probate Code 9880-9885 which provided that a lawyer could participate in a probate proceeding sale. This revision aligns both statutes.	No response required.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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 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 represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.10 [RPC 3-120]

“Sexual Relations With Client”

(XDraft #7, 09/12/09)

Summary: Proposed Rule 1.8.10 substantially adopts ABA Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. The proposed Rule differs from the Model Rule in adding a definition of “sexual relations” in paragraph (b), which is imported verbatim from existing California Rule of Professional Conduct 3-120.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
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- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-120

Statute

Bus. & Prof. Code §§ 6106.8 & 6106.9

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13s due to member absences)

Approved on 10-day Ballot, Fewer than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 5
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

See Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.10* Sexual Relations With Client

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

1. Proposed Rule 1.8.10 substantially adopts Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. As the comparison chart illustrates, unlike current California rule 3-120, the Commission has proposed a rule that follows Model Rule 1.8(j) which effectively bans, rather than limits, sexual relations between lawyers and their clients.
2. The version of the Rule that was initially circulated for public comment closely followed current California rule 3-120 in that it limited, but did not ban, virtually all sexual relationships. The Commission originally passed this version of the rule by a vote of 8 to 1.
3. In response to the initial public comment distribution, the Commission received four written public comments in favor of a broad Model Rule-type ban and two written comments in favor of the narrower limitation in the current California rule. Also, an attendee at the public hearing spoke in favor of the direction of the Model Rule. After reviewing the public comment, the Commission voted 7 to 6 not to retain the Rule as sent out for public comment. Instead, the Commission voted 8 to 6 to adopt a rule that is identical to Model Rule 1.8(j) in prohibiting all sexual relationships between lawyer and client except for consensual relationships that predate the lawyer-client relationship. At its September 2009 meeting, the Commission confirmed this decision by a 7 to 6 vote. In response to the subsequent public comment distribution, seven comments were received with: 2 comments favoring the broad Model Rule-type ban (including a comment letter from HALT, a law reform organization); 3 comments opposed; and 2 comments suggesting modifications. After considering these comments, the Commission voted 6 to 5 (with one abstention) to retain the broad rule approach.

* Proposed Rule, XDraft 7 (9/12/09).

INTRODUCTION (Continued):

4. In considering the alternatives, the Commission observed that the professions of medicine and psychology have absolute bans similar to the Model Rule, and there is no suggestion that these bans have caused any of the personal or constitutional problems raised by the minority. There also is no suggestion of any such problem in any of the other jurisdictions that have adopted the Model Rule ban. The proponents of the Model Rule ban also argued that a ban would foster public trust in the legal system and that, whether or not one can fairly say that the lawyer-client relationship almost always is unequal, the public naturally will assume the worst about the lawyer's conduct whenever a lawyer engages in a sexual relationship that would be banned by the Model Rule.

5. The Commission also notes that the minority's reliance on the argument that the proposed Rule will conflict with Business and Professions Code § 6106.9 and thus is "a denigration of the legislative process," is misplaced. The Supreme Court can impose a higher standard on lawyers than the legislature has done. Thus, there is no "conflict" with section 6106.9 merely because the proposed Rule and the statute would impose different standards of conduct. There is no need, as the minority asserts, to go to the Legislature to "fix" the statute.

6. Those members of the Commission who adhered to its original 8-1 recommendation to retain the concepts underlying current rule 3-120 argued that a virtual ban like that in Model Rule 1.8(j) conflicted with Business and Professions Code § 6106.9, which limits, but does not ban, sexual relations between lawyers and clients. Current rule 3-120 is consistent with section 6106.9. At the public hearing, it was suggested by a member of the public that the Legislature "does not really understand how the rule works," and that it can "fix" the statute to conform to the rule. The Commission minority disagrees and considers this a denigration of the legislative process. However, the fact remains that adoption of 1.8(j) would expand on, and in the view of some members of the Commission, conflict with existing state law.

7. The minority also noted the paucity of empirical evidence suggesting that the current rule is not working in the sense that clients are complaining about improper sexual relationships with their lawyers but not receiving support from State Bar prosecutors, or failing to complain because of enforcement concerns. Therefore, it is highly questionable that enacting a virtual ban on such relationships would provide further protection to the public.

INTRODUCTION (Continued):

8. The minority also notes that the proper focus of the ethical rules is the regulation of conduct of individuals as lawyers. The present Rule quite properly prohibits the abuse of a lawyer's "power position" over a client by demanding or obtaining sexual favors; but not every lawyer-client relationship is of such a nature. For example, if an actuary working on employee benefits becomes romantically involved with a lawyer working for the same company on like matters, the power relationship is likely to be equal; or if the chief executive and the chief counsel of a public corporation become romantically involved before their eventual marriage, how is that the business of the Bar? But unlike the present rule, the proposed rule would ban both of these – and many other – relationships, which are clearly not the business of the Bar. We are not the bedroom police. Outside the context of having a deleterious effect on a lawyer-client relationship, the social habits of lawyers that do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. Current rule 3-120 addresses this problem.

9. The minority notes the same criticism can be leveled at the unsupported claim by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") that making it easier to prove a violation would also have a salutary effect by inhibiting attorneys from entering into such relations. Apparently, the thinking is that making enforcement incrementally more difficult encourages lawyers to have sexual relations with clients. However, inhibiting lawyers and clients from exercising the right to choose their personal and sexual partners is not necessarily a good thing. There is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. For every non-coerced sexual relationship that does not produce a deleterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In some cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, a bright-line ban similar to that in Model Rule 1.8(j) will have a chilling effect on that freedom.

10. Additionally, the minority argues that merely banning sexual relations without requiring some nexus to a lawyer's professional duties could encourage personally dissatisfied clients to use the existence of a sexual relationship with a lawyer as retaliation against the attorney for some perceived personal slight or offense. They pointed out that the State Bar disciplinary system should not be a venue in which jealous romantic partners seek vengeance.

INTRODUCTION (Continued):

11. As noted, the COPRAC letter concludes with approving references to ABA commentary developed during the discussion concerning Model Rule 1.8(j). Comments such as “the attorney-client relationship is almost always unequal,” and that “it is unlikely a client can provide informed consent due to the ‘client’s own emotional involvement,’” appear to some Commission members to be hyperbolic, overly simplistic conclusions offered to explain complex social interactions, as well as being unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney-client relationship, current rule 3-120 bans the conduct.

12. The minority also argues that the purported reasons for the new prohibition of sexual relations between lawyer and client are inconsistent with the only exception to the proposed Rule. If it is adopted, a lawyer may represent a client with whom she or he has an existing sexual relationship, regardless of whether the lawyer’s performance of legal services will adversely be affected by that relationship. Conversely, if the proposed Rule is adopted, and a lawyer and client become romantically involved but comply with the Rule by remaining chaste until they marry or become domestic partners, the literal wording of the rule will prohibit them from consummating their otherwise legitimate relationship.

13. Last but perhaps most importantly, the proposed Rule following Model Rule 1.8(j) implicates both the federal and California constitutional rights of sexual privacy. It has long been settled that there is a federal and state constitutional right to sexual privacy. In fact, this penumbra right is one of individual autonomy thereby requiring the existence of a compelling state interest before it can be abridged. (*Griswold v. Connecticut* (1965) 381 U.S. 479) One prong of the “compelling state interest test” is whether the law is narrowly tailored to meet the needs of the public. The U.S. Supreme Court has recently affirmed this tenet of constitutional law, in striking down Texas’ sodomy law. (*Lawrence v. Texas* (2003) 539 U.S. 558) Our state supreme court follows this same analytical path when scrutinizing laws affecting sexual privacy under the California constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757; see also Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, Geo. J. Legal Ethics (Winter 1997).)

INTRODUCTION (Continued):

14. *A Note on the Rule Number.* As noted, the Rule appears in the Model Rules numbered as 1.8(j). The Commission has not proposed that California follow the Model Rules construct of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within current client, former client, or government lawyer conflict situations addressed in Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier to locate and use, the Commission has recommended that each rule in the 1.8 series be given a separate number. Thus, the Commission's proposed sex with a client rule appears as a stand-alone rule, numbered 1.8.10, to correspond to Model Rule 1.8(j).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule</u>* Rule 1.8.10 Sexual Relations With Client	<u>Explanation of Changes to the ABA Model Rule</u>
(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	(ja) A lawyer shall not ~~have~~<u>engage in</u> sexual relations with a client unless a consensual sexual relationship existed between them when the ~~client~~<u>lawyer-client</u> relationship commenced.	Paragraph (a) is nearly identical to MR 1.8(j). The only changes are 1) to substitute "lawyer-client" for the Model Rules' "client-lawyer" rubric to conform the phrase to the style used in California statutes, e.g., "Lawyer-Client Privilege," Evid. Code §§ 950-962, and in typical judicial opinions; and 2) to change "have" to "engage in" so that, when considered in conjunction with Comment [1], the Rule will apply to sexual relations that are initiated by the lawyer or the client and that are an exploitation by the lawyer in the course of a professional representation. The change from "have" to "engage in", together with the sentence at the end of Comment [1], was added in response to the Board Committee on Regulation and Admissions' consideration of 1.8.10 on November 12, 2009.

* Proposed Rule 1.8.10, XDraft 8 (11/30/09).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.10 Sexual Relations With Client	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.</u>	The Model Rule does not define "sexual relations." Paragraph (b) adds a definition of "sexual relations" imported verbatim from California rule 3-120(A) and Bus. & Prof. Code § 6106.9(d). Following the Board Committee on Regulation and Admissions' review of proposed rule 1.8.10 in November 2009, the existing definition of "sexual relations" in rule 3-120(A) was reconsidered by the Commission, along with a broader definition and no definition at all. A broader definition that applies equally (whether the lawyer initiates the sexual relations or is the recipient of advances from the client) runs the risk of subjecting a lawyer to discipline for being the recipient of client conduct that is for the client's sexual arousal, gratification, or abuse. No definition would be consistent with Model rule 1.8(j), but would cause uncertainty as to what definition to apply to rule 1.8.10 cases. The Commission stayed with recommending Bus. & Prof. Code § 6106.9(d) the existing definition in rule 3-120(A), which is consistent with the statutory definition in Bus. & Prof. Code § 6106.9(d).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
Client-Lawyer Sexual Relationships [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.	~~Client-Lawyer Sexual Relationships~~ ~~[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	[1] This Rule prohibits sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. See, e.g., <i>Greenbaum v. State Bar</i> (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; <i>Alkow v. State Bar</i> (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; <i>Cutler v. State Bar</i> (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; <i>Clancy v. State Bar</i> (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657]. The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. See, e.g., <i>Giovanazzi v. State Bar</i> (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; <i>Benson v. State Bar</i> (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; <i>Lee v. State Bar</i> (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; <i>Clancy v. State Bar</i> (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657]. Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. See, e.g., <i>Magee v. State Bar</i> (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; <i>Lantz v. State Bar</i> (1931) 212 Cal. 213 [298 P. 497]. In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation. The paragraph (a) prohibition applies equally whether the lawyer is the	Comment [1] replaces Model Rule 1.8, cmt. [17]. While repeating some of the core ethical principles that inform the proposed Rule, Comment [1] cites to California case law supporting the referenced principles. In response to the Board Committee on Regulation and Admissions' consideration of 1.8.10 on November 12, 2009, a sentence is added at the end of Comment [1] stating that the prohibition in this Rule applies whether it is the client or the lawyer who initiates the sexual relations.

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.	
[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).	~~[182] Sexual relationships that~~ This Rule is not applicable to ongoing consensual sexual relations which predate the client-lawyer-client relationship ~~are not prohibited. Issues~~ because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the ~~client-lawyer-client~~ relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be ~~materially limited~~ adversely affected by the relationship. See ~~Rule~~ Rule 1.7(a)(2) (conflicts of interest), 1.1 (competence) and 2.1 (independent judgment).	Comment [2] is based on Model Rule 1.8, cmt. [18]. The active voice replaces the passive in the first sentence to conform to California rule drafting convention. The term "adversely affected" has been substituted for the Model Rule's "materially limited" because the Commission has not adopted that term in its proposed Rule 1.7.
[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.	~~[193] When the client is an organization, paragraph (j) of this Rule prohibits~~ is applicable to a lawyer for the organization (whether inside counsel or outside counsel) ~~from having a who has~~ sexual relationship ~~relations~~ with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.	Comment [3] is based on Model Rule 1.8, cmt. [19]. No change in meaning is intended by the changes. The cross-reference to Rule 1.13, concerning the organization as client, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization. The minority argues that the proposed Comment contradicts the rationale underlying the Rule. See Introduction, ¶. 12.

Rule 1.8.10 Sexual Relations With Client

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this Rule, “sexual relations” means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

COMMENT

- [1] This Rule prohibits sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. ~~(See, e.g.,~~ *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. ~~(See, e.g.,~~ *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) ~~Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g.,~~ *Magee v. State Bar* (1962) 58 Cal.2d 423 [24

Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation. The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

- [2] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be adversely affected by the relationship. See Rules ~~{1.7(d)~~ 1.7(a)(2) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).
- [3] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule ~~{1.13}~~.

Rule ~~3-120~~1.8.10 Sexual Relations With Client
(Redline Comparison of the Proposed Rule to Current California Rule)

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (Ab) For purposes of this ~~rule~~Rule, “sexual relations” means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.
- (B) ~~A member shall not:~~
- (1) ~~Require or demand sexual relations with a client incident to or as a condition of any professional representation; or~~
 - (2) ~~Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or~~
 - (3) ~~Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~
- (C) ~~Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.~~
- (D) ~~Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

Discussion: COMMENT

- [1] This Rule ~~3-120~~ is ~~intended to prohibit~~prohibits sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a ~~member is~~ advised to lawyer must keep clients' interests paramount in the course of the ~~member's~~ lawyer's representation. The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

~~For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)~~

~~Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.~~

- [2] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be adversely affected by the relationship. See Rules 1.7(a)(2) (conflicts of interest), 1.1 (competence) and 2.1 (independent judgment).
- [3] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

Rule 1.8.10 Sexual Relations With Client (Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

COMMENT

- [1] This Rule prohibits sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657]. The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657]. Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24

Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497]. In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation. The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

- [2] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be adversely affected by the relationship. See Rules 1.7(a)(2) (conflicts of interest), 1.1 (competence) and 2.1 (independent judgment).
- [3] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

**Rule 1.8.10 Sexual Relations With Client.
[Sorted by Commenter]**

TOTAL = 7 **Agree = 2**
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anastasi, Pascal	D	No		The existing rule and prohibition has legitimacy because it is effective when circumstances exist that are likely to cause adverse effects in the representation in the representation of the attorney's client. This makes perfect sense as the rules should be formed to protect the clients. The prohibitions pertain in situations when sex is: (1) required as a condition of a representation; (2) obtained by coercion, intimidation or undue influence; or (3) cause the lawyer to perform services incompetently. The latter is obviously the core issue ... causing poor representation. But a complete ban on all sex in every situation is improper. I may not approve, you may not approve, but the question should be has any harm been incurred. Please adopt rules that have a legitimate purpose, not just a "politically correct" or other "holier than thou" purpose.	This comment reflects the minority position which has been rejected by a majority of the Commission.
2	COPRAC	A	Yes	Comment [2]	Comment [2] uses the term "adversely affected" which language derived from a prior draft of Rule 1.7. Now that the current draft of Rule 1.7 uses the "materially limited" test, the phrase "adversely affected" should be	The Commission agrees with this comment and is recommending the suggested change to conform this rule to the latest draft of rule 1.7.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.10 Sexual Relations With Client. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 3 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	replaced with “materially limited.” This would be consistent with the ABA Model Rule. Also, in Comment [2], the reference to 1.7(d) should be changed as the current version of 1.7 no longer has a subsection (d). Comment [3] contains a reference to Rule 1.13. COPRAC does not see the point of this reference, and believes that it could be confusing. Accordingly, we propose to delete it.	The cross-reference to Rule 1.13, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization, to assist the lawyer in complying with this rule.
3	Eggleston, Janis E.	M	No		Rule 1.8.10 is ambiguous in that it does not identify whether lawyers will be prevented from having sexual relations with a client after the representation has concluded. Given that our duty of loyalty and confidentiality continue to exist after the conclusion of the representation, those same continuing duties might apply to sexual relations. The rule should clarify if, or under what terms, sexual relations with clients could exist after the representation has concluded.	The Commission considered this change, including a possible new comment definitively resolving the issue raised by the commenter. However, the Commission ultimately decided that the facts of a particular situation might make a difference in whether the rule is found to be applicable. By analogy, the Commission considered a Supreme Court case which concluded that a conflicts rule applicable to a current client relationship can, under certain facts, apply to a former client relationship. See <i>Hunnicutt v. State Bar</i> (1988) 44 Cal.3d 363.
4	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the RRC and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current CRPC 3-120.	No response required.

Rule 1.8.10 Sexual Relations With Client. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 3 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Office of Chief Trial Counsel	M	Yes	Comment [1]	Comment [1] is too long and seems more appropriate for a treatise, law review or ethics opinion. The Commission, however, might want to advise attorneys in a Comment of B&P Code section 6106.9, which also covers sexual relations between attorneys and clients.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. The Commission disagrees that a cross reference to section 6106.9 would be appropriate. The Board's desired policy, which reflects the ABA's absolute ban approach) is inconsistent with the policy in the B&P code provision, and a cross-reference would cause unnecessary confusion. Ultimately, Board implementation of this Rule will entail coordination with the Legislature, the Governor and the Supreme Court to resolve the inconsistency.
6	Rogers, Robert K.	D	No		I believe the current rule adequately covers the areas of real concern regarding sexual relations with clients. I disagree with government (i.e. State Bar) involvement in personal morals and social norms, and I believe the Proposed Rule crosses that line. The current rule prohibits conduct that is coercive and addresses the potential for the relationship to interfere with the attorney's ability to perform to the best of his or her ability. This would prohibit a relationship from developing in, for example, a situation in which the attorney and client are involved in real estate or other purely financial	The Commission and the Board of Governors disagree that the current rule either appropriately recognizes the fiduciary duties of the highest nature owed by a lawyer to a client or provides for effective enforcement.

Rule 1.8.10 Sexual Relations With Client. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 3 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					transactions or disputes. I see nothing wrong, generally, in two people developing a personal relationship that arises out of a professional one, and I think that the State Bar should limit itself to situations in which there is a real danger that the attorney/client relationship will be harmed. This Proposed Rule is too broad in its scope, and too confining in its proscription.	
7	Rose, Stephen Kent	D	No		Sexual relationships should not be the Bar's business. Given that anybody who asks for or receives any legal information is potentially a client this would seriously limit either sex or conversation.	The Commission and the Board of Governors disagree that the current rule either appropriately recognizes the fiduciary duties of the highest nature owed by a lawyer to a client or provides for effective enforcement.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 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.

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(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the

representation of another client if the representation presents a substantial risk that the lawyer’s responsibilities to the public entity would limit the lawyer’s ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

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client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

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(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.8.11 [n/a] “Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9”

(XDraft #2.2, 01/06/10)

Summary: This new rule addresses the imputation of a lawyer’s conduct prohibited by rules in the 1.8 series of specific prohibitions (such as the prohibition against a lawyer entering into a business transaction with a client) to other lawyers associated with the prohibited lawyer.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 11

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.11* Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.8.11, which governs the imputation of conduct prohibited in the 1.8 series of Rules to lawyers associated in law firms, is based on Model Rule 1.8(k). Changes to the language in Model Rule 1.8(k) are primarily intended to conform the Rule to the Commission's numbering convention for the proposed rule counterparts to Model Rule 1.8. Rather than follow the ABA in placing a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

Please note that this Rule went out for public comment as Rule 1.8.13, and as a result there are references to the earlier numbering in the public comment.

* Proposed Rule, XDraft 2.2 (1/6/10). [Formerly proposed Rule 1.8.13]

<u>ABA Model Rule</u> Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9	<u>Explanation of Changes to the ABA Model Rule</u>
(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.	(~~k~~) While lawyers are associated in a law firm, a prohibition in ~~the foregoing paragraphs~~ (~~a~~)Rules 1.8.1 through (~~i~~)Rule 1.8.9 that applies to any one of them shall apply to all of them.	Rule 1.8.11 is based on Model Rule 1.8(k). The changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.

* Proposed Rule, XDraft 2.2 (1/6/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule*</u> Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.	~~[20]~~ ~~Under paragraph (k), a~~ prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~ <u>Rules 1.8.1</u> through ~~(j)~~ <u>1.8.8</u> also applies to all lawyers associated in a <u>law</u> firm with the personally prohibited lawyer. For example, one lawyer in a <u>law</u> firm may not enter into a business transaction with a client of another ~~member of~~ <u>lawyer associated in</u> the <u>law</u> firm without complying with ~~paragraph (a)~~ <u>Rule 1.8.1</u>, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ <u>This Rule does not apply to Rules 1.8.9 and 1.8.10 since the</u> prohibition ~~set forth in paragraph (j)~~ <u>those Rules</u> is personal and is not applied to associated lawyers.	Comment [1] to proposed Rule 1.8.11 is based on Model Rule 1.8, Comment [20]. As with the Rule itself, the changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.

* Proposed Rule, XDraft 2.1 (1/5/09). Redline/strikeout showing changes to the ABA Model Rule

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through ~~1.8.8~~1.8.9

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through ~~Rule 1.8.8~~1.8.9 that applies to any one of them shall apply to all of them.

Comment

- [1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through ~~1.8.8~~1.8.9 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to ~~Rules 1.8.9 and~~Rule 1.8.10 since the prohibition in ~~those Rules~~that Rule is personal and is not applied to associated lawyers.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9

(Commission's Proposed Rule – Clean Version)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

- [1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

**Rule 1.8.11 Imputation of Personal Conflicts.
[Sorted by Commenter]**

TOTAL = 4 **Agree = 3**
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes	Comment [1]	Except for the last sentence of Comment [1], the Comment should be stricken.	The Commission disagrees. The first sentence is a necessary introduction to the helpful example in the second sentence.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
4	Santa Clara County Bar Association	M	Yes		We recommend that the 2009 amended version of ABA Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization.	The commenter has confused proposed Rule 1.8.11 with proposed Rule 1.10. Rule 1.8.11 is the counterpart to Model Rule 1.8(k), and provides for imputation of a lawyer's personal interest conflicts that arise from the 1.8 series of rules to other lawyers in the firm. Screening is not permitted for such conflicts. The Commission, however, agrees with the commenter that screening should be permitted in the Rules for conflicts imputed under Rule 1.10 and is requesting that the Board of Governors reconsider its decision to reject screening in proposed Rule 1.10.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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. Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §§6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably,

Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to

the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is

reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: 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 involvement in the

performance of the legal work for the client . . .

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(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.

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Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

Proposed Rule 1.9 [RPC 3-310(E)]

“Duties to Former Clients”

(XDraft #7, 2/9/10)

Summary: This Rule addresses conflicts of interest that arise when a lawyer's current representation is adverse to a client that the lawyer or the lawyer's firm (while the lawyer was still at the firm) formerly represented in the same or a substantially related matter. The black letter substantially follows the Model Rule but the Rule's comment is modified to address California case law. See Introduction & Explanation of Changes to the Comments.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-310(E)

Statute

Bus. & Prof. Code §6068(e)

Case law

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564; *In re Matter of Lane* (Rev.Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New Jersey Rule 1.9.

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 3

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No
(See the introduction.)

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the introduction and the Explanation of Changes for paragraph (b) of the proposed Rule and Comment [5] to the proposed Rule in the comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.9* Duties to Former Clients

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.9, which governs a lawyer's duty to former clients, is substantially the same as Model Rule 1.9. The minor changes to the language in the black letter of Model Rule 1.9 are for clarity and to include the same reference to the California State Bar Act that has been made in a number of other Rules. The Comments to proposed Rule 1.9 contain substantive additions and deletions to the Model Rule counterparts that, in part, explain relevant California case law and elaborate on the meaning of the phrase "substantially related" as used in the rule. Of particular note is Comment [5], in which the Commission recommends that the Supreme Court reject the position taken by the Review Department in *In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735, that the substantial relationship test, which provides an irrebuttable presumption in civil disqualification matters, is also applicable to disciplinary proceedings. See Explanation of Changes for Comment [5].

Minority. A minority of the Commission objects to Comment [5] to the rule on the ground that it reverses settled law concerning the application of the substantial relationship test to disciplinary and malpractice actions. The minority contends that the test is a substantive rule of law, not a rule of evidence that is rebuttable. The minority also takes the position that, even if it were a rule of evidence, then its application should be left to the courts. Finally, the minority objects to the differential application of the test in civil disqualification proceedings on the one hand, and disciplinary and malpractice actions on the other. The minority thus urges the deletion of Comment [5]. See Full Minority Dissent. below.

* Proposed Rule 1.9, XDraft 7 (2/9/10).

Proposed Rule 1.9 Duties to Former Clients

Minority Dissent

Comment 5 proposes to change the time-honored “substantial relationship” test to preclude its application in disciplinary proceedings and legal malpractice actions. The substantial relationship test provides that when a substantial relationship exists between the former representation and the current representation, the attorney’s knowledge of confidential information is conclusively presumed. (See *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.) Comment 5 changes this rule by making the presumption rebuttable in disciplinary proceedings and legal malpractice actions. The Commission reasons that Evidence Code section 958 is an exception to the lawyer-client privilege and that the lawyer therefore can and should be allowed to prove that he or she did not actually receive confidential information. There are several problems with altering the application of the substantial evidence in some proceeding, but not others.

First, the substantial relationship test is not a rule of evidence at all, but a substantive rule of law. A conclusive or irrebuttable presumption differs from a rebuttable presumption in that only the latter is considered a rule of evidence. (See *People v. McCall* (2004) 32 Cal.4th 175, 184-185 “[A] distinction must be drawn between mandatory rebuttable presumptions, which operate as evidentiary devices, and mandatory conclusive presumptions, which operate as rules of substantive law.”].)

Because it is a substantive, prophylactic rule -- a “rule by necessity, for it is not within the power of the former client to prove what is in the mind of the attorney” (*Global, supra*, at p. 489.) -- the question is not whether or not the lawyer can disprove receipt of confidential information. Based on ethical policy, not evidence, the substantial evidence test presumes conclusively that the lawyer received confidential information from the former client. The presumption is conclusive, rather than rebuttable, because the very probe into whether the attorney actually gained access to confidential information would itself destroy the values sought to be protected. (*Conflicts of Interest in the Legal Profession* (1981) 94 Harv. L. Rev. 1244, 1329.) “The presumption also stems from a recognition of how difficult it is for the former client to prove that confidential information was given to the attorney.” (*Id.*) “By forcing a client to prove receipt of information, the cloak of secrecy would be torn from the attorney-client communications. As one court has stated, ‘[t]hat kind of Hobson’s Choice is not one to which the legal profession ought to submit its clients.’” (*Ibid.*) The fact that the presumption might be rebuttable does not alter the client’s dilemma.

Second, because it is a prophylactic rule and not a rule of evidence, a lawyer’s denial that he or she received confidential information misses the point. “The interest to be preserved by preventing attorneys from accepting

representation adverse to a former client is the protection and enhancement of the professional relationship in all its dimensions.” (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315 , 325.) The question is not whether confidential information was *actually* exchanged between the lawyer and the client, but whether it *normally* would have been exchanged. (*Id.* at p. 327.) While a limited exception exists where the lawyer can show that there was no opportunity to receive confidential information, there is no exception that allows a lawyer to discuss what confidential information the lawyer did or did not receive.

Third, if, as the Commission maintains, this is indeed a rule of evidence, then the application of the substantial relationship test should be left to the courts. In disciplinary proceedings the State Bar Court should determine under its own rules of evidence and procedure how the test should be applied in those proceedings. (See, e.g., Rules of Practice of the State Bar Court and Bus & Prof Code § 6086.5.) It is beyond the purview of the Commission to draft rules of evidence or procedure for the State Bar Court.

Finally, the notion that this--or any other rule--will apply differently depending on whether the proceeding involves disqualification, on one hand, or discipline or malpractice, on the other, is unprecedented. We should not have rules that have such differential application. Comment 5 should be deleted.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.	(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed <u>written</u> consent, ~~confirmed in writing~~.	The Commission proposes the adoption of Model Rule paragraph (a) except for the substitution of the more client-protective requirement that the lawyer obtain the client's <i>written</i> consent to the lawyer's adverse representation. This change affords more client protection and is consistent with California's requirement of <i>written</i> consent in other conflict situations.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.	(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a <u>law</u> firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, <u>while at the former law firm</u>, had acquired information protected by <u>Business and Professions Code section 6068(e) and</u> Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed <u>written</u> consent, ~~confirmed in writing~~.	Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. The addition of "law" to modify "firm" conforms to the Rules style. The first change in (b)(2) is non-substantive; it clarifies that paragraph (b) applies when a lawyer learned information about a former client while in an earlier law firm association. The purpose of paragraph (b) is to describe the application of Rule 1.9 when the lawyer has departed that earlier law firm; the additional phrase in subparagraph (2) clarifies this connection. The addition of the reference to Bus. & Prof. Code § 6068(e) was made in response to public comment expressing concerns over the scope of protection afforded by proposed Rule 1.6. Although the Commission does not agree with the expressed concern, it has added the reference. Proposed paragraph (b) also substitutes the requirement of <i>written</i> consent in place of the MR's laxer "confirmed in writing" standard.

* Rule 1.9, XDraft 7 (2/9/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:	(c) A lawyer who ~~has~~ formerly represented a client in a matter or whose present or former <u>law</u> firm has formerly represented a client in a matter shall not thereafter:	Proposed paragraph (c) is identical to the Model Rule paragraph, except for the elimination of one unnecessary word and the addition of "law" to modify "firm" to conform to the Rules style.
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or	(1) use information relating to ~~the representation—a~~ <u>former client</u> to the disadvantage of the former client except as these Rules <u>or the State Bar Act</u> would permit ~~or require~~ with respect to a <u>current</u> client, or when the information has become generally known; or	The use of 'relating to a former client' in place of the Model Rule's 'relating to the representation of a former client' is intended to eliminate the possibility of a narrow reading that the duty applies only to information that relates to the subject matter of a former representation. A lawyer's continuing duty of confidentiality under section 6068(e) and Rule 1.6 applies to all information obtained by a lawyer by virtue of a lawyer-client relationship if the use or disclosure of the information likely would be harmful or embarrassing to the client or if the client has directed the lawyer to not use or disclose the information. This paragraph also adds a reference to the State Bar Act. It also has another substantive change, which is the removal of the concept that a lawyer might be required to disclose a client's confidential information. That might be possible under Model Rule 1.6, but there is no such requirement either in the California Rules or in the State Bar Act. Finally, this adds the clarifying adjective "current". The Model Rules apparently only once refer to a current client as "current client", but they otherwise use the unmodified word "client" to refer to a current client. Because this Rule is concerned with duties owed to former client, the Commission recommends adding "current" in all places in the rule that the reference is to a "current client.". The Commission believes this should avoid misunderstanding by making immediately clear the meaning of provisions that otherwise might be more difficult to read.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.	(2) reveal information relating to ~~the representation~~ <u>a former client</u> except as these Rules <u>or the State Bar Act</u> would permit ~~or require~~ with respect to a <u>current</u> client.	The proposed changes in (c)(2) track those proposed for (c)(1).

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.	[1] After termination of a lawyer-client relationship, the lawyer ~~has certain continuing~~ <u>owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (<i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client.</u> ~~[2]~~ <u>Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to confidentiality and conflicts of interest and thus may not represent another client except a matter in conformity with this Rule which the lawyer represented the former client. Under this Rule, for</u>	Proposed Comments [1] and [2] materially revise Model Rule Comment [1] in order to more fully explain how and why Rule 1.9 protects former clients, and to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients. The Supreme Court's opinion in <i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564 (cited in proposed Comment [1]) and other authority such as <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 159, emphasize that a lawyer has two duties to former clients. Both of these duties are described and explained in these proposed Comment paragraphs. The Commission believes that it is essential to preserve this case law, and it further believes that Model Rule 1.9 is consistent with these California principles. However, adopting the Model Rule Comment risked obscuring these points and thus causing misunderstanding of the Rule's extremely important restrictions on lawyer conduct.

* Proposed Rule 1.9, Draft 5.3 (9/1/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	For example, a lawyer could not properly seek to rescind on behalf of a new client a contract <u>the lawyer</u> drafted on behalf of the former client. ~~So also~~ <u>a</u> <u>A</u> lawyer who has prosecuted an accused person could not ~~properly~~ represent the accused in a subsequent civil action against the government concerning the same ~~transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9].~~ Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.	
[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution	~~{2} The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution~~	Because proposed Comments [1] and [2] replace Model Rule Comments [1], the balance of the proposed Comment is renumbered.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.	~~functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~	
[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in	[3] ~~Matters are "substantially related" for purposes of this Rule if they involve Paragraph (a) also addresses the same transaction or legal dispute or~~ <u>second of the two duties owed to a former client. It applies when</u> there ~~otherwise~~ is a substantial risk that ~~confidential factual information as would normally have been~~ <u>protected by Business and Professions Code section 6068(e) and Rule 1.6 that was obtained in the prior representation would materially advance the client's position</u> <u>be used or disclosed in thea subsequent matterrepresentation in a manner that is contrary to the former client's interests and without the former client's informed written consent.</u> For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person <u>ordinarily</u> may not ~~then~~ <u>later</u> represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in <u>securingconnection with the environmental permitsreview associated with the land use approvals</u> to build a shopping center <u>ordinarily</u> would be precluded from <u>later</u> representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations <u>that existed</u>	The Model Rule Comment discusses in its paragraphs [2] and [3] the vital question of when a lawyer's retention is "substantially related" to a former matter as to which the lawyer owes continuing duties to the former client under this Rule. Proposed Comments [3], [4], [5], and [6] substantially expand on the Model Rule discussion in order to provide a fuller explanation and context for this topic. Also, proposed Comment [3] revises the Model Rule Comment's reference to "environmental permits" in order to conform the terminology to California law.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.	<u>when the lawyer represented the client</u>; however, ~~the lawyer~~<u>paragraph (a)</u> would not ~~be precluded, on apply if~~ the ~~grounds of substantial relationship, from defending~~<u>lawyer later defends</u> a tenant of the completed shopping center in resisting eviction for nonpayment of rent. ~~Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client if there is not required to reveal the confidential information learned by the lawyer in order to establish a no~~ substantial risk ~~that~~<u>relationship between</u> the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client<u>and use</u> and information that would in ordinary practice be learned by a lawyer providing such services<u>eviction matters</u>.	

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation).	Proposed Comment [4] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is. Also, it includes a reminder of the important concept that a lawyer sometimes can avoid the violation of duties owed to a former client, just as a lawyer sometimes can avoid the violation of duties owed to a current client, by limiting the scope of a new representation. This reminder includes cross-references to Rule 1.2(c) (limiting the scope of a representation) and to Rule 1.7, Comment [15] (discussing the same point in the context of a lawyer's duties to a current client).
	[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the	Proposed Comment [5] has no direct corollary in the Model Rule Comment. It also is part of the expanded explanation of what a "matter" is and includes citations to pertinent California appellate opinions. In addition, the Commission is recommending that Review Department's opinion in <i>In re Matter of Lane</i> (1994) 2 Cal. State Bar Ct. Rptr. 735, be rejected. In that opinion, the Review Department suggested that the substantial relationship test, which provides an irrebuttable presumption in civil disqualification

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>attorney. (<i>H.F. Ahmanson & Co. v. Salomon Brothers, Inc.</i> (1991) 229 Cal.App.3d 1445, 1454)</u> <u>This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See <i>In re Complex Asbestos Litigation</i>, (1991) 232 Cal.App.3d at p. 592; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.</u>	matters, was also applicable to disciplinary proceedings. The Commission determined that the Review Department's conclusion is ill-advised in those situations where the lawyer's new client is not present and the lawyer will be afforded an opportunity to provide direct evidence of what information the lawyer actually obtained in the prior representation.
	<u>[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.</u>	Proposed Comment [6] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is and is intended to underline that the concept of a "matter" should be understood within the context of the purposes of Rule 1.9 as they are explained in Comment [1].

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Business and Professions Code section 6068(e) and Rule 1.6 that the former client would not want disclosed or in a manner that would be to the disadvantage of the former client.	Proposed Comment [7] has no direct corollary in the Model Rule Comment. It supplements proposed Comment [6].
Lawyers Moving Between Firms [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the	Lawyers Moving Between Firms ~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the~~	The Commission proposes to remove all of Model Rule Comment [4] as being discursive and not helpful to understanding the Rule.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.	~~rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~	
[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.	~~[5]~~ Paragraph (b) ~~operates~~<u>addresses a lawyer's duties to disqualify a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest</u> only when the lawyer ~~involved~~ has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm ~~is disqualified from~~<u>would violate this Rule by</u> representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.	Proposed Comment [8] is substantially the same as Model Rule Comment [5]. The wording change is intended to avoid a possible misreading of Rule 1.9(b), which as written might be seen as referring only to former clients of a lawyer's former firm, while it should also include current clients of a lawyer's former firm. Rather than attempting to revise paragraph (b), which would have caused considerable drafting difficulties, the Commission chose to clarify through this Comment. As has been done throughout, the Commission has removed the reference to disqualification, these being disciplinary rules and disqualification being a matter within the authority of a court in the exercise of its responsibility to control the proceedings.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.	[69] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm ~~whose disqualification is sought~~to which this Rule applies.	Proposed Comment [9] is nearly identical to Model Rule Comment [6], but removes the reference to disqualification in the last sentence.
[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).	~~[710] Independent of the question of disqualification of a firm, a~~A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).	Proposed Comment [10] is substantially the same as Model Rule Comment [7]. However, the proposed Comment removes the reference to lawyer disqualification. Although the Commission understands that Rule 1.9 will be cited when disqualification issues are raised, it has written the Rule primarily for disciplinary purposes and does not want to suggest that it presumes to dictate to courts how to exercise their authority, for example, under C.C.P. § 128(a)(5). In addition, a reference to Bus. & Prof. Code § 6068(e) has been added. See Explanation of Changes for paragraph (b)(2), above.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.	[8~~11~~] Paragraph (c) provides that <u>confidential</u> information acquired by ~~the~~<u>a</u> lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the <u>former</u> client. ~~However,~~<u>See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information.</u> The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. <u>However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)</u>	Proposed Comment [11] is based on Model Rule Comment [8]. The first set of changes clarify that it (and Rule 1.9) speak only of confidential information that is protected by Rule 1.6, not to non-confidential information that a lawyer might have learned in the course of representing a former client. The addition of the last sentence was made in response to public comment received on this Rule and proposed Rule 1.6 expressing the incorrect view that <i>Matter of Johnson</i> prohibits a lawyer from using to the disadvantage of a former client or disclosing information that is generally known. That opinion holds that a lawyer has obligations with respect to information that is in a public record, and therefore potentially available to others, but that is not generally known..
[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.	<u>Client Consent</u> [9~~12~~] The provisions of this Rule are for the protection of former clients and can be waived if the <u>former</u> client gives informed <u>written</u> consent, ~~which consent must be confirmed in writing under paragraphs (a) and (b).~~ See Rule 1.0(e). With regard to the effectiveness of an advance ~~waiver~~<u>consent</u>, see Comment [22] to Rule 1.7. With regard to ~~disqualification~~<u>the application of a lawyer's conflict to</u> a firm with which a lawyer is or was formerly associated, see Rule 1.10.	Proposed Comment [12] is much the same as Model Rule Comment [9]. There are two substantive changes. First, the proposed Comment substitutes California's more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing" (this change can be seen in paragraphs (a) and (b) of the proposed Rule, and is consistent with the same change made in other proposed conflicts Rules). Second, as explained with respect to Comment [10], this removes the reference to disqualification.

Rule 1.9 Duties to Former Clients

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.
- (c) A lawyer who formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to a former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or

- (2) reveal information relating to a former client except as these Rules or the State Bar Act would permit with respect to a current client.

COMMENT

- [1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. ~~(*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505])~~ These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information ~~to the lawyer that will be~~ protected ~~as required by Rule 1.6 and~~ Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.
- [2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has

prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter.

- [3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by ~~Rule 1.6 and~~ Business and Professions Code section 6068(e) and Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the land use and eviction matters.
- [4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent

representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) ~~and Rule 1.7, Comment [15]~~.

- [5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. ~~(*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614].)~~ This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. ~~(See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185].)~~ In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.
- [6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior

representation that is protected by ~~Rule 1.6 and~~ Business and Professions Code section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

- [7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by ~~Rule 1.6 and~~ Business and Professions Code section 6068(e) and Rule 1.6 that the former client would not want disclosed or in a manner that would be to the disadvantage of the former client.

Lawyers Moving Between Firms

- [8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Profession Code 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

- [9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm to which this Rule applies.

- [10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code section 6068(e).

- [11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

Client Consent

- [12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0.1(e-[1](#)). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.9 Duties to Former Clients
(Commission's Proposed Rule –Clean Version)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.
- (c) A lawyer who formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to a former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or

- (2) reveal information relating to a former client except as these Rules or the State Bar Act would permit with respect to a current client.

COMMENT

- [1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.
- [2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not represent the accused in a

subsequent civil action against the government concerning the same matter.

- [3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Business and Professions Code section 6068(e) and Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the land use and eviction matters.
- [4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the

matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation).

- [5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614]. This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185]. In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.
- [6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code

section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

- [7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Business and Professions Code section 6068(e) and Rule 1.6 that the former client would not want disclosed or in a manner that would be to the disadvantage of the former client.

Lawyers Moving Between Firms

- [8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Profession Code 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

- [9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm to which this Rule applies.

- [10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code section 6068(e).

- [11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

Client Consent

- [12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0.1(e-1). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						
TOTAL = 2 Agree = 1 Disagree = 0 Modify = 1 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.9(a) & (b)	1. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the Current Rule only requires that it be adverse. This would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules neither the subparagraph nor Proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation.	1. The Commission disagrees and has not made the requested change. It is correct that current rule 3-310(E) uses "adverse" rather than "materially adverse", but it does so with respect the lawyer's position <i>vis-à-vis</i> the lawyer's former client. Proposed 1.9(a) and (b)(1) change the format by instead focusing on two things. The first of these is whether the two representations are in the same or substantially related matters. If so, the new representation is deemed to be adverse to the former client (the proposed rule does not use "adverse" in this part of the analysis but nevertheless arrives at that conclusion). The second is whether the information is "material to the employment", which is the phrase contained in 3-310(E). Thus, the proposed rule in this regard arrives at the same place as the current rule while being more detailed and complete than is the current rule.
				1.9(b)(2)	2. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2) and thanks them for making that change.	2. No Response needed.
				1.9(b)	3. OCTC is concerned with the use of the term "knowingly" in subparagraph (b). This appears	3. The Commission disagrees and has not made the requested change. The "knowingly" standard

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.9(c)(1)	to sanction a lack of conflict procedures regarding an attorney's former clients at another firm and is inconsistent with Comment [4] of Proposed Rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." Although negligence is not a basis for discipline, gross negligence or recklessness is. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence. Further, by using the term "knowingly" the Commission may inadvertently also affect disqualification rulings in civil and criminal cases. 4. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit...or when the information has become generally known" in subparagraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude	appears in the part of the proposed Rule that concerns a lawyer who has changed firms and is involved in a matter substantially related to a matter handled by the prior firm. A knowledge standard is appropriate here and is consistent with current law. A conflicts check in the new firm's system is unlikely to reveal the conflict, and the lawyer's new firm normally will have no ability to do a conflict check in the prior firm's system. 4. The Commission disagrees and has not made the requested change. OCTC misunderstands the <i>Johnson</i> decision and misreads the proposed Rule. It does not say that a lawyer never can disclose public information but rather that a lawyer is not free to disclose information simply because it can be found among public records; information might be in a public record but not generally known. See also Comment [11], the last sentence of which draws a distinction between "generally known" information and "information in the public record," but does not

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.9(c)(2)	attorneys from disclosing information they obtained from the client that might be of public record. (See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. OCTC opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not "generally known." 5. Paragraph (c)(2) applies some exceptions to revealing information of former clients "with respect to current clients." Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." Although this proposed language is also in the Model Rules version, OCTC is not sure when subparagraph (c)(1) applies or	absolutely prohibit the disclosure of public record information. 5. The Commission disagrees and has not made the requested change. OCTC is correct that paragraph (c)(2) does not express an exception for information that is generally known. However, that paragraph prohibits the disclosure of confidential information, and the Commission does not see how a lawyer could be considered to have "disclosed" information that already is generally known.

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	when subparagraph(c)(2) applies. 6. OCTC has problems with some of the Comments to this proposed rule, particularly Comment [5]. Comment [5] states that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. However, the statement in Comment [5] that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to established State Bar decisional law. In <i>In the Matter of Lane</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.) ” (Id at 747.) If there is to be a change in the law, it should be in the rule, not a comment. The Comment does not even advise or address the <i>Lane</i> decision. Further, OCTC disagrees with the analysis in Comment [5]. Comment [5] states that the reason for this suggested difference is that in	6. Comment [5] describes a distinction between the application of the substantial relationship test in disqualification and in other contexts. After lengthy deliberations, the Commission concluded that the <i>Lane</i> case's reliance on the substantial relationship test in the disciplinary context is misplaced, and has revised Comment [5] to reflect that position. The substantial relationship test is a rule of necessity in disqualification cases because a party cannot prove what confidential information a lawyer has disclosed to an adversary. The Rule should not prohibit such proof in a disciplinary matter where the applicable procedures and the circumstances permit proof.

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					a disciplinary proceeding or civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the conflict rule. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) While <i>Woods</i> addresses a disqualification motion, its holding is equally applicable in discipline and civil cases. Further, as previously discussed, the presumption is already in the disciplinary case law. OCTC requests that that portion of Comment [5] implying that the presumption does not apply to discipline cases be stricken. Comments [8] & [9] 7. If the Commission adopts OCTC's position that "knowingly" should be stricken from subparagraph (b) then Comment [8] and [9] should be stricken.	7. The Commission has retained "knowingly" and therefore has not removed Comments [8] and [9].

Rule 1.9 Duties to Former Clients. [Sorted by Commenter] TOTAL = 2 Agree = 1 Disagree = 0 Modify = 1 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [1] – [4], [7] Comment [10] Comment [11]	8. Comments [1] – [4], and [7], are more appropriate for treatises, law review articles, and ethics opinions. Comment [10] belongs in Proposed Rule 1.6, not this rule. The first sentence of Comment [11] is unnecessary. Comment [11] refers to subparagraph (c) of Proposed Rule 1.9. OCTC is concerned that, like in proposed subparagraph (c) itself, what is meant by “generally known information” and this Comment appears inconsistent with the established law that B&P Code section 6068(e) is broader than the attorney-client privilege. OCTC opposes any change to the requirement that precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.	8. The Commission has considered each of the questioned Comment paragraphs and believes that each serves an important purpose in guiding lawyers with respect to the new rule.
				Comment [12]	9. As previously discussed regarding conflict rules, OCTC opposed advanced waivers. (See OCTC’s discussion to Proposed Rule 1.7.) It recommends that the second sentence of this Comment be stricken. The Commission should also consider whether the rest of the Comment is necessary in light of the rules cited in the Comment. (NOTE: no specific Comment was listed, but staff assumes OCTC is referring to Comment [12]).	9. The Commission’s views on advance conflict consents are stated in the Rule 1.7 commenter chart.
2	San Diego County Bar Association, Legal Ethics Committee	A	Yes		Support as drafted.	No response required.

Rule 1.9: Duties to Former Clients

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: Rule 3-310(E) forbids representation adverse to a client or former client if a lawyer “by reason of the representation of the client or former client . . . has obtained confidential information material to the employment.”

District of Columbia: Rule 1.9 contains only the language of ABA Model Rule 1.9(a), but does not require that consent be in writing or confirmed in writing. D.C.’s version of Rule 1.9(b), which appears in Rule 1.10(b), is substantially similar to 1.9(b) but provides an exception when “the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.”

Illinois: In the rules effective January 1, 2010, Illinois deletes the requirement that a client’s consent to a conflict of interest be confirmed in writing.

Massachusetts: Rule 1.9(c), which draws on DR 4-101(B)(3) of the ABA Model Code of Professional

Responsibility, adds that a lawyer may not use confidential information “to the lawyer’s advantage, or to the advantage of a third person” unless permitted or required by other rules, without the client’s consent.

Nebraska adds Rules 1.9(d)-(f) to govern conflicts arising from the past work of law clerks, paralegals, secretaries, messengers, and any other “support person.” Notably, Rule 1.9(d) parallels ABA Model Rule 1.9(b), but Nebraska Rule 1.9(e) does not impute support person conflicts to other lawyers at the firm if the former client consents or the conflicted support person is screened to protect the former client’s confidential information.

New York: In the rules effective April 1, 2009, Rule 1.9 is substantially similar to the Model Rule, except that New York uses the term “confidential” information in Rule 1.9(c) instead of the phrase “information related to the representation.” New York moves Comments 4-6 to the comments following Rule 1.10.

Pennsylvania: Rule 1.9 tracks ABA Model Rule 1.9, except Pennsylvania Rule 1.9(a) and Rule 1.9(b)(2) do not require that client consent be “confirmed in writing.”

Texas: Rule 1.09(a) provides that without prior consent, a lawyer who “personally” has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer’s services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05 [the Texas confidentiality rule]; or

(3) if it is the same or a substantially related matter.

Virginia: Rule 1.9(a) requires the consent of both the present and former client.

Proposed Rule 1.10 [n/a]

“Imputation of Conflicts: General Rule”

(ALT1, XDraft 8, 6/28/10, and ALT2, XDraft #7.1, 7/2/10)

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. Following the Supreme Court's disposition of the petition for review and requests for depublishation in *Kirk v. First American Title*, and further public comment, the Commission requests that the Board of Governors reconsider its decision on Rule 1.10 (see version ALT1, attached) and adopt a provision permitting unconsented screening in limited circumstances, as set forth in attached version ALT2. In the alternative, the Commission requests that the Board forward to the Supreme Court both versions of the Rule to permit the Court to make an informed decision on this issue. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-310

Statute

Case law

Kirk v. First American Title Ins. Co. (2010) 183 Cal.App.4th 776. 108 Cal.Rptr.3d 620.

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☒ Other Primary Factor(s)

See the introduction in the Model Rule comparison chart.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 3

Abstain 2

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

July 2010

(Draft rule following consideration of second round of public comment and the California Supreme Court's disposition of *Kirk v. First American Title*)

INTRODUCTION & EXPLANATION OF REQUEST FOR RECONSIDERATION OF BOARD'S DECISION NOT TO INCLUDE A PROVISION PERMITTING UNCONSENTED ETHICAL SCREENING IN LIMITED SITUATIONS IN PROPOSED RULE 1.10:

Summary of the Commission's Request. The Commission believes that the Supreme Court's disposition of the *Kirk* case, *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, as well as comments received during both rounds of public comment, have created changed circumstances that warrant the Commission's return to the Board to seek reconsideration of the Board's previous votes on proposed Rule 1.10, and to request that the Board adopt that version of Rule 1.10, attached, that permits unconsented ethical screening in limited situations in the private firm-to-private firm context. This version of the Rule is denominated as "ALT2". The version of Rule 1.10 approved by the Board at its May 2010 meeting is also attached (denominated as "ALT1" in these materials)

Procedural History of the Board's Consideration of Rule 1.10 and Kirk. 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 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. The Board agreed with the Commission and, at its May 2010 meeting, adopted a version of Rule 1.10 that addressed imputation but contained no express rule provision concerning ethical screening. However, the Rule did contain two comments expressing the Board's belief that the issue of ethical screening should be left to resolution by case law.

* Proposed Rule 1.10, ALT1, XDraft 8 (6/21/10) and ALT2, XDraft 7.1 (7/2/10).

Contemporaneously with the Board's action, a petition for review of the Court of Appeals decision in *Kirk* was filed with the Supreme Court, together with several requests to depublish the decision. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be depublished.

Significance of the Supreme Court's Actions in Kirk. The Commission believes that the Supreme Court's actions in the *Kirk* case warrant the Board reversing itself and adopting a version of Rule 1.10 that permits unconsented ethical screening in limited circumstances as approved by the Court of Appeals. In *Kirk*, the Supreme Court denied both the petition for review and numerous requests that the Court of Appeal decision be depublished. The Supreme Court was squarely presented with addressing the issue of screening in limited circumstances. The Court of Appeals had concluded that screening in the private lawyer context in limited circumstances was warranted. In reaching that decision, the court found it "significant" that "a majority of the Commission for the Revision of the Rules of Professional Conduct believed that screening *should* be ethically permissible in limited circumstances." 183 Cal.App.4th at 805 (emphasis in original). The same court questioned the rationale that permitted screening of a lawyer who has moved into government service from a private firm, but not the same lawyer who had moved from one private firm to another. *Id.* at 806 n. 25 ("The law cannot possibly be that [a law firm] could effectively screen [the lawyer] if he was tainted from information obtained when he worked for the [government], but cannot effectively screen him if he was tainted from information obtained when he worked for [a private client]. The court also noted that the policy rationales traditionally used by courts to distinguish between screening in a government context and screening in the private context were not compelling and, for the most part, applied equally in the private firm context. *Id.* at 805 n. 24. Some have argued that much the Court of Appeal's opinion was dicta and should not be relied upon as sign post for the direction the Supreme Court would take as to screening in the private context. If that were true, then surely the Supreme Court would have granted the petition for review to set the record straight or, failing that, would at least have depublished the opinion to remove the inference that judges and lawyers should look to it for guidance. The Supreme Court, however, did neither, suggesting it was satisfied not only with the Court of Appeal's conclusion on the specific issue before it (screening in the prospective client context), but also its arguably broader pronouncements on screening in the limited situations presented in the Commission's proposed Rule.

Commission Request. Accordingly, the Commission requests that the Board reconsider its decision not to address unconsented screening directly in Rule 1.10 and adopt the Commission's proposed Rule, ALT2, that permits such screening only in limited circumstances. The Commission urges the Board not to continue to pursue the piecemeal, case-by-case approach that is sanctioned in the rule draft it approved at its May 2010 meeting. In this respect, the Commission agrees fully with the comment submitted by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") during the second public comment period:

“COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.” See June 14, 2010 Letter from COPRAC to Harry B. Sondheim, Commission Chair (in complete public comment, provided with this submission).

Alternatively, the Commission requests that the Board of Governors forward to the Supreme Court the attached ALT2 version of the Rule that the Commission has approved, in addition to the version of the Rule that the Board approved at its May 2010 meeting (“ALT1”). The Commission believes the Supreme Court should have the benefit of having an alternative in making its decision to approve a Rule counterpart to Model Rule 1.10 that permits screening, but not broadly as does the Model Rule.

Public Comment and effect on the Commission’s decision to recommend unconsensual screening in limited situations. Initially, the Commission was equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in the matter. Therefore, during the initial public comment period, the Commission expressly solicited input from the public and the profession on the issue of whether California should sanction any kind of unconsensual ethical screening. Several commenters, including COPRAC and the legal ethics committees from the Orange County Bar, the San Diego Bar, and the Santa Clara Bar, recommended that a broad screening provision, similar to the ABA provision, be adopted. See Initial Public Comment Chart. In light of this public comment, the Commission revisited the issue of unconsensual screening in a private firm and voted to adopt a provision that would permit such screening only in the limited situation where the prohibited lawyer “did not substantially participate in the prior representation.” See subparagraph (a)(2)(i). Notwithstanding the views of COPRAC and the local bar committees, the Commission determined that the first step to permit screening by private firms in California should be a modest one. There is precedent for this approach in other jurisdictions; there are twelve such jurisdictions that permit screening in limited situations: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin. Although a federal court had predicted that under appropriate circumstances, California would permit unconsensual screening, see *In re County of Los Angeles* (2000) 223 F.3d 990, until the Court of Appeal decision in *Kirk*, no California state court had sanctioned unconsensual screening for a lawyer who moves from one private firm to another. Given *Kirk*’s acceptance of limited screening and further support for the concept during the second public comment period, the Commission has concluded that a limited screening provision would be appropriate to “test the waters” in California. Paragraph (a)(2)(i) accomplishes this by limiting the availability of screening to only those lawyers who “did not substantially participate in the prior representation.” Comment [7] explains what is meant by “substantially participate.”

Commentary to the Rule. The Comment to the Rule is based on the Comment to Model Rule 1.10, but the Commission made some substantive additions and deletions. The additions, in part, identify California's emphasis on the duty of confidentiality as it relates to imputation of conflicts. The deletions, in part, implement the Commission's view that the Rule is intended as a disciplinary rule rather than a rule that establishes a standard of civil disqualification. See Explanation of Changes to the Comment.

Minority: A minority of the Commission maintains that there is no reason for the Board to reconsider its decision. The Board repeatedly has decided on multiple occasions that screening is a matter with sufficient uncertainty that it should be left to the court to resolve. *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, does not change that conclusion.

Kirk created a highly circumstantial standard that will require further applications in the courts before any general conclusions regarding the scope of the standard can be drawn. Kirk 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 highly circumstantial test which Kirk announced leaves the law unsettled and should be left to evolve in the courts. The Supreme Court's decision to not decertify the opinion and to decline review of the Court of Appeal decision does not mean the Court endorsed the decision. (See e.g. Cal Rule of Ct, Rule 8.1125(d).) Nor does it make the law any more settled in light of Kirk's highly circumstantial test.

The screening rule the majority asks the Board to reconsider has nothing to do with either the facts or the test in Kirk. The proposed screening rule would allow any lawyer who is not a lead attorney to be screened if that lawyer did not "substantially participate" in the client's matter. A majority of the Commission decided that the "substantially participate" standard does not exclude the possibility that the lawyer actually obtained a client's confidential information. In other words, the Rule would allow screening even if the lawyer acquired confidential information that could be used against the client. The Rule would permit screening without any of the balancing of interests the Kirk standard requires. The Rule would allow screening in a side-switching situation that Kirk held was not appropriate for screening.

Furthermore, the proposed screening rule still suffers from the fundamental problem that a 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 proposed screening rule contains provisions allowing the client to know the basic terms of the screen and providing for assurances of compliance, but it does not and cannot overcome the fact that the affected client is prevented by law firm's duties of confidentiality and the lawyer-client privilege from knowing whether there is actual compliance. The legal profession cannot engender client trust by imposing screens on a wary public. The comments the Commission received do not address that screening comes at the expense of client trust and client protection, which are more important values than finding a way to more predictably impose a screen without client consent. [See full Dissent, below.]

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.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless	(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless <u>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.</u>	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, ALT1 [NO SCREEN], XDraft 8 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(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).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless	(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless	Paragraph (b) is identical to Model Rule 1.10(b), which is consistent with California law. See <i>Goldberg v. Warner-Chappell</i> (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also <i>Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.</i>, 607 F.2d 186 (7th Cir. 1979).
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and	(1) the matter is the same <u>as</u> or substantially related to that in which the formerly associated lawyer represented the client; and	Subparagraph (a)(1) is identical to Model Rule 1.10(a)(1), except for the addition of the word “as.” No change in meaning 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 <u>Business and Professions Code section 6068(e) and</u> 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~~ <u>prohibition under</u> this ~~rule~~ <u>Rule</u> may be waived by ~~the~~ <u>each</u> affected client under the conditions stated in Rule 1.7.	Paragraph (c) is identical to Model Rule 1.10(c), except that the phrase “prohibition under” has been substituted for “disqualification prescribed by” because the Rule is intended as a disciplinary rule, not as a civil standard. The word “each” has been substituted for “the” to make clear that both affected clients of the firm must waive any prohibitions under the Rule.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	(d) The ~~disqualification~~<u>imputation</u> of <u>a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	Paragraph (d) is identical to Model Rule 1.10(d), except that the phrase “imputation of a conflict of interest to” has been substituted for “disqualification of” because the Rule is intended as a disciplinary rule, not as a civil standard.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Definition of “Firm” [1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] – [4].	Definition of “Firm” [1] ~~For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c).~~ Whether two or more lawyers constitute a firm ~~within~~<u>for purposes of this definition</u>Rule can depend on the specific facts. See Rule ~~1.0~~<u>1.0.1(c)</u>, Comments [2] - [4].	Comment [1] is based on Model Rule 1.10, cmt. [1]. The deleted language is redundant because it already appears in the global definition of “‘firm’ or ‘law firm’,” which the Commission intends to include in the global definition section. The phrase “for purposes of this Rule” has been substituted for “within this definition” for clarity, the predicate for this sentence – the definition of law firm in the first sentence – having been deleted. <u>Minority.</u> A minority of the Commission believes there is insufficient reason for proposed Comment [1] to diverge from the Model Rule.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Principles of Imputed Disqualification [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).	Principles of Imputed ~~Disqualification~~ Conflicts of Interest [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the ~~principle~~<u>duties</u> of loyalty <u>and confidentiality owed</u> to the client as ~~it applies~~<u>they apply</u> to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing <u>the duties of</u> loyalty <u>and confidentiality owed</u> to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty <u>and confidentiality</u> owed by each lawyer with whom the lawyer is associated. Paragraph (a)~~(1)~~ operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10~~(a)(2) and 1.10 (b)~~.	The heading has been changed to reflect that the Rule is intended as a disciplinary rule, not as a rule creating a civil standard of disqualification. Comment [2] is based on Model Rule 1.10, cmt. [2], except that the concept of the duty of confidentiality has been added because 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~~<u>prohibited from further representation</u>.	Comment [3] is based on Model Rule 1.10, cmt. [3], but “prohibited from further representation” and “prohibition” have been substituted for variants of “disqualified” to reflect that this Rule is intended primarily as a rule of discipline.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.	On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal ~~disqualification~~ <u>prohibition</u> of the lawyer would be imputed to all others in the firm.	
[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.	[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation <u>by others in the law firm</u> if the lawyer is prohibited from acting because of events <u>that occurred</u> before the person became a lawyer, for example, work that the person did while a law student. ~~Such persons~~ <u>In both situations</u>, however, ~~ordinarily~~ <u>such persons</u> must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules ~~1.0~~ <u>1.0.1</u> (k) and 5.3. <u>See also Comment [9].</u>	Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity. <u>Minority.</u> A minority of the Commission believes that the second sentence misstates California law, at least where the lawyer acted in a fiduciary capacity in the previous employment. The substitution of “in both situations” for “such persons” is intended to clarify that screening should be implemented in the event of either situation described in the first two sentences. The word “ordinarily” has been deleted because it is unclear under what circumstances such a person who was substantially involved in the matter on the other side should be permitted to participate in the matter. The reference to Rule 1.0.1 is to the number the Commission has assigned to the proposed terminology section. The reference to Comment [9] has been included to direct lawyers to that Comment, which addresses the relation of this Rule to disqualification motions.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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~~<u>current</u> 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 <u>Business and Professions Code section 6068(e) and</u> 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~~<u>each</u> 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) <u>and Comments [14A] to [17A]</u>, and that each affected client or former client has given informed <u>written</u> 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~~<u>1.0.1</u>(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.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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].

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	~~[11]~~<u>[7-ALT1]</u> Where a lawyer has joined a private firm <u>or a government agency</u> after having represented the government <u>or another government agency</u>, imputation is governed ~~under~~<u>by</u> Rule 1.11(b) and (c), not this Rule. ~~Under Rule 1.11(d), where~~ <u>Where</u> a lawyer ~~represents the~~<u>has become employed by a</u> government <u>agency</u> after having served clients in private practice, <u>or other</u> nongovernmental employment ~~or, the questions of whether, in another government agency a particular matter, former client conflicts are not a lawyer’s conflict under paragraph (d) will be~~ imputed to ~~government other~~ lawyers associated with <u>serving in</u> the ~~individually disqualified lawyers~~<u>same governmental agency; and</u> <u>(2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].</u>	Comment [7-ALT1] is based on Model Rule 1.10, cmt. [11]. There are two versions of the Rule that are proposed: ALT-1 reflects the Board’s vote that the issue of screening when a government lawyer moves from private practice to government employment should be left to the case law. The ALT-1 version should be included if BOG disagrees with the Commission that paragraph (e) should be restored to Rule 1.11. This Comment corrects an error in the final public comment draft.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.	[7-ALT2] 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).	Comment [7-ALT2] is based on Model Rule 1.10, cmt. [11]. There are two versions of the Rule that are proposed: ALT-2 reflects the Commission’s conclusion that the issue of screening when a government lawyer moves from private practice to government employment should be addressed in Rule 1.11, specifically in proposed Rule 1.11(e). The ALT-2 version should be included if BOG agrees with the Commission that paragraph (e) should be restored to Rule 1.11. This Comment corrects an error in the final public comment draft.
[12]Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.	~~[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 also applies to other lawyers associated in a firm with the personally prohibited lawyer.	Comment [8] 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.
	<u>Rule Not Determinative of Disqualification Motions</u> [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 Charlissee C. (2008) 45 Cal.4th 145; Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.	Comment [9] 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.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT1 [NO SCREEN] – Board’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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

(Redline Comparison of the Proposed Rule ALT1 to the Public Comment Draft)

- (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-[ALT1](#)] 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)~~ the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

- [7-[ALT2](#)] 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
(Commission's Proposed Rule ALT1 – 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-ALT1] 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, the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

- [7-ALT2] 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.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless	(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless	The first part of paragraph (a) is identical to Model Rule 1.10(a).
(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or	(1) the prohibition is based on a personal interest of the ~~disqualified~~prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or	Subparagraph (a)(1) is nearly identical to Model Rule 1.10(a)(1), except that it substitutes “prohibited” for “disqualified” to reflect that this Rule is primarily intended as a rule of discipline. <u>Minority.</u> A minority of the Commission objects to the “materially limiting” standard because it eliminates the client protection provided by the current California rule. Under the current rule, a lawyer is required to disclose the possibility of a conflict of interest when the lawyer knows that another lawyer in the lawyer’s law firm has a relationship or interest in the subject matter of the representation. This standard in this rule allows lawyers to avoid informing the client of situations that could result in a conflict. The standard would turn on a prediction about whether there is a substantial risk, which would allow lawyers to avoid disclosing circumstances that later turn out to be a conflict and injure the client. This standard will communicate to lawyers that they need only determine that they are straight shooters who will do the right thing, a determination easily made by a lawyer acting under the influence of economic motivation. This standard makes it questionable whether any lawyer ever will be subject to discipline under this Rule. This also means that the Rule will provide

* Proposed Rule 1.10, ALT2 [SCREEN], XDraft 7.1 (7/2/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
		negligible protection to clients, and the continuing viability of client-protective current California case law will be called into question. The client-protective standard should be: “... that could have an adverse effect on the representation of the client”
(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer’s association with a prior firm, and	(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the ~~disqualified~~ <u>prohibited</u> lawyer’s association with a prior firm, and	The Commission recommends adoption of a substantially modified version of Model Rule 1.10(a)(2). Model Rule 1.10(a)(2), adopted by the ABA in February 2009 and further amended in August 2009, broadly permits screening of lawyers who move from one private firm to another, even if the former client does not consent. “Broadly permits screening,” means that the jurisdiction’s provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client’s representation. In effect, this is equivalent to the “substantial responsibility” standard in MR 1.11 and would place private lawyers more or less on equal footing with government lawyers. Although no jurisdiction to date has adopted the precise ABA approach, 13 jurisdictions have adopted broad screening provisions. Jurisdictions that broadly permit screening are: Delaware, Illinois (both current and proposed), Kentucky, Maryland, Michigan (both current and proposed), Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee (proposed revision), Utah and Washington. Although there was little support for a broad screening provision, the Commission was equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in a matter. “Permits screening in limited situations” means that a jurisdiction’s provision permits screening only of a lawyer who did not “substantially

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
		participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or “is not likely to be significant” (e.g., Minn.) Jurisdictions that permit screening in limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee (current rule only); and Wisconsin. The public comment materials for Rule 1.10 specifically solicited comments on whether California should adopt a Rule that permits some form of nonconsensual screening. Several commenters, including COPRAC and the ethics committees from the Orange County Bar, the San Diego Bar, and the Santa Clara Bar, recommended that a broad screening provision, similar to the ABA provision, be adopted. See Public Comment Chart, below. Only one commenter expressly objected to the adoption of any screening provision. Following public comment, the Commission revisited the issue of nonconsensual screening and voted to recommend the adoption of a modified version of Model Rule 1.10(a)(2) that permits screening of a lawyer who moves laterally from one private firm to another private firm only in the limited situation where the moving lawyer had not substantially participated in the prior representation. The specifics of the recommended screening provision are discussed in the Explanations to each of the subparagraphs to proposed Rule 1.10(a)(2). <u>Minority.</u> A minority of the Commission dissents because this Rule will not protect clients. In some situations a client will consent to

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
		screening - if requested to do - so based on the nature of the situation and the client's trust in the law firm. When the client lacks that trust, which likely will be because of the intensely disputed and significance of the matter to the client, the law firm should not have the right to impose screening. The freedom to do so is in the commercial interests of law firms but not in the interests of the affected client and will reduce trust in the legal system. It is crucial to understand that there is no effective way to know that confidential information held by a lawyer in a firm representing a client's adversary has not been imparted to the other firm lawyers. The mechanisms in the Rule may allow for verification that screening mechanisms are in place, but not whether they are violated. Our rules protect client confidential information to assure that clients can communicate their most harmful or embarrassing information to their lawyer without fear of consequence. That interest cannot be protected where the client does not have confidence that information in the hands of an opposing law firm which has an interest as an advocate for the client's adversary will not be used or disclosed for the benefit of the adversary. "No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (<i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) The mechanisms in this Rule do not change this conclusion.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
	(i) <u>the prohibited lawyer did not substantially participate in the prior representation;</u>	Subparagraph (a)(2)(i) has no counterpart in the Model Rule. This subparagraph expressly limits the availability of screening as provided in the Rule to moving lawyers who did not “substantially participate” in the prior representation. The term “substantially participate” is taken from Colorado Rule 1.10. The intent is to limit the availability of screening as provided under this Rule to those lawyers who were involved only peripherally in the prior representation and thus not likely to have acquired material confidential information. See Comment [7], which clarifies what is intended by the term “substantially participate.” <u>Minority.</u> A minority dissents to the "did not substantially participate" standard because it does not assure that a client's confidential information is protected. It focuses on the length or amount of a lawyer's involvement in the prior matter and not whether the lawyer acquired confidential information or whether that information is important in the new matter against the former client. The screened lawyer may have been involved in the former client's matter briefly, but in that brief involvement learned a client's deepest secret. No amount of screening will reduce the former client's anxiety that the client's deepest secret in held by a lawyer in an adversary's law firm.
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;	(iii) the ~~disqualified~~prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;	Subparagraph (a)(2)(ii) is based on Model Rule 1.10(a)(2)(i). As has been done throughout the Rules, the word “prohibited” has been substituted for “disqualified.” See also proposed Rule 1.0.1(k) and Comments [8]-[10] thereto (definition of “screened”).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and	(iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which <u>notice</u> shall include a description of the screening procedures employed; a statement of the 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	Subparagraph (a)(2)(iii) is nearly identical to Model Rule 1.10(a)(2)(ii), with the word “notice” added in the sixth line for clarification.
(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.	(iv) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.	Subparagraph (a)(2)(iv) is identical to Model Rule 1.10(a)(2)(iii).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless	(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:	Paragraph (b) is identical to Model Rule 1.10(b), which is consistent with California law. See <i>Goldberg v. Warner-Chappell</i> (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also <i>Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.</i>, 607 F.2d 186 (7th Cir. 1979).
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and	(1) the matter is the same <u>as</u> or substantially related to that in which the formerly associated lawyer represented the client; and	Subparagraph (a)(1) is identical to Model Rule 1.10(a)(1), except for the addition of the word “as.” No change in meaning 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 <u>Business and Professions Code section 6068(e), and</u> Rules 1.6 and 1.9(c) that is material to the matter.	Subparagraph (a)(2) is based on Model Rule 1.10(a)(2), but a reference to B&P Code § 6068(e), which states a lawyer’s duty of confidentiality, has been added.
(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.	(c) A ~~disqualification—prescribed by~~<u>prohibition under this rule</u> may be waived by ~~the~~<u>each</u> affected client under the conditions stated in Rule 1.7.	Paragraph (c) is identical to Model Rule 1.10(c), except that the phrase “prohibition under” has been substituted for “disqualification prescribed by” because the Rule is intended as a disciplinary rule, not as a civil standard. The word “each” has been substituted for “the” to make clear that both affected clients of the firm must waive any prohibitions under the Rule.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	(d) The ~~disqualification~~<u>imputation</u> of <u>a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	Paragraph (d) is identical to Model Rule 1.10(d), except that the phrase “imputation of a conflict of interest to” has been substituted for “disqualification of” because the Rule is intended as a disciplinary rule, not as a civil standard.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Definition of “Firm” [1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] – [4].	Definition of “Firm” [1] ~~For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c).~~ Whether two or more lawyers constitute a firm ~~within~~<u>for purposes of this definition</u>Rule can depend on the specific facts. See Rule ~~1.0~~<u>1.0.1(c)</u>, Comments [2] - [4].]	Comment [1] is based on Model Rule 1.10, cmt. [1]. The deleted language is redundant because it already appears in the global definition of “‘firm’ or ‘law firm’,” which the Commission intends to include in the global definition section. The phrase “for purposes of this Rule” has been substituted for “within this definition” for clarity, the predicate for this sentence – the definition of law firm in the first sentence – having been deleted. <u>Minority.</u> A minority of the Commission believes there is insufficient reason for proposed Comment [1] to diverge from the Model Rule.
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	Principles of Imputed ~~Disqualification~~<u>Conflicts of Interest</u> [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the ~~principle~~<u>duties</u> of loyalty ~~and confidentiality owed~~ to the client as ~~it applies~~<u>they apply</u> to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing ~~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~~	The heading has been changed to reflect that the Rule is intended as a disciplinary rule, not as a rule creating a civil standard of disqualification. Comment [2] is based on Model Rule 1.10, cmt. [2], except that the concept of the duty of confidentiality has been added because that duty’s importance as an underlying rationale for an imputation rule.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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).	owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).	
[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. 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 of the lawyer would be imputed to all others in the firm.	[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be ~~disqualified~~<u>prohibited from further representation</u>. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal ~~disqualification~~<u>prohibition</u> of the lawyer would be imputed to all others in the firm.	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.
[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	[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation <u>by others in the law firm</u> if the lawyer is prohibited from	Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity. <u>Minority</u>. A minority of the Commission believes that the second sentence misstates California law, at least where the lawyer acted in a fiduciary capacity in the previous employment.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	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 [13].	The substitution of “in both situations” for “such persons” is intended to clarify that screening should be implemented in the event of either situation described in the first two sentences. The word “ordinarily” has been deleted because it is unclear under what circumstances such a person who was substantially involved in the matter on the other side should be permitted to participate in the matter. The reference to Rule 1.0.1 is to the number the Commission has assigned to the proposed terminology section.
[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was 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).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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~~<u>each</u> 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)~~, <u>Comments [14] – [17A]</u>, and that each affected client or former client has given informed <u>written</u> 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~~<u>1.0.1</u>(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.
[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.	[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike ~~section~~<u>paragraph</u> (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in ~~sections~~<u>subparagraphs</u> (a)(2)~~(iii)-(iv)~~ be followed. <u>However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer’s association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm’s prior representation of the former client. In addition, the screening procedures are available only if the prohibited</u>	Comment [7] is based on Model Rule 1.10, cmt. [7]. Non-substantive changes include: (i) “Paragraph” has been substituted for “section” to conform to California Rule style. (ii) “Rule 1.0.1” has been substituted for “Rule 1.0” because proposed Rule 1.0.1 is the counterpart to Model Rule 1.0. (iii) A cross-reference to Comment [13] has been added to direct readers to that Comment, which elaborates on the last sentence of the Model Rule. Substantively, five sentences have been added to clarify the limitation on the availability of screening under this Rule. The second sentence clarifies an important limitation in the Rule – the screening provisions are available only when the firm seeks to screen a lawyer whose prohibition is based on the lawyer’s

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer’s participation in the management and direction of the matter at the policy-making level, but also may mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.</u> A description of effective screening mechanisms appears in Rule ~~1.01.0.1~~(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. <u>See Comment [13].</u>	previous association with a different firm. That limitation assures that a law firm could not erect a screen to protect the confidential information of a client that was formerly represented by firm lawyers when they were at the firm. The third sentence emphasizes that screening under the Rule is available only for lawyers who did not substantially participate in the prior representation, and the fourth and fifth sentences describe generally what is meant by “substantial participation,” providing clarification of when the Rule is applicable.
[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	[8] Paragraph (a)(2)(~~ii~~) 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~~<u>prohibited</u>.	Comment [8] is nearly identical to Model Rule 1.10, cmt. [8], except that “prohibited” has been substituted for “disqualified,” as has been done throughout the Rules.
[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that	[9] The notice required by paragraph (a)(2)(~~iii~~) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client’s material	Comment [9] is nearly identical to Model Rule 1.9, cmt. [9], the only difference being the cross-reference to paragraph (a)(2)(iii) because of the addition of paragraph (a)(2)(i) to the Rule.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the client’s material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.	confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.	
[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) ~~are intended to~~ give the former client assurance that the client’s material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.	Comment [10] is nearly identical to Model Rule 1.10, cmt. [10]. The phrase “are intended to” has been added because it is a more accurate statement of the purpose of requiring certifications under subparagraph (a)(2)(iv).
[11]Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the 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.	<u>[11-ALT1]</u> Where a lawyer has joined a private firm <u>or a government agency</u> after having represented the government <u>or another government agency</u>, imputation is governed ~~under~~<u>by</u> Rule 1.11(b) and (c), not this Rule. ~~Under Rule 1.11(d), where~~ <u>Where</u> a lawyer ~~represents the~~<u>has become employed by a</u> government <u>agency</u> after having served clients in private practice, <u>or other</u> nongovernmental employment ~~or, the questions of whether, in another government agency a particular matter, former client conflicts are not a lawyer’s conflict under paragraph (d) will be~~ imputed to ~~government other~~ lawyers associated with <u>serving in the individually disqualified lawyers same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11,</u>	Comment [11-ALT1] is based on Model Rule 1.10, cmt. [11]. There are two versions of the Rule that are proposed: ALT-1 reflects the Board’s vote that the issue of screening when a government lawyer moves from private practice to government employment should be left to the case law. The ALT-1 version should be included if BOG disagrees with the Commission that paragraph (e) should be restored to Rule 1.11. This Comment corrects an error in the final public comment draft.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Comments [9B] and [9C].	
[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.	[11-ALT2] Where a lawyer has joined a private firm or a government agency after having represented the government or <u>another government agency</u>, 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).	Comment [11-ALT2] is based on Model Rule 1.10, cmt. [11]. There are two versions of the Rule that are proposed: ALT-2 reflects the Commission’s conclusion that the issue of screening when a government lawyer moves from private practice to government employment should be addressed in Rule 1.11, specifically in proposed Rule 1.11(e). The ALT-2 version should be included if BOG agrees with the Commission that paragraph (e) should be restored to Rule 1.11. This Comment corrects an error in the final public comment draft.
[12]Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.	[12]Where a lawyer is prohibited from engaging in certain transactions under Rules [1.8.1] through Rule ~~1.8.1.8.9~~, paragraph (k) of that 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.	Comment [12] is based on Model Rule 1.10, cmt. [12]. Any changes to the comment merely reflect the rule numbering convention the Commission has adopted for the 1.8 series of rules. Brackets have been placed around the Rules pending a final decision on numbering.
	Rule Not Determinative of Disqualification Motions [13]This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matters pertaining to disqualification. See Code of Civil	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.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Procedure section 128(a)(5); Penal Code section 1424; <i>In re Charlissee C.</i> (2008) 45 Cal.4th 145; <i>Rhaburn v. Superior Court</i> (2006) 140 Cal.App.4th 1566.	

Rule 1.10: Imputation Of Conflicts Of Interest: General Rule

(Redline Comparison of the Proposed Rule ALT2 to the Public Comment Draft)

- (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.~~
- (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
- (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the prohibited lawyer's association with a prior firm, and
- (i) the prohibited lawyer did not substantially participate in the prior representation;
- (ii) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
- (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which notice shall include a description of the screening procedures employed; a
- statement of the 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
- (iv) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (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)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially

limit the representation by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0.1(k) and 5.3. See also Comment [913].

[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] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike paragraph (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in subparagraphs (a)(2)(ii)-(iv) be followed. However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's prior representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but also may mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. See Comment [13].

[8] Paragraph (a)(2)(ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that

lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[9] The notice required by paragraph (a)(2)(iii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iv) are intended to give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11-ALT1] 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. Where a lawyer has become employed by a government agency after having served clients in private practice or in other nongovernmental employment, the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

[~~711-ALT2~~] ~~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 in other nongovernmental employment, imputation is governed by Rule 1.11(e).

[812] 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

[913] 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~~matters pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charlissee C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.

~~[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
(Commission's Proposed Rule ALT2 – Clean Version)

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the prohibited lawyer's association with a prior firm, and
 - (i) the prohibited lawyer did not substantially participate in the prior representation;
 - (ii) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which notice shall include a description of the screening procedures employed; a statement of the 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
- (iv) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (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 firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0.1(k) and 5.3. See also Comment [13].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by 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 [14] – [17A], and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0.1(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike paragraph (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in subparagraphs (a)(2)(ii)-(iv) be followed. However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's prior representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but also may mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. See Comment [13].

[8] Paragraph (a)(2)(ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[9] The notice required by paragraph (a)(2)(iii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules.

The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iv) are intended to give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11-ALT1] 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. Where a lawyer has become employed by a government agency after having served clients in private practice or in other nongovernmental employment, the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

[11-ALT2] 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. Where a lawyer has become employed by a government agency after having served clients in private practice or in other nongovernmental employment, imputation is governed by Rule 1.11(e).

[12] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule Not Determinative of Disqualification Motions

[13] This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matters pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charlissee C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.

Proposed Rule 1.10 Imputation of Conflicts: General Rule

Minority Position in Favor of Rule 1.10 Without Unconsented Screening

Minority Dissent

A minority of the Commission dissents to the inclusion of screening in Rule 1.10, which would allow unconsented screening when a lawyer did not substantially participate in a former client's matter. A majority of the Commission decided that the "substantially participate" standard does not exclude the possibility that the lawyer actually obtained a client's confidential information. The California Supreme Court has recognized that "Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148.)

The proposed screening provision would allow screening in situations where the lawyer obtained confidential information that could be used against the client. It would allow screening without any of the balancing of interests that the court required in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776.

The recent decision in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 does not justify the proposed screening rule. *Kirk* created a highly circumstantial standard that will require further applications in the courts before any general conclusions regarding the scope of the standard can be drawn. *Kirk* 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 highly circumstantial test which *Kirk* announced leaves the law unsettled and should be left to evolve in the courts. The Supreme Court's decision to not decertify the *Kirk* opinion and to decline review does not mean the Court endorsed the decision. (See e.g. Cal Rule of Ct, Rule 8.1125(d).) Nor does it make the law any more settled in light of *Kirk*'s highly circumstantial test.

The screening rule the majority asks the Board to reconsider has nothing to do with either the facts or the test in *Kirk*. The proposed Rule would allow any lawyer who is not a lead attorney to be screened if that lawyer did not "substantially participate" in the client's matter regardless of the circumstances. The proposed screening rule would allow screening in a side-switching situation that *Kirk* held was not appropriate for screening. The proposed screening rule is not patterned on *Kirk* and was not considered or sanctioned by *Kirk*. There is no legal authority for the proposed screening rule.

Allowing screening without a client's consent undermines the extremely important role of confidentiality and trust in a prospective lawyer-client relationship.

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 the client information that the client imparted in confidence.

Rule 1.10 imputes the conflict to the lawyer's firm in order to assure clients that the lawyer will not be tempted by the interest of the lawyer's firm to reveal information the client imparted to the lawyer in confidence. Imputation is necessary 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. 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 client's inability to know whether a screen has been violated.

The proposed screening rule suffers from the fundamental problem that a 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 client's interests. While the proposed screening rule provisions allow the client to know the basic terms of the screen and receive assurances of compliance, it does not and cannot overcome the fact that the affected client is prevented by law firm's duties of confidentiality and the lawyer-client privilege from knowing whether there is actual compliance.

The legal profession cannot assure prospective clients that they can communicate with lawyers in confidence when the 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 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.)

Screening without client consent does not protect clients and undermines clients' ability to communicate with lawyers without fear of consequence because a client cannot be verify compliance. A 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 client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn that information the client

expected would be held in confidence is in the possession of the law firm that now represents the client's adversary in a situation where that information could benefit that adversary.

The comments the Commission received do not address that screening comes at the expense of client trust and client protection, which are more important values than finding a way to more predictably impose a screen without client consent. While making screening more predictable protects lawyers, it does not protect clients with confidential information at stake. 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 client's adversary.

Kirk is but one decision, whose significance will be measured over time. It presents a highly controversial standard that for the first time allows other interests to outweigh the duty of confidentiality. Given the significance of the duty of confidentiality, it is left to be seen how courts will engage in that balancing and whether they will allow other interests to outweigh the protection of client trust in the ability to communicate with a lawyer in confidence. The courts should be left to resolve the scope and application of the *Kirk*. Screening should not be imposed on a client by a Rule of Professional Conduct.

**Rule 1.10 Imputation of Conflicts: General Rule.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties. In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of	The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board of Governors rejected the proposed Rule. The Board subsequently approved a version of Rule 1.10 without any provision for screening. However, in light of the Supreme Court's decision to deny review in <i>Kirk v. First American Title Ins. Co.</i> (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, rev. denied (6/23/10), and also to deny a request for depublishation of the Court of Appeal opinion, the Commission voted to request that the Board reconsider its rejection of proposed Rule 1.10 with a provision permitting limited screening.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.10 Imputation of Conflicts: General Rule.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					screening in the rule could nevertheless subject a lawyer to discipline.	
2	Office of Chief Trial Counsel ("OCTC")	M		1.10(a)	1. Commenter is concerned with the use of the term "knowingly" in paragraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases. 2. As it has noted with respect to other rules, the commenter believes there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions.	1. 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 subject to discipline. California should not depart from this approach, which is taken in every jurisdiction. 2. The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.
				Comment	Comment [1] simply states that whether two	The Commission did not make a change. Comment

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				[1]	or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment [1] provides guidance as to what constitutes a law firm.	[1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines “law firm” – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term “law firm” will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation.
				Comment [3]	Comment [3] should be clarified or stricken.	The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment “deals with the elimination of imputation of a lawyer’s ‘personal-interest’ conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.” See also proposed Rule 1.7.
				Comment [4]	Comment [4] discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people.	The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment reflects current case law and “is intended to give guidance to lawyers about important practical questions.”
				Comment [9]	Comment [9] needs more clarification or should be stricken	The Commission has not made the requested change to Comment [9]. As noted in the

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Explanation of Changes to proposed Rule 1.10, the comment "has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it." Nevertheless, the Commission has made some clarifying changes to the Comment and added references to California case law.
3	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	Model Rule 1.10(a)(2)	Whether it is ethically proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited. Trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. Because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today. Ethical screens have been shown to be effective to protect confidential client	The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board of Governors rejected the proposed Rule. The Board subsequently approved a version of Rule 1.10 without any provision for screening. However, in light of the Supreme Court's decision to deny review in <i>Kirk v. First American Title Ins. Co.</i> (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, rev. denied (6/23/10), and also to deny a request for depublication of the Court of Appeal opinion, the Commission voted to request that the Board reconsider its rejection of proposed Rule 1.10 with a provision permitting limited screening.

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					information. As the court in <i>Kirk v. First American Title Ins. Co.</i> put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." Kirk, <i>supra</i>, at * 16. The commenter urges the Board of Governors to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).	

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. . .

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) 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:

(1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and

(2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Tennessee: Rule 1.10 includes the following screening provisions:

(c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the

representation of the current client;
and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if

(1) the disqualified lawyer was substantially involved in the representation of a former client; and

(2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

Texas: Rule 1.09 provides:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10 [concerning government lawyers], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Wisconsin: Rule 1.10(a)(2) permits law firms to avoid imputation of a lateral lawyer's Rule 1.9 conflict if "(i) the personally disqualified lawyer performed no more than minor and isolated services in the

disqualifying representation and did so only at a firm with which the lawyer is no longer associated"; (ii) the personally disqualified lawyer is timely screened and is apportioned no part of the fee from the matter; and (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with this rule.

Proposed Rule 1.11 [N/A]
**“Special Conflicts Of Interest For Former And Current
Government Officers And Employees”**

(ALT1, XDraft #12.1, 6/29/10, and ALT2, XDraft 12.1, 7/8/10)

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. Following further public comment, the Commission requests that the Board of Governors reconsider its decision on Rule 1.11 (see version ALT1, attached) and adopt version ALT2, attached, that includes paragraph (e), which provides for imputation and screening within a government agency in conformance with California law. In the alternative, the Commission requests that the Board forward to the Supreme Court both versions of the Rule to permit the Court to make an informed decision on this issue. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 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 8
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:

Government lawyers

☒ 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

July 2010

(Draft rule following consideration of second round of public comment.)

INTRODUCTION & EXPLANATION OF REQUEST FOR RECONSIDERATION OF BOARD'S DECISION NOT TO INCLUDE PARAGRAPH (E), CONCERNING IMPUTATION OF CONFLICTS AND SCREENING WITHIN GOVERNMENT AGENCIES AS REQUIRED BY CALIFORNIA LAW:

Summary of the Commission's Request. The Commission believes that comments received during both rounds of public comment warrant the Commission's return to the Board to seek reconsideration of the Board's previous votes on proposed Rule 1.11, and to request that the Board adopt the version of Rule 1.11, attached, that includes paragraph (e), which implements settled California law and expressly provides that the conflicts of a lawyer who moves from the private sector into government employment are imputed to other lawyers in the agency and requires those agencies to institute an ethical wall to rebut the presumption of shared confidences between the tainted lawyer and other lawyers in the agency. 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]. This version of the Rule is denominated as "ALT2". The version of Rule 1.11 approved by the Board at its May 2010 meeting, is also attached (denominated as "ALT1" in these materials).

Procedural History of the Board's Consideration of Rule 1.11. At its May 14, 2010 meeting, the Regulation and Admissions Committee of the Board of Governors voted against adoption of the version of Rule 1.11 proposed by the Commission. That version of the Rule, which is attached as ALT2, was revised extensively following the initial public comment to address concerns raised by the Department of Justice ("DOJ") in a March 12, 2010 from George Cardona to the Commission about the aforementioned paragraph (e)'s notice requirements.

* Proposed Rule 1.11, ALT1, XDraft #12.1 (6/29/10) and ALT2, XDraft #12.1 (7/8/10).

Commission Request. The Commission requests that the Board reconsider its decision not to include paragraph (e) in Rule 1.11. The initial public comment version of paragraph (e) provided:

(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 office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:

(1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and

(2) 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. However, notice to the former client is not required if prohibited by law or a court order.

The DOJ objected to the notice requirement in paragraph (e)(2), noting that the exception in the second sentence ("law or court order") was not sufficient to avoid unduly prejudicing the public interest, for example, where an ongoing criminal investigation might be compromised by prompt provision of notice to the former client. In response to that concern, the Commission substantially revised subparagraph (e)(2) to address those precise 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 circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. (Emphasis added).

In addition to the foregoing revision, Comment [9C] was added to remove any doubt as to the intent that a government investigation not be compromised:

[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.

The Commission believes that the foregoing revisions adequately address the DOJ's concerns about notice. Although the DOJ and other government agencies might prefer not to have to give any notice at all, the Commission believes that paragraph (e) strikes an appropriate balance between the interests of the government and the duties owed by the tainted government lawyer to his or her former client, a person who now is the subject of a government investigation and faces the potential loss of liberty. If a lawyer were moving from one private firm to another, under the applicable rule adopted by the Board, screening would not even be an option. Here, the government is provided with the option of screening to avoid the imputation of the tainted lawyers conflicts. When practicable, the government should be required to provide the required notice to the former client.

Accordingly, the Commission requests that the Board reconsider its rejection of paragraph (e), as revised following the initial public comment period.

Further, the Board included in the adopted version of Rule 1.11 a substantially different Comment [9C], which provides:

[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

As it does with respect to Rules 1.10 and 1.18, the Commission urges the Board not to continue to pursue the piecemeal, case-by-case approach that is sanctioned in the rule draft the Board approved at its May 2010 meeting. In this respect, the Commission agrees fully with the comment submitted by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") during the second public comment period:

"COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties." See June 14, 2010 Letter from COPRAC to Harry B. Sondheim, Commission Chair (in complete public comment, provided with this submission).

Alternatively, the Commission requests that the Board of Governors forward to the Supreme Court the attached ALT2 version of the Rule that the Commission has approved, in addition to the version of the Rule that the Board adopted at its May 2010 meeting ("ALT1"). The Commission believes the Supreme Court should have the benefit of having an alternative in making its decision to approve a Rule counterpart to Model Rule 1.11 that incorporates well-settled California law into the Rule.

Description of Rule 1.11, ALT2. 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.

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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>written</u> consent, ~~confirmed in writing~~, to the representation. <u>This paragraph shall not apply to matters governed by Rule 1.12(a).</u>	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~~<u>prohibited</u> 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. Under paragraph (b), a law firm is permitted to use screening in

* Proposed Rule 1.11, XDraft 12.1 (6/29/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
		order to avoid imputation of a conflict from one lawyer to the rest of the law firm. <i>Minority.</i> 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~~<u>personally prohibited</u> 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~~<u>Rule</u>.	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>who was a public officer or employee and, during that employment, acquired</u> 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~~<u>that</u> 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~~<u>personally prohibited</u> 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).

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>written</u> 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 <u>a lawyer for a party, or with a law firm for a party,</u> 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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 (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	(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 (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	Proposed paragraph (e) and its subparagraphs are identical to Model Rule 1.11(e) and its subparagraphs.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~these~~ <u>these</u> Rules—~~of Professional Conduct~~, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 <u>and conflicts resulting from duties to former clients as stated in Rule 1.9</u>. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. <u>See, e.g., Business and Professions Code section 6131</u>. 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~~ <u>1.0.1</u>(e-1) for the definition of <u>“informed written consent.”</u>	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), <u>and (a)(2) and (d)(1)</u> restate the obligations of an individual lawyer ~~who has served toward a former government client,~~ <u>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</u> ~~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. The third and fourth sentences are identical to the second and third sentences of Model Rule 1.11, cmt. [2].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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~~ <u>Concerning</u> imputation <u>and screening</u> within a government agency, ~~paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers~~ <u>see Comments [9B] and [9C], below.</u>	The last sentence of the Model Rule comment has largely been replaced by a cross-reference to Comments [9A] and [9C], which provide better guidance on the duties of a government lawyer who has previously been in private or other non-government employment.
[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 <u>government or</u> 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). <u>[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).]</u>	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~paragraph~~<u>paragraphs (b) and (e)</u> are necessary to prevent ~~the disqualification rule~~<u>this Rule</u> from imposing too severe ~~a deterrent~~<u>an obstacle</u> against entering public service. The ~~limitation~~<u>limitations</u> of ~~disqualification~~<u>representation</u> 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 <i>after</i> 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].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	parties, rather than ~~extending~~ ~~disqualification~~<u>imputing conflicts</u> to all substantive issues on which the lawyer worked, serves a similar function.	
	<u>[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</u>	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].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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) 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 <i>Civil Service Commission v. Superior Court</i> 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.	<u>Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)</u> [6] Paragraphs (b) and (c) contemplate a screening arrangement <u>for former government lawyers</u>. See Rule ~~1.0~~<u>1.0.1</u>(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 <u>to the appropriate government agency</u>, 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.
[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 <u>actual</u> 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. <i>Minority.</i> 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.	Comment [9] is identical to Model Rule 1.11, cmt. [9].
	<u>Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.</u> <u>[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).</u>	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 <i>personally</i> 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>This Rule Not Determinative of Disqualification</u> <u>[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., <i>Hollywood v. Superior Court</i> (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., <i>City & County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); <i>Younger v. Superior Court</i> (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.</u>	Comment [9B] 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 <i>Hollywood v. Superior Court</i> 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 <i>Cobra Solutions</i> and <i>Younger</i>, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers 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. The last sentence of the Comment clarifies that Penal Code section 1424 governs motions to disqualify prosecutors.
	<u>[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.</u>	Comment [9C] has no counterpart in the Model Rule. It has been added to effectuate the Board's intent that the law of screening of lawyers who move from the private sector to government employment 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT1 [NO PARA (e)] – Board’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.	<u>Matter</u> [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.	Comment [10] is identical to Model Rule 1.11, cmt. [10].

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Redline Comparison of the Proposed Rule ALT1 to the Public Comment Draft)

- (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) 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-1) 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. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

- [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 paragraph (b) 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].

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.
- [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.

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).

This Rule Not Determinative of Disqualification

- [9B] 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]. Regarding prosecutors in criminal matters, see Penal Code section 1424.
- [9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

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 Of Interest For Former And Current Government Officers And Employees
(Commission's Proposed Rule ALT1 – Clean Version)

- (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) 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-1) 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. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

- [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 paragraph (b) 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.

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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].

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.
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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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>written</u> consent, ~~confirmed in writing~~, to the representation. <u>This paragraph shall not apply to matters governed by Rule 1.12(a).</u>	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~~<u>prohibited</u> 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, ALT2 (PARA (e)) Draft 12.1 (7/8/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
		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. <i>Minority.</i> 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~~<u>personally prohibited</u> 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~~<u>Rule</u>.	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>who was a public officer or employee and, during that employment, acquired</u> 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~~<u>that</u> 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~~<u>personally prohibited</u> 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).

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>written</u> consent; ~~confirmed in writing~~; or	In subparagraph (d)(2)(i), California’s heightened standard, “informed written consent₁” 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 <u>a lawyer for a party, or with a law firm for a party</u>, 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
	(e) <u>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:</u>	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., <i>City of Santa Barbara v. Superior Court</i> (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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
	(1) <u>the personally prohibited lawyer is timely screened from any participation in the matter; and</u>	See Explanation of Changes for paragraph (a).
	(2) <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>
(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.	

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~these~~ <u>these</u> Rules—~~of Professional Conduct~~, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 <u>and conflicts resulting from duties to former clients as stated in Rule 1.9</u>. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. <u>See, e.g., Business and Professions Code section 6131</u>. 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~~ <u>1.0.1</u>(e-1) for the definition of <u>“informed written consent.”</u>	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), <u>and (a)(2) and (d)(1)</u> restate the obligations of an individual lawyer ~~who has served toward a former government client,~~ <u>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</u> ~~toward a former government or private client.~~ <u>Rule 1.10 is not applicable to the conflicts</u>	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. The third sentence, which is identical to the Model Rule, has been

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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 (e) ~~does not impute~~ provides that the conflicts of a lawyer currently serving as an officer or employee of the government <u>shall be imputed</u> 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.	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	[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 <u>government or</u> 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). <u>]</u>As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
these paragraphs.	applicable to the conflicts of interest addressed by ~~these~~ paragraphs (a)(2) and (d)(2).¹	
[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	[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~~paragraphs (b) and (e) are necessary to prevent ~~the disqualification rule~~this Rule from imposing too severe ~~a deterrent~~an obstacle against entering	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 <i>after</i> 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].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.	public service. The ~~limitation~~<u>limitations</u> of ~~disqualification~~<u>representation</u> in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than ~~extending~~<u>imputing conflicts</u> to all substantive issues on which the lawyer worked, serves a similar function.	
	<u>[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</u>	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].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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. 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) 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 <i>Civil Service Commission v. Superior Court</i> 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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 <u>actual</u> 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. <i>Minority.</i> 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].

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.</u> <u>[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).</u>	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 <i>personally</i> 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.
	<u>Screening of Current Government Lawyers Pursuant to Paragraph (e)</u> <u>[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 [9C].</u>	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.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission’s Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[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.</u>	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.
	<u>This Rule Not Determinative of Disqualification</u> <u>[9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., <i>Hollywood v. Superior Court</i> (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., <i>City & County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); <i>Younger v. Superior Court</i> (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.</u>	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 <i>Hollywood v. Superior Court</i> 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 <i>Cobra Solutions</i> and <i>Younger</i>, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers actually handling the matter. The Commission determined that rather than codify these cases in the Rule itself and subject

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>ALT2 [PARA (e)] – Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		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.	<u>Matter</u> [10] For purposes of paragraph (ef) 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].

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Redline Comparison of the Proposed Rule ALT2 to the Public Comment Draft)

(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.

(ef) 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-1) 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. ~~Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below. 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 ~~paragraph~~paragraphs (b) ~~is~~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.

~~[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.~~

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 [9C].

[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.

This Rule Not Determinative of Disqualification

[9B D] 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]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

~~[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.~~

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 Of Interest For Former And Current Government Officers And Employees
(Commission's Proposed Rule ALT2 – Clean Version)

- (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-1) 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 [9C].

[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.

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]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

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.

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Minority Dissent to Inclusion of Paragraph (e) Minority Dissent A

A minority of the Commission dissents to the inclusion of 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 Board repeatedly has decided on multiple occasions that screening is a matter with sufficient uncertainty that it should be left to the courts to resolve.

The law in this field is still unsettled, with courts allowing screening in the governmental context and not in others. Even in those situations where screening was permitted, the courts recognized that their decisions were dependent of the particular facts. *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403] involved a unique situation in which all parties agreed that no confidential information had in fact been imparted to the city. No court has extended the case in the government context. Most of the screening cases in the government context, including *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771], involve creating independent legal units within a government agency,

which has nothing to do with the type of screening the Commission majority asks the Board to reconsider.

The screening rule the majority asks the Board to reconsider goes beyond any procedure California courts have authorized. No court has allowed the kind of screening the majority urges on the widespread basis that would result from adopting the majority's proposed screening rule. The law in this field is still evolving and should be left to the courts.

The screening procedure in Rule 1.11(e) differs from other screening proposals in that it allows for screening without any notice to the former client. It would allow for a situation in which a client discusses with a lawyer facts related to a government investigation. The lawyer then becomes employed by the very agency conducting the investigation subject to an unconsented screen erected without the client's knowledge and without the client's ability to verify compliance. The 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 client. The 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 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 client in a situation where the information would advance the agency's position. The comments the Commission received do not address that screening comes at the expense of client trust and client protection, which are more important values than finding a way to more predictably impose a screen without client consent. Making screening more predictable protects lawyers. It does not protect clients and client trust in the ability to communicate with lawyers in confidence.

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 different 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.

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 Charlissee 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 *Charlissee 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 for Government Employees [Sorted by Commenter]						TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes	(e)	COPRAC supports the implementation of screening through the Rules of Professional Conduct and urges reconsideration and adoption of the prior version of the rule permitting screening including the prior version of subsection (e). COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be easily referenced, and easily applied. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening. In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Absence of a rule	The Commission recommended screening in the situation covered by former paragraph (e). The Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moved from other employment into government service. However, in light of further public comment, the Commission voted to request that the Board reconsider its rejection of proposed Rule 1.11 with paragraph (e) that provides for imputation within a government agency but affords the opportunity for screening.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					could subject a lawyer to discipline even if case law develops to permit screening as a method to avoid disqualification.	
2	Office of Chief Trial Counsel	M	Yes	1.11(a)	OCTC thanks the Commission for adding B&P Code section 6131 to the Comments, but we still are concerned that subparagraph (a) is incomplete. OCTC believes it should state: Except as law may otherwise expressly permit <i>or prohibit</i> . The same is true of subparagraphs (c) and (d).	The Commission disagrees. Adding the phrase "or prohibit" to paragraphs (a), (c) and (d) would make the wording of those paragraphs illogical. Those paragraphs prohibit representation in defined circumstances. They contain an exception ["Except as law may otherwise expressly permit, . . ."]. Adding the phrase "or prohibit" would mean, to paraphrase, that, "Except as law may otherwise expressly . . . prohibit . . . a lawyer shall not represent a client." That would be a double negative. Its effect would be the opposite of what is intended by the rule. The exception to the rule would negate the law. In plain English, it would mean, "If the law prohibits you from representing a client, you may represent that client."
				1.11(b)	Subparagraph (b) of the rule prohibits an attorney in a firm from knowingly undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened and is apportioned no part of the fee and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the	The Commission disagrees.

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.11(c)	provisions of the Rule. OCTC agrees with the minority of the Commission who objected to the use of the term “<i>knowingly</i>” because it would immunize attorneys who do not bother to check for conflicts of interest. Disciplinary law has long recognized that gross negligence can constitute misconduct. That would be appropriate here. Further, it would be consistent with Comment [4], of Proposed Rule 1.7, which states: “Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer’s violation of this Rule.” OCTC does not object to the concept contained in subparagraph (c), but did find it a little confusing as written. It would suggest that the Commission might want to tighten the language.	The Commission considered this objection when the proposed rule was first published for preliminary public comment. Paragraph (c) was modified in light of this comment. The comment is moot.
				1.11(d)(2)(ii)	OCTC is concerned that subparagraph (d)(2)(ii) prohibiting government officers and employees from negotiating for private employment might be too broad. It would appear to prohibit any criminal prosecutor from negotiating with the public defender’s office for a job.	The Commission disagrees. Paragraph (d)(2)(ii) prohibits government lawyers from negotiating for “private” employment with a party, lawyer, or law firm on the other side. That paragraph is limited to a government lawyer who seeks “private” employment. The Commission thinks that OCTC is misreading the paragraph.
					The Comments are too many and most	The Commission disagrees. The comments provide

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					appear more appropriate for treatises, law review articles, and ethics opinions.	useful guidance to lawyers and courts on the application of the Rule.
3	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes	(e)	1. The commenter notes the minority objection to screening in the private to government context.	1. This comment is moot because the Board of Governors deleted original paragraph (e) which had been recommended by the Commission. That paragraph dealt with conflicts and screening if a lawyer moves from other employment into government service. However, if paragraph (e) is restored, this comment will become relevant.
				(e)(2)	2. Commenter agrees with the proposed wording of paragraph (e)(2) but expresses concern about how the client could monitor the screen and ensure it retains its effectiveness.	2. This comment is moot because the Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. However, if paragraph (e) is restored, this comment will become relevant.
				(e)	3. Commenter points out that paragraph (e) does not address the head of office and supervisory lawyer situation and thereby is <i>de facto</i> overruling <i>Cobra Solutions</i> .	3. This comment is moot because Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. In addition, <i>Cobra Solutions</i> and other cases are cited in Comment [9B]. Those cases are not impliedly overruled by doing so. Instead, that Comment calls them to the readers' attention so that they are aware of the potential applicability of such cases in the disqualification context. However, if paragraph (e) is restored, this comment will become relevant.

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]							TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
				(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 unless the screening is conducted and notice given as set forth in 1.11(b)(1) and (2).	4. The Commission disagrees with the commenter and has retained the “knowingly” standard in the rule and comment. As in the other jurisdictions that have adopted imputation as a disciplinary standard, the Commission concluded that the Model Rule’s standard should be adopted. Although a lawyer without actual knowledge could properly be disqualified in a civil action, the lawyer would not be subject to discipline. The Commission concluded that California should not depart from this approach.	
4	U.S. Attorney’s Offices for the Central, Eastern, Northern and Southern Districts of California	M	Yes	Comment [2] & [9C]	We are concerned that the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we suggest that the Proposed Comments be modified as follows	The Commission disagrees. The comments do not confuse imputation and disqualification. They have been drafted to keep the two concepts distinct. Comments [9B] and [9C] are physically located separately from Comment [2] in order to avoid confusion. Disqualification of prosecutors’ offices because of imputed conflicts may be unusual in criminal cases, but that is not the limit of Rule 1.11, which also applies to civil and to non-litigation matters. Whether disqualification of prosecutors’ offices is or is not unusual should not be the subject of the Comments. Although the Legislature has made disqualification unusual in situations in which <i>Younger</i> and other precedents apply, and although court decisions express reluctance to disqualify entire offices of prosecutors, the former client of a side-shifting prosecutor is still aggrieved, and the Comments should not sanctify the conflicts of interest in such cases.	

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of this Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comment closer to the ABA Model Rule Comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Comment [2] would read: “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 non-governmental 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	The Commission disagrees. The effect of these changes would be to change the neutral wording of Comment [9C] (“This Rule leaves open the issues of . . .”) to wording that would be used by the commenters to argue that Rule 1.11 prohibits imputation of conflicts within government offices. The Rules of Professional Conduct should not be reworded to change the analyses and results of disqualification motions. This rule should not define when conflicts will be imputed within government offices for disqualification purposes and should not be written to change the decisional law regarding disqualification motions. California decisions have not accepted Model Rule Comment [2]. In addition, moving Comment [9C] to Comment [2] and merging them would change the significance of both comments. Now, they clearly distinguish conflicts for discipline purposes from conflicts for disqualification purposes. The Commission recommends that the rule not become a revision of decisional law regarding disqualification and that the distinctions between discipline and disqualification be kept clear.

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4
Agree = 0
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9B]	provides for screening and notice. The Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law." Second, we would suggest that Proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to <u>Younger</u> (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read: <u>"This Rule Not Determinative of Disqualification</u> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., <i>Hollywood v. Superior Court</i> (2008)	The Commission disagrees with the deletion of <i>Younger</i>. <i>Younger</i> still states valid analyses of disqualification standards. In <i>Cobra Solutions</i>, 38 Cal. 4th 839, 850 (2006), the Court stated that the principles discussed in <i>Younger</i> "have not lost their relevance." Not calling <i>Younger</i> to the attention of a reader would be misleading. The Commission does not recommend that additional cases be cited in Comment [9B]. The list of cases that would have to be added to the comment would make the comment far too long. The Commission also disagrees with the proposal to reword the last sentence of Comment [9B]. It now states, "Regarding prosecutors in criminal matters, see Penal Code section 1424." That is the code section the Legislature added to offset <i>Younger</i> and its sequellae. Instead of the neutral wording of the last sentence of Comment [9B], the commenters would change the sentence from alerting a reader to the need to consult the code section to a sentence that would make the code section the limit of

Rule 1.11 Special Conflicts for Government Employees [Sorted by Commenter]						TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					43 Cal.4th 721. 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., <i>In re Charlissee C.</i> , 45 Cal.4 th 145 (2008); <i>City & County of San Francisco v. Cobra Solutions, Inc.</i> , 38 Cal.4 th 839 (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code section 1424."	disqualification motions. The Comment should not become a basis for changing the premises of disqualification decisions. Other standards may also apply. Moreover, federal courts are not bound by the California Penal Code in deciding disqualification motions. The change the commenters recommend is an attempt to bring the California statute into federal practice by changing the Rules of Professional conduct.

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. 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. . . .

(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.

(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.

Proposed Rule 1.12 [n/a]

“Former Judge, Arbitrator, Mediator”

(XDraft #6, 02/17/10)

Summary: This proposed new rule regulates the conduct of lawyers who may be asked to represent a client in a matter in which the lawyer previously participated personally and substantially as a judge, arbitrator, mediator or other third-party neutral. The Rule generally prohibits such representation unless all of the parties to the proceedings give their informed written consent. The rule also states that such conflicts may be imputed to other lawyers but that the imputation of the conflict can be avoided by establishing an ethical wall to screen the affected lawyer.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-310(A)

Statute

Case law

Cho v. Superior Court (1995) 39 Cal.App.4th 113

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 5
Opposed Rule as Recommended for Adoption 3
Abstain 2

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the introduction and also the explanation for paragraphs (a) and (c) in the Model Rule comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.12* Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.12 closely tracks Model Rule 1.12, but incorporates three substantive changes: (i) substituting the current California Rules' more client-protective requirement of "informed written consent" for the Model Rule's "informed consent, confirmed in writing," see Explanation of Changes, paragraph (a); (ii) expanding the restriction on employment negotiations between adjudicative officers or their staff and parties or their representatives appearing before them, see Explanation of Changes, paragraph (b); and (iii) limiting to former law clerks the availability of ethical screening to avoid imputed disqualification of a law firm after leaving judicial employment, see Explanation of Changes, paragraphs (c) and (d).

Variation in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 1.12; most have adopted Model Rule 1.12 with little or no variation. D.C. Rule 1.12 applies only to non-judicial, third party neutrals. Judges and law clerks are governed under D.C. Rule 1.11. New York, one of only two jurisdictions that has adopted law firm discipline, expressly requires that the *law firm* to which the former adjudicative officer moves to takes steps to properly screen the former adjudicative officer. There are minor variations concerning consent and notice in other jurisdictions. E.g., Georgia, Pennsylvania.

* Proposed Rule, XDraft 6 (02/17/10).

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.	(a) Except as stated in paragraph (de), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed <u>written</u> consent, ~~confirmed in writing~~.	Paragraph (a) is identical to Model Rule 1.12(a), except that the cross-reference is to paragraph (e) because of the addition of new paragraph (c), and the requirement of California's more client-protective "informed written consent" instead of the Model Rule's "informed consent, confirmed in writing."
(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.	(b) A lawyer shall not ~~negotiate for~~<u>participate in discussions regarding prospective</u> employment with any person who is involved as a party, or as <u>a</u> lawyer for a party, <u>or with a law firm for a party</u>, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may ~~negotiate for~~<u>participate in discussions regarding prospective</u> employment with a party, or <u>with a</u> lawyer ~~involved~~<u>or a law firm for a party</u> in a matter in which the clerk is participating personally and substantially, but only ~~after~~<u>with</u> the ~~lawyer has notified approval of~~ the judge or other adjudicative officer.	Paragraph (b) is a modified version of Model Rule 1.12(b). First, the phrase "negotiate for," that appears in two places, has been replaced with the phrase "participate in discussions regarding prospective." The Commission's replacement language is consistent with the Model Rule language in covering negotiations for employment but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as employment negotiations. In addition, the Commission's language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics. Second, the phrase "or with a law firm for a party" has been added for clarification. It makes clear that negotiations are prohibited not only with a lawyer actually appearing in the matter, but also with that lawyer's law firm. The same clarifying change is made in the second sentence. In addition, the Commission has added the

* Proposed Rule, XDraft 6 (02/17/10), redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
		requirement that the judge or adjudicative officer must <i>approve</i> negotiations by a law clerk, not just be given notice of the negotiations as specified in the Model Rule.
	(c) <u>Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.</u>	The Commission has added paragraph (c) to provide for greater confidence in the integrity of the judicial system and in the administration of justice by not allowing judges to leave a case, join a law firm involved in the matter, and have that firm continue to act as counsel in the case over the objection of one of the parties simply by screening the former judge from the case.
(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:	(~~ed~~) If a lawyer is disqualified by paragraph (a) <u>because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal</u>, no lawyer in a <u>law</u> firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:	Paragraph (d) is based on Model Rule 1.12(c). Together with proposed paragraph (c), it permits screening only of law clerks to avoid imputation in a law firm. See <i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. The Commission recommends screening for law clerks because the aforementioned concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.
(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and	(1) the disqualified lawyer is ~~timely~~ <u>and effectively</u> screened from any participation in the matter and is apportioned no part of the fee therefrom; and	In subparagraph (d)(1), the Commission has added “and effectively” to “timely” to emphasize that not only must a screen be implemented in a timely manner, but it also must be effective.

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.	(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this ~~rule~~Rule.	Subparagraph (d)(2) is identical to Model Rule 1.12(c)(2).
(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.	~~(d)~~ (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.	Paragraph (e) is identical to Model Rule 1.12(d).

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.	[1] This Rule generally parallels Rule 1.11. <u>“Personally and substantially” includes the receipt or acquisition of confidential information that is material to the matter.</u> The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, <u>or acquire confidential information.</u> So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, <u>such as uncontested procedural duties typically performed by a presiding or supervising judge or justice.</u> Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. ~~Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.~~	Comment [1] is based on Model Rule 1.12, cmt. [1]. The Commission has added language to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. The Commission has also added language to the third sentence of the Model Rule comment to explain more precisely the kinds of duties that would fall outside the Rule. The last two sentences of Model Rule 1.12, cmt. [1] have been deleted because they are inapplicable in California.

* Proposed Rule, XDraft 6 (2/17/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.	[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed <u>written</u> consent, ~~confirmed in writing~~. [See Rule 1.0(e) ~~and (b)~~.] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.	Comment [2] is identical to Model Rule 1.12, cmt. [2], except that California's more client-protective "informed written consent" has been substituted to conform to the changes to paragraph (a). See Explanation of Changes for paragraph (a). For the same reason, the reference to Model Rule 1.0(b) (definition of "confirmed in writing") has been deleted.
[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.	[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. ~~Thus, paragraph~~ <u>Paragraph</u> (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm ~~unless the conditions of this paragraph are met~~.	Comment [3] is based on Model Rule 1.12, cmt. [3]. The revisions are necessary to conform the comment to new paragraph (c), which does not provide for screening of adjudicative officers to avoid imputation of their disqualification to members of their law firms. See Explanation of Changes for paragraph (c).
[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	[4] <u>Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met.</u> Requirements for screening procedures are stated in Rule <u>[1.0(k)]</u>. Paragraph ~~(e)~~ <u>(d)</u>(1) does not prohibit the screened lawyer from receiving a salary or partnership	Comment [4] is based on Model Rule 1.12, cmt. [4] and clarifies that the permissive screening provisions in paragraph (d) apply only to law clerks to adjudicative officers. See Explanation of Changes for paragraph (d).

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	
[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	Comment [5] is identical to Model Rule 1.12, cmt. [5].

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.
- (c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.
- (d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. "Personally and substantially" includes the receipt or acquisition of confidential information that is material to the matter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in

which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. See Rule 1.0.1(e-1). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6 and Business and Professions Code section 6068(e), they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.

[4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule 1.0.1(k). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	A	Yes		The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
2	San Diego County Bar Association Legal Ethics Committee	M	Yes		It is unclear whether “personally and substantially” is intended to include anything beside “confidential information that is material to the matter.” If not, then the sentence should read: “Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter.” If so, then the sentence should read: “Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter.” Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former Judge, Arbitrator, Mediator representing an adversary, client's should not have the burden of proving that a former judge's, etc. participation actually entailed the receipt of	Comment [1] states that “personally and substantially” is not limited to the acquisition of confidential information but also includes the judge's personal participation in a matter. Whether a judge personally participated in a matter might be more easily determined than whether the judge received confidential information, and both aspects therefore should be preserved in the Comment.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 1**
Disagree = 0
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					material confidential information. Rather, if a former judge, etc., has heard facts about the substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation. If this recommendation is adopted, the modified language should read: “‘Personally and substantially’ is intended to include, <u>without limitation</u>, the receipt or acquisition of confidential information that is material to the matter <u>or participation in a matter that included knowledge of facts related to the substantive claims in that matter.</u>”	
3	Santa Clara County Bar Association	M	Yes	1.12(b)	Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the “negotiating employment” stage. The rule should apply to the interviewing stage though requiring the judges’ approval for an interview is not necessary. The following language should be added at the conclusion of subparagraph (b) as it now reads: “In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer.”	The commenter previously submitted this point for the initial public comment distribution of this rule. At that time, the Commission agreed and thereafter subparagraph (b) was amended to read as follows: “A lawyer shall not participate in discussions regarding prospective employment with any person . . . A lawyer serving as a law clerk . . . may participate in discussions regarding prospective employment . . . The that was added also tracks more closely the language used in Canon 3E(5)(h) of the Code of Judicial Ethics.

Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to Rule 1.12.

District of Columbia: Rule 1.12 does not include former judges.

Georgia: Rule 1.12(b) adds that a law clerk who accepts employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantively “shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employee is involved.”

Illinois: In the rules effective January 1, 2010, Rule 1.12(a) does not require consent to be confirmed in writing.

Massachusetts extends the law clerk exception in Rule 1.12(b) to law clerks working for mediators.

New York: In the rules effective April 1, 2009, Rule 1.12(a) is a nearly verbatim adoption of DR 9-101(A) of

the old Model Code. Rule 1.12(d) describes in more detail the procedures necessary to avoid the imputation of a conflict, and several additional comments offer further guidance regarding these procedures.

Pennsylvania: Rule 1.12 tracks ABA Model Rule 1.12 except Pennsylvania Rule 1.12(a) does not require that client consent be “confirmed in writing.”

Texas has no equivalent to Rule 1.12(d).

Proposed Rule 1.13 [RPC 3-600]

“Organization as Client”

(XDraft # 11.1, 10/20/09)

Summary: Proposed Rule 1.13 is based on Model Rule 1.13 but, because of California's strong policy on client confidentiality, diverges from the Model Rule in one significant respect. Unlike the Model Rule, the proposed Rule does not permit a lawyer for an organization to report suspected wrongdoing of the organization's constituents outside the organization's chain of command. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rule

RPC 3-600

Statute

Business & Professions Code § 6068(e)(1).

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

In rejecting the Model Rule's provisions that permit a lawyer to report misconduct outside the organization, the proposed Rule creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act and which also permit reporting outside the organization. See Introduction.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.13* Organization as Client

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.13 is based on Model Rule 1.13. However, the proposed rule diverges significantly from the Model Rule in not permitting a lawyer for an organization to report suspected wrongdoing of the organization's constituents outside the organization's chain of command. The Commission makes this recommendation because the Model Rule provision is based on policy decisions that are inimical to California's traditional emphasis on protection of client confidentiality.

The American Bar Association revised Model Rule 1.13 in August 2003, following the financial debacles involving companies such as Enron, Global Crossing and WorldCom. The revisions of Model Rule 1.13, which permit whistle blowing by lawyers outside the corporate structure, were intended as a companion piece to the ABA's concurrent revisions to Model Rule 1.6, which created exceptions to confidentiality that permit a lawyer to reveal a client's confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. The Commission has recommended rejection of those exceptions for the same reason it recommends rejection of the whistle blowing provision in Model Rule 1.13(c): First, Model Rules 1.6 and 1.13 are inconsistent with the all but absolute duty of confidentiality under § 6068(e). Second, these provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. Proposed Rule 1.13 provides that assurance by mandating that a lawyer who knows of wrongdoing by a constituent in the organization attempt to dissuade the constituent from his or her action and, failing that, to go up the organizational ladder – if necessary to highest authority in the organization authorized to act on its behalf, in an attempt to change the course of conduct. If the lawyer's

* Proposed Rule 1.13, XDraft 11.1 (10/20/08).

INTRODUCTION (Continued):

attempts fail, then the lawyer must abide by the lawyer's duty of confidentiality under Business & Professions Code § 6068(e)(1) and not reveal the information outside the corporate chain of command. See Explanation of Changes for Comments [2] and [9].

The Commission believes that this approach will better promote the organizational client's compliance with the law by encouraging the client's constituents to be candid with the lawyer, a candor that would be lost if the constituents know the lawyer is authorized to report misconduct outside the organization. In conformance with this approach, both the black letter and comment to the Model Rule have been revised to alert lawyers that ignoring violations of duty or law that will likely injure the organization is not an option. For example, the black letter of Model Rule 1.13(b) has been revised to impose on an organization's lawyer an objective standard ("knows or reasonably should know") to determine when the lawyer must report up the organization's ladder. In addition, the comment to the Rule has been revised to emphasize that a lawyer may no longer hide his or her head in the sand. See, e.g., Explanation of Changes for Comments [4], [5] and [6].

Variation in Other Jurisdictions. Most jurisdictions have adopted to some extent the 2003 revisions to Model Rule 1.13, i.e., they have added revised paragraph (c) and new paragraphs (d) and (e), and accompanying comments, which together address a lawyer's authority to report misconduct outside the organization. Jurisdictions that have not adopted those paragraphs include the District of Columbia, Georgia, Missouri, New York, Ohio, Pennsylvania and Texas.

Potential Conflict with SEC Standards of Professional Conduct. The Commission's proposed Rule arguably creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act, 15 U.S.C. § 7245 and which also permit reporting outside an organization. See 17 C.F.R. 205.3(d)(i)-(iii). However, because the SEC rules are permissive and not mandatory, California lawyers should be able to fulfill their duties under proposed Rule 1.13 (as they have been able to do under current rule 3-600), without violating duties imposed under the SEC Rules. See also *The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality* (Spring 2004), available at <http://www.calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf>.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.	(a) A lawyer employed or retained by an organization ~~represents~~ <u>shall conform his or her representation to the concept that the client is the organization itself</u>, acting through its duly authorized constituents <u>overseeing the particular engagement</u>.	Paragraph (a) is based on Model Rule 1.13(a), but two clarifying changes have been made: first, emphasis is placed on the fact that the lawyer is <i>obligated</i> to treat the organization as the client; and second, emphasis is placed on the fact that the organization acts through those duly authorized constituents who <i>oversee the particular engagement</i> for which the lawyer has been retained.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.	(b) If a lawyer ~~for representing~~ an organization knows that an officer, employee or other person associated with the organization is ~~engaged in action~~ <u>acting</u>, intends to act or refuses to act in a matter related to the representation <u>in a manner that the lawyer knows or reasonably should know</u> is (i) a violation of a legal obligation to the organization, or a violation of law ~~that~~ reasonably ~~might be imputed~~ <u>imputable</u> to the organization, and ~~that is~~ <u>(ii)</u> likely to result in substantial injury to the organization, ~~then~~ the lawyer shall proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization. <u>Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that</u>	Paragraph (b) closely follows Model Rule 1.13(b), but with several changes. First, the word “representing” is substituted for the word “for” as a clarification. Second, the word “acting” is substituted for “engaged in action” for economy of language. Third, the phrase “in a manner” has been added to make the sentence grammatically correct. Fourth, and most important, using “knows or reasonably should know” imposes an objective standard on a lawyer’s determination of whether the constituent’s action is (i) a violation of a legal obligation or a violation of law, and (ii) likely to result in substantial injury to the organization. Although the lawyer must have actual knowledge of the constituent’s action, the lawyer’s analysis of the action’s consequences must be objective. Further, romanettes are used to clarify that both a (i) “violation” (of duty or law) <u>and</u> (ii) likely injury to the organization must be present before the lawyer’s duty to act is triggered. By using the “knows or reasonably should know” standard, the lawyer’s obligations under paragraph (b) are expanded beyond the Model Rule and the rules adopted in most jurisdictions, thereby increasing the likelihood that

* Proposed Rule 1.13, XDraft 11.1 (10/20/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
	can act on behalf of the organization as determined by applicable law.	a lawyer will go up the corporate ladder to report malfeasance or misfeasance. Finally, "lawful" has been added as a modifier of "interest" to emphasize that the lawyer's duty only to pursue the best "lawful" interests of the client organization.
(c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.	~~(c) Except as provided in paragraph (d), if~~ ~~(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and~~ ~~(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,~~ ~~then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.~~	The Commission recommends the deletion of Model Rule 1.13(c) because it is inimical to California's strong policy of protecting the confidentiality and maintaining the trust of the client. See Business & Professions Code § 6068(e)(1) and Explanation of Changes for paragraph (c), below. See also Introduction, ¶¶. 2,3. In recommending that Model Rule 1.13(c) not be adopted, the Commission urges the continuation of the longstanding approach reflected in current California Rule 3-600 of requiring the lawyer to work within the organization in situations defined in paragraph (b) and not to have unilateral discretion to report outside the organizational, conduct that would be contrary to the lawyer's duties under section 6068(e).

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068(e)(1).</u>	Paragraph (c) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (c), which correctly states California policy on protecting a client's confidential information. See Introduction, ¶¶. 2,3. See also Explanation of Changes for deleted Model Rule 1.13(c).
(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.	~~(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.~~	Because the Commission has recommended deleting Model Rule 1.13(c), see Explanation of Changes, above, it also recommends deletion of Model Rule 1.13(d), which limits the application of deleted paragraph (c).
	<u>(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.</u>	Paragraph (d) has no counterpart in the Model Rule. The Commission recommends adoption of paragraph (d) because it states, in accordance with California's strong policy of confidentiality, the appropriate course of action a lawyer should take if the lawyer is unsuccessful in persuading the organization's constituents not to pursue action that is a violation of duty or law, and likely to substantially injure the organization. In effect, it rejects the permissive disclosure procedure sanctioned by Model Rule 1.13(c). See Introduction, ¶¶. 2,3.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) ~~or (c)~~, or who <u>resigns or</u> withdraws under circumstances ~~that require or permit the lawyer to take action under either of those paragraphs,~~<u>described in paragraph (d).</u> shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	Paragraph (e) is based on Model Rule 1.13(e), but has been modified to conform to the differences between proposed paragraphs (b), (c) and (d), and Model Rule 1.13(b), (c) and (d).
(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.	(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer <u>representing the organization</u> shall explain the identity of the <u>lawyer's</u> client ~~when~~<u>whenever</u> the lawyer knows or reasonably should know that the organization's interests are adverse to those of the ~~constituents~~<u>constituent(s)</u> with whom the lawyer is dealing.	Paragraph (f) is based on Model Rule 1.13(f). The phrase "representing the organization" and the word "lawyer" have been added to clarify when the lawyer's duty under the paragraph is triggered. The second romanette clause, concerning the constituent's mistaken belief, has been added to emphasize the lawyer's duty to avoid misapprehension by an unrepresented person that the lawyer represents that person. See also proposed Rule 4.3. The second sentence of paragraph (f) is carried forward from current California rule 3-600(D). This sentence adds an affirmative duty not to mislead to the duty in the first sentence to correct the constituent's misapprehension.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.	(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules <u>1.7, 1.8.2, 1.8.6, and 1.8.7</u>. If the organization's consent to the dual representation is required by <u>Rule 1.7</u> <u>any of these Rules</u>, the consent shall be given by an appropriate official <u>or body</u> of the organization other than the individual who is to be represented, or by the shareholders.	Paragraph (g) closely follows Model Rule 1.13(g). References to several other rules that might create a dual representation conflict have been added, as well as an appropriate grammatical change ("any of these Rules"). The phrase, "or body" has been added in recognition that an organization often authorizes a group of constituents to consider and approve conflict waivers. This might be, for example, the Board of Directors or a litigation committee of the Board.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
The Entity as the Client [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.	The Entity as the Client [1] ~~An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to~~<u>This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to</u><u>This Rule also applies to governmental organizations. See Comment [13]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders held by persons acting for. In the case of other organizational clients that are not corporations, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.</u>	Although the substance of Model Rule 1.13, cmt. [1] and that of proposed Comment [1] are generally the same, the Commission recommends adoption of proposed Comment [1] because it provides better guidance than the Model Rule comment concerning the nuances of who is the client when a lawyer represents an organization. In particular, the proposed comment gives examples of the kinds of organizations within the rule, (see first sentence) and explains that an agent or fiduciary who acts on behalf of the organization is a constituent within the scope of the Rule for purposes of the matter (last sentence).

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.</u>	Comment [2] has no counterpart in the Model Rule. It has been added to improve guidance to a lawyer on the constituents within the organization with whom the lawyer should communicate with or from the lawyer should take direction.
[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.	~~[2]~~<u>[3] When one of the constituents</u> <u>When a constituent</u> of an organizational client communicates with the organization's lawyer in that ~~person's~~<u>constituent's</u> organizational capacity, the communication is protected <u>by Rule 1.6 and Business and Professions Code section 6068(e)(1).</u> Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6 <u>and Business and Professions Code section 6068(e)(1).</u> This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except ~~for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise~~<u>as</u> permitted by Rule 1.6 <u>or Business and Professions Code section 6068(e).</u>	Comment [3] is based on Model Rule 1.13, cmt. [2]. The Comment has been revised to provide appropriate reference to the governing provisions in California. The example provided in the second sentence has been deleted as unnecessary. In addition, that part of the comment that discusses a lawyer's implied authority to disclose client information has been deleted because the Commission has recommended the rejection of the implied authority provision in Model Rule 1.6 ("Confidentiality of Information").

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.	~~[3]~~ When constituents of ~~the an~~ organization make decisions for it, ~~the decisions a lawyer~~ ordinarily must ~~be accepted by~~ <u>accept those lawyer decisions</u> even if their utility or prudence is doubtful. ~~It is not within the lawyer's province to make decisions on behalf of the organization~~ concerning policy and operations, including ones entailing serious risk, ~~are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the~~. <u>A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is in a violation of law that might be imputed reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances,</u> the lawyer must proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization.	Comment [4] is based on Model Rule 1.13, cmt. [3]. The first two sentences have been modified to be in the active voice. The third sentence has been added not only to remind lawyers of their duties to inform the client of significant developments, but also to point out that, even if the ultimate decision is the client's, the lawyer generally is obligated to provide the client with information that will enable the client to make an informed decision. The last sentence has been revised to track the modifications to paragraph (b), i.e., the addition of romanettes, to better set forth the trigger for the lawyer's duties to go up the organization ladder.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. As defined in Rule 1.0(f) Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.-See Rule 1.0.1(f).</u>	Comment [5] has no counterpart in the Model Rule. The first two sentences clarify that the lawyer is under no duty to investigate his or her client to uncover evidence of wrongdoing. However, the last sentence of the Comment, taken from Model Rule 1.13, cmt. [3], is a reminder that although a lawyer must have actual knowledge of the conduct, the lawyer cannot turn a blind eye to events that indicate a breach of duty or violation of law on the part of a constituent.
	<u>[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).</u>	Comment [6] has no counterpart in the Model Rule. It has been added to clarify that, although a lawyer must have actual knowledge of the constituent's action or inaction, (see Explanation for Comment [5]), the lawyer is held to an objective standard in analyzing the situation to determine whether the constituent's action or inaction is a violation of duty or law, and is likely to substantially injure the organizational client.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of	[4~~7~~] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its <u>potential</u> consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; ~~f.~~ For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. ~~Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of~~ <u>For the responsibility of a subordinate lawyer in</u>	Comment [7] closely follows Model Rule 1.13, cmt. [4]. The last two sentences of the Model Rule comment have been deleted because they are expository practice pointers. In their place, a cross-reference to Rule 5.2, concerning the responsibilities of subordinate lawyers, has been added.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
sufficient importance to warrant doing so in the best interest of the organization.	~~representing an organization, see Rule 5.2, organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.~~	
[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.	~~[5]~~ Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.	Comment [8] is identical to Model Rule 1.13, cmt. [5].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068(e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.</u>	Comment [9] has no counterpart in the Model Rule. It has been added to explain several alternatives a lawyer might take in order to vindicate the lawyer's duty to act "in the best lawful interest of the organization" under the conditions of paragraph (b). Much of the language included here can be found in current California rule 3-600(B). See also Explanation of Changes for paragraph (b) concerning the use of a "knows or reasonably should know" standard.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8]¹ A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	~~[8]~~¹⁰ A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) ~~or (c)~~, or who <u>resigns or</u> withdraws ~~in circumstances that require or permit the lawyer to take action under either of these paragraphs~~<u>under circumstances described in paragraph (d)</u>, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal ~~and the reason for the lawyer's discharge or withdrawal~~.	Comment [10] is based on Model Rule 1.13, cmt. [8]. It is intended to provide guidance to lawyers on how to proceed under paragraph (e). The comment has been modified to conform to proposed paragraph (d), which diverges from the Model Rule. See Explanation of Changes for paragraph (e).
	<u>[11]Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.</u>	Comment [11] has no counterpart in the Model Rule. It has been added to remind lawyers that they are not authorized to substitute their judgment for that of the organization's constituents. See also Comment [4] and the Explanation of Changes thereto.

¹ **Commission Note:** The Commission recommends a slight reorganization of the proposed counterparts to Model Rule 1.13, cmts. [6] and [7]. Therefore, those Model Rule comments are found below, following proposed Comment [11].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Relation to Other Rules [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.	Relation to Other Rules ~~[6]~~^[12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules <u>1.4, 1.6, 1.8, 1.16, 3.3, or 4.1, or the 1.8 series of rules.</u> ~~Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.~~	Comment [12] is based on the first two sentences of Model Rule 1.13, cmt. [6]. References to other rules that are applicable in the organizational context and are not superseded by proposed Rule 1.13 have been added. The reference to "1.8" has been replaced by a reference to "the 1.8 series of rules" because of the numbering convention the Commission recommends for those unrelated conflicts rules. The remainder of the Model Rule comment has been deleted because it addresses paragraphs (c) and (d) of the Model Rule, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.	~~[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.~~	The Commission recommends rejection of Model Rule 1.13, cmt. [7], because it relates to paragraphs (c) and (d) of Model Rule 1.13, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).</u>	Comment [13] has no counterpart in the Model Rule. It has been added to provide guidance to lawyers proceeding under paragraph (d).

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Government Agency [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.	Governmental Agency Organizations <del>[9]</del>~~[14]~~ ~~The duty defined in this Rule applies to In representing governmental organizations. Defining, it may be more difficult to define~~ precisely the identity of the client and <del>prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter</del>~~the lawyer's obligations. However, those matters are~~ beyond the scope of these Rules. ~~[See Scope [18].]~~ Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. ~~For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.~~ Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. ~~Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.~~ In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. ~~See Scope~~ This Rule does not limit that authority.	The title of this section of the Comment has been revised to conform to the terms used in the following comment. Comment [14] is based on Model Rule 1.13, cmt. [9], with some revisions. The first two sentences have been revised for clarity. The references to "Scope [18]" and "Scope" have been deleted because the Commission does not recommend the adoption of the Scope section of the Model Rules. See Introduction and Explanation of Changes for proposed Rule 1.0 ("Purpose and Scope of the Rules of Professional Conduct"). The Commission recommends substituting Rule 1.0 for the concepts found in the Preamble and Scope of the Model Rules. Finally, the next to last sentence of the Model Rule comment has been deleted. The Commission has recommended that Model Rule 1.13(c) be rejected, so disclosure outside the organization is not permitted.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e)(1) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.</u>	Comment [15] has no counterpart in the Model Rule. It has been added to clarify that although proposed Rule 1.13 does not permit reporting outside an organizational client, a governmental organization can establish procedures for lawyers to report misconduct within the organization.
Clarifying the Lawyer's Role [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.	Clarifying the Lawyer's Role ~~[10]~~¹⁶ There are times when <u>the lawyer knows or reasonably should know that</u> the organization's interest may be or become adverse to those of one or more of its constituents <u>or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent.</u> ~~↓ Under paragraph (f),~~ in such circumstances the lawyer ~~should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest,~~ <u>must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the</u>	Comment [16] is based on Model Rule 1.13, cmt. [10]. The Comment has been revised to conform to the revisions made to Model Rule 1.13(f). See Explanation of Changes for paragraph (f), above.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>constituent</u> that the lawyer ~~cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions~~<u>does not represent the constituent and that communications</u> between the lawyer ~~for and the constituent are not confidential as to~~ the organization and ~~the individual~~ may <u>be disclosed to the organization or used for the benefit of the organization. See Rule 4.3.</u>~~not be privileged.~~	
[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.	~~[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.~~	The Commission recommends deleting Model Rule 1.13, cmt. [11], because it states the obvious.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Dual Representation [12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.	Dual Representation [12~~17~~] Paragraph (g) ~~recognizes that a~~allows lawyer ~~for~~ to represent both an organization ~~may also represent a principal officer or major shareholder.~~ and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.	Comments [17] and [18] expand upon the terse Model Rule Comment [12] to provide guidance concerning an issue that often arises. The guidance provided in these comments is derived from State Bar Formal Opn. 1999-153.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[18]This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. ~~{(See State Bar Formal Opn. 2003-163.)}~~ In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See <i>Goldstein v. Lees</i> (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; <i>In re Banks</i> (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)</u>	See Explanation of Changes for Comment [17]. The case law citations after the next to last sentence are intended to provide specific examples of the kinds of situations that often require resolution in the organizational context. The last sentence replaces Model Rule 1.13, cmts. [13] and [14], concerning derivative actions. The Commission recommends the rejection of those comments in favor of this sentence and citation. Suitable guidance concerning a lawyer's duties when involved in a derivative action is beyond the scope of a rule comment.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Derivative Actions [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.	~~Derivative Actions~~ ~~[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.~~	See Explanation of Changes for Comment [18], paragraph 3.
[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.	~~[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.~~	See Explanation of Changes for Comment [18], paragraph 3.

Rule ~~3-600~~1.13 Organization as Client
(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A) In representing~~ A lawyer employed or retained by an organization, ~~a member~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~highest~~ duly authorized ~~officer, employee, body, or constituent~~ constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068(e)(1).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the
- organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's *directors, officers, employees, members, shareholders, or other constituents*, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse *to* those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the *consent shall be given by an appropriate* official or body of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

- [1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [13]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.
- [2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.
- [3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the communication is protected by Rule 1.6 and Business and Professions Code section 6068(e)(1). Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents

are covered by Rule 1.6 and section 6068(e)(1). This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except as permitted by Rule 1.6 or by section 6068(e).

- [4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.
- [5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the

constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[9] ~~(B) If~~ Even in circumstances where a ~~member~~ lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an ~~organization~~ organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that ~~is~~ the lawyer knows or ~~may be~~ reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, ~~but the lawyer does not know or in a manner which~~ reasonably should know that such conduct is likely to result in substantial injury to the organization, ~~the member shall~~ paragraph (b) does not violate his or her duty of protecting all confidential information as provided apply. Nevertheless, in ~~Business and Professions Code section 6068~~ such circumstances, ~~subdivision (e). Subject~~ subject to

Business and Professions Code section 6068, ~~subdivision (e)~~(1), the ~~member~~lawyer may take such actions as appear to the ~~member~~lawyer to be in the best lawful interest of the organization. Such actions may include among others: (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.

~~(1) — Urging reconsideration of the matter while explaining its likely consequences to the organization; or~~

~~(2) — Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.~~

~~(C) — If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.~~

~~(D) — In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into~~

~~believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.~~

[10] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal and the reason for the lawyer's discharge or withdrawal.

[11] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

[12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.6, 1.16, 3.3, [4.1], or the 1.8 series of Rules.

[13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Governmental Organizations

[14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by

the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of *Business and Professions Code section 6068(e)(1)* or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

[16] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communications between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3

Dual Representation

(E) A member representing^[17] Paragraph (g) allows lawyers to represent both an organization ~~may also represent any~~ and a constituent of its ~~directors, officers, employees, members, shareholders, or other constituents, subject to an organization in the provisions of rule 3-310~~ same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. ¶ Paragraph (g) requires that the organization's consent to the dual representation ~~is required by rule 3-310, of the consent shall be given by an appropriate organization and a constituent of the organization must be provided by someone other than the individual or constituent who is to be represented.~~ When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the ~~shareholder(s)~~ rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.

Discussion:-

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to ~~prohibit members from representing both an organization and other parties connected with it, as for instance (as simply~~

~~one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

[18] This Rule 3-600 ~~is~~ does not intended to create or to validate artificial distinctions between entities ~~prohibit lawyers from representing both an organization and their officers, employees, or members, nor is it the purpose a constituent of an organization in separate matters, so long as the rule to deny lawyer has addressed the existence or importance conflicts of such formal distinctions interest that may arise.~~ In dealing with a close corporation or small association, ~~members~~ lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, ~~members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty~~ a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in ~~perceiving their correct duty matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law.~~ (See ~~People ex rel Deukmejian v. Brown (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.~~ Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

Rule 1.13 Organization as Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code section 6068(e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official or body of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

- [1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [14]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.
- [2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.
- [3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the communication is protected by Business and Professions Code section 6068(e) and Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by section

6068(e) and Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information protected by Business and Professions Code section 6068(e) and Rule 1.6 except as permitted by or by section 6068(e) and Rule 1.6.

- [4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.
- [5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the

constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068(e), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while

explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.

- [10] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal and the reason for the lawyer's discharge or withdrawal.
- [11] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

- [12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.6, 1.16, 3.3, or the 1.8 series of Rules.

- [13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Governmental Organizations

- [14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by

the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

- [15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

- [16] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communications between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3

Dual Representation

- [17] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.
- [18] This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior*

Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105. Similar issues can arise in a derivative action. See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		COPRAC agrees that the rule should not permit a lawyer to report outside of the organization as the Model Rule permits. To do so would be contrary to California's statutory protections and historical view on the importance of confidentiality. However, the addition of the objective standard in paragraph (b) is troublesome in that a lawyer could be subject to discipline if he or she "reasonably should have known" that an act is illegal and likely to result in substantial injury to the organization. This language goes beyond both the current California rule and the Model Rule and appears to be unprecedented. What constitutes "reasonably should have known"? Will a tax lawyer be deemed to "reasonably should have known" that an action violates antitrust laws if it is outside the scope of the matter on which he or she is working? If he or she is working for a national firm with lawyers who practice in such areas, will the lawyer be held to a higher standard (essentially imputing the knowledge of others at the firm to that lawyer)?	No response required. The Commission disagreed and did not make any revisions to the Rule. The Commission believes that requiring a lawyer to act when the lawyer has <i>actual knowledge</i> of a constituent's act or failure to act in a matter <i>that relates to the lawyer's representation</i> and knows or reasonably should know that the conduct meets the criteria under paragraph (b) strikes the proper balance in protecting the organization and the public. Having an objective rather than an actual knowledge standard alerts lawyers that ignoring violations of law that will likely injure the organization is no longer an option. "Reasonably should know" is a defined term in the Rules and means that a lawyer of reasonable prudence and competence would ascertain the matter at issue. See Proposed Rule 1.0(j). "Reasonably" is also a defined term and refers to conduct of a reasonable prudent and competent lawyer. Proposed Rule 1.0(h). Comment [6] (rather than Comment [5]) explains the

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.13. Organization as Client.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 1**
Disagree = 0
Modify = 3
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [5] says that a lawyer is not required to audit the client's activities or initiate an investigation, but that statement is directed to the portion of paragraph (b) that deals with knowledge of the conduct (not the consequences thereof). For these reasons, COPRAC believes that knowledge also should be the standard with respect to the consequences of the conduct. Further, paragraph (b) mandates that a lawyer refer such matters to a higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." While urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed in Comment [7], it is only mentioned as a possibility "in some circumstances." COPRAC recognizes that some occasions may arise in which reporting up the ladder may be necessary, however, contrary to the suggestion of Comment [7], COPRAC believes that in certain situations, urging reconsideration should be the first response. If the general rule becomes reporting up the ladder, the free flow of communication that is essential to the attorney-client relationship will most certainly be damaged, possibly beyond repair, as the	"reasonably should know" standard in the context of the Rule and advises lawyers to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria under paragraph (b) that requires action on the lawyer's part. See response to Orange County Bar Association (above).

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					constituents with whom the lawyer communicates on a regular basis will think twice about speaking openly with counsel. Consequently, COPRAC believes that urging reconsideration should be included in the text of the rule itself as an optional first step, except in exigent circumstances. Similarly, while paragraph (g) requires independent consent for dual representation, Comment [17] recognizes this is not always possible and, therefore, not always required. COPRAC believes that this exception also should be included in the text of the rule. With regard to Comment [17], COPRAC notes that the third sentence appears to be much more restrictive than the language of paragraph (g) that it is interpreting. Paragraph (g) simply permits shareholders to provide consent to dual representation, whereas Comment [17] implies that shareholders may consent only when there is no official to consent and the board is deadlocked. Neither condition is mandated by the rule, and there is no reason for both to be required.	No change in paragraph (g) is necessary. Paragraph (g) closely tracks Model Rule 1.13(g) and Comment [17], which is derived from State Bar Formal Opinion 1993-153, is sufficient to point out there are circumstances when independent consent may not be possible. No change is necessary. The third sentence in Comment [17] is consistent with paragraph (g). Neither the Rule nor the Comment refers to shareholders. The Rule refers to other official or body of the organization while Comment [17] refers to other constituent of the organization.

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Finally, the last sentence of paragraph (d) says that "[t]he lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16." Comment [13] attempts to rephrase this in the following terms: "Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16." However, paragraph (d) does not seem to "confirm" such a restriction, but rather merely notes that the duty to resign or withdraw may be a permissible response. As the sentence appears to be unnecessary to Comment [13], COPRAC suggests that it be deleted.	The Commission agreed and has changed the last sentence in Comment [13] to read: Paragraph (d) confirms that the lawyer's response may include the right, and where appropriate, the duty to resign or withdraw in accordance with Rule 1.6."
2	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	NI	Yes		It is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.	No response required.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.13(b)	The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.	The Commission disagrees and no change to paragraph (b) has been made. The quoted phrase comes directly from Model Rule 1.13(b) and is intended to include constituents of the organization who are not officers or employees.

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment's to the rule distinguish the circumstances requiring an in-house counsel's withdrawal from representation of the organization to the in-house counsel's resignation. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.	Paragraph (a) expressly provides that the rule applies to lawyers "employed or retained" by the organization. The clear intent of the rule is to apply to all lawyers who represent organizational clients including in-house counsel. Paragraph (d) provides that the lawyer's response "may include the lawyer's right and, where appropriate, duty to resign or withdraw <u>in accordance with rule 1.16.</u>" Rule 1.16 applies to in-house and outside counsel. Thus, the appropriate response takes into account the circumstances and what is in the best lawful interests of the organization. Distinguishing the circumstances requiring an in-house counsel's withdrawal from the representation from resignation in the comments to the rule is not necessary and would vary depending on the specific circumstances. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Orange County Bar Association ("OCBA")	M	Yes	1.13(b)	We believe Proposed Rule 1.13 is inconsistent with the position taken in Proposed Rule 1.6 concerning confidential client information. Proposed Rule 1.6(b) restricts permissible disclosure of confidential client information to five limited circumstances, but does not mandate such disclosures if the lawyer chooses not to reveal such information. Further, even in situations where the lawyer reasonably believes that a criminal act by the client is likely to result in substantial bodily harm or death, Proposed Rule 1.6 first requires that the lawyer attempt to persuade the client not to take such action, if doing so is reasonable under the circumstances. In contrast, Proposed Rule 1.13(b) <i>mandates</i> that a lawyer refer certain matters to higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." Urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed not in the rule itself, but rather in Comment [7] to Proposed Rule 1.13 as a possibility "in some circumstances," <i>i.e.</i> , as the "exception to the rule" of reporting up the ladder.	The Commission disagrees and has not made the requested changes to the rule. Rule 1.13 is consistent with proposed Rule 1.6. Indeed, paragraph (c) provides that in taking any action pursuant to paragraph (b) the lawyer shall not violate his or her duty to protect all confidential client information. Moreover, reporting up the ladder within the client organization does not violate Rule 1.6 because the client is the organization and the report is made only to the organization. Further, paragraph (b) does not mandate "up the ladder" reporting as the lawyer's first response. In the circumstances that trigger a lawyer's duty under paragraph (b), the lawyer's response is to proceed in the best lawful interests of the organization, which may include urging reconsideration. Comment [7] does not suggest that asking a constituent to reconsider the matter is an exception to the lawyer's obligations under paragraph (b). Paragraph (b) obligates the lawyer to refer the matter to higher authority unless the lawyer reasonably believes it is not necessary in the best lawful interests of the organization to do so. Thus, the Rule does not mandate that a lawyer immediately report up the ladder rather than urging reconsideration as the first step. The Commission disagreed that urging reconsideration as a prerequisite to reporting up the ladder needs to be expressly stated in paragraph (b)

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [14], [15]	The OCBA recognizes that the five limited circumstances in Proposed Rule 1.6(b) anticipate disclosure to a non-client, whereas Proposed Rule 1.13(b) provides disclosure to a higher authority within the client organization, although Comments [14] and [15] to Proposed Rule 1.13 note that, at times, such a higher authority may be outside of the organization. Nonetheless, suggesting that a lawyer immediately report “up the ladder” rather than urging reconsideration as an initial step would conflict with the policies furthered by the duty of confidentiality as set forth in Comment [2] to Proposed Rule 1.6. The policies furthered by the duty of confidentiality include encouraging the client “to seek legal assistance and to communicate fully and frankly with the lawyer.” The Comment recognizes that “[t]he lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.” However, if the lawyer’s first response is the report up the ladder, constituents likely will not advise the lawyer of matters he or she may need to know in connection with the representation, chilling the communication necessary to such representation since the information needed usually will not be provided by the highest authority in the organization, but by its lower-	The Commission believes the proposed Rule better promotes the policies furthered by the duty of confidentiality owed to the organization as described in Rule 1.6, Comment [2]. Comments [14] and [15] provide guidance on identifying the government client including the highest authority for purposes of the rule and do not detract from Rule 1.6.

Rule 1.13. Organization as Client. [Sorted by Commenter]						TOTAL = 5 Agree = 1 Disagree = 0 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					level constituents. We believe that urging reconsideration should be, absent exigent circumstances, a prerequisite to reporting up the ladder and should be expressly included as such in the text of the rule itself. Such a step is particularly important, as the lawyer: (a) may be mistaken about what is in the best interest of the organization; (b) may not understand the constituent's reasons for taking such actions; or (c) may be able to persuade the constituent that his or her intended actions would be ill-advised.	
5	San Diego County Bar Association	A	Yes		Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code section 6068(e) on confidentiality.	No response required.

Rule 1.13: Organization as 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.)

Arizona has adopted the 2003 version of ABA Model Rule 1.13 verbatim. Regarding entity clients, the Arizona Legislature has also enacted the following statute, A.R.S. §12-2234, to codify the attorney-client privilege for corporations and other entities in civil cases:

(B) . . . [A]ny communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.

2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

(C) The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

The statute was passed in reaction to the Arizona Supreme Court's decision in *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (Ariz. 1993), which rejected the federal courts' broad view of the attorney-client privilege for corporations announced in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The *Samaritan* court instead adopted a "functional" test for the attorney-client privilege and required a defendant hospital to disclose information that the defendant contended was privileged. The following year, after intense lobbying by corporate interests, the Arizona Legislature enacted

§12-2234, which effectively overruled the *Samaritan* opinion and adopted *Upjohn*. However, in *Roman Catholic Diocese of Phoenix v. Superior Court*, 62 P.3d 970 (Ariz. App. 2003), a lower appellate court has held that §12-2334 applies only in civil proceedings and that *Samaritan* remains good law in criminal cases.

California: Rule 3-600 substantially follows the positions in Rule 1.13 as originally adopted. Among other things, it does not create an exception to confidentiality when conditions like those in Model Rule 1.13(c) are present but says only that the lawyer may, or must, resign.

District of Columbia omits paragraphs (c), (d), and (e) of ABA Model Rule 1.13.

Georgia: Rule 1.13 tracks the pre-2003 version of ABA Model Rule 1.13 verbatim, but Georgia adds the following paragraph (f): “‘Organization’ as used herein includes governmental entities.”

Maryland, Michigan, and New Jersey all retain verbatim the Kutak Commission’s 1981 draft of Rule 1.13(c), which provides that “remedial action” may, if necessary, include “revealing information otherwise protected by Rule 1.6” — but “only if the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interest of the organization.”

Michigan: Rule 1.13(a) tracks the Kutak Commission’s 1980 draft by providing that a lawyer for an organization represents the organization “as distinct from” its directors, officers, employees, members, shareholders, or other constituents. Moreover, Michigan Rule 1.13(f) provides as follows:

For purposes of this rule “organization” includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Minnesota effectively deletes the requirement in ABA Rule 1.13(c)(2) that the lawyer “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.” Minnesota also deletes ABA Model Rule 1.13(d).

Missouri: Missouri retains the 2002 version of ABA Model Rule 1.13 verbatim and thus has no equivalent to paragraphs (d) and (e) of the current version of ABA Model Rule 1.13.

New Jersey: Rule 1.13(a), which borrows from the Kutak Commission's 1980 draft, states that a lawyer employed or retained to represent an organization represents the organization "as distinct from" its directors, officers, employees, members, shareholders or other constituents. In addition, New Jersey adds that for purposes of Rules 4.2 and 4.3 "the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group," which is defined as follows:

Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

New Jersey Rule 1.13(b) retains verbatim the 1983 version of ABA Model Rule 1.13(b). New Jersey Rule 1.13(c) retains verbatim the Kutak Commission's 1981 draft — see Maryland entry above. New Jersey has not adopted ABA Model Rules 1.13(d) and (e), and New Jersey's equivalent to ABA Model Rule 1.13(f) provides that in dealing with an organization's directors, officers,

employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer "believes that such explanation is necessary to avoid misunderstanding on their part." Finally, New Jersey also adds a subparagraph (f) that defines the term "organization" in Rule 1.13 to include "any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or nonprofit organization."

New York: In the rules effective April 1, 2009, Rule 1.13 is substantially similar to the pre-2003 version of Model Rule 1.13.

Ohio: Rule 1.13(b) adds "or reasonably should know" after "knows" in the first sentence. Ohio omits ABA Model Rules 1.13(c), (d), and (e). Ohio Rule 1.13(c) provides: "The discretion or duty of the lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c)."

Pennsylvania retains the 1983 version of ABA Model Rule 1.13(b) essentially verbatim, and retains the 2002 version of ABA Model Rule 1.13(c).

Texas: Rule 1.12(a) says that a lawyer retained or employed by an organization "represents the entity." Texas Rule 1.12(d) relieves the lawyer of responsibilities to the entity when the lawyer properly withdraws from the representation. Texas Rule 1.12(e) (equivalent to ABA Model Rule 1.13(f)) requires a

lawyer to explain the identity of the client “when explanation appears reasonably necessary to avoid misunderstanding. . . .”

Proposed Rule 1.14 [n/a]

“Client with Diminished Capacity”

(XDraft #14, 2/27/10)

Summary: This proposed new rule addresses the special circumstances applicable when a lawyer represents a client who has diminished capacity. It permits, but does not require, a lawyer to notify an individual or organization that has the ability to take action to protect a client who is at risk of undue influence or other harm. The rule excludes representation of minors, clients in criminal matter, and persons who are the subject of conservatorship proceedings.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code §6068(e); Family Code §3150; Welfare & Institutions Code §§300, 602, 675 et seq., §§5000-5579; and Probate Code, Division 4, Parts 1-8, §§1400-3803; Civil Code § 51 (Unruh Act).

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 4
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

(See the introduction in the Model Rule comparison chart.)

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Representatives of the State Bar's Trusts & Estates Section Executive Committee have appeared at Commission meetings to discuss this rule and provided valuable assistance to the Commission.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the Introduction to the Model Rule comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule Proposed Rule 1.14* Client With Diminished Capacity

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: the Rule (1) carves out an exception for minors, defendants in criminal matters and persons who are the subject of guardianship or conservatorship proceedings because the rights of such individuals are separately regulated by California statutes; (2) establishes a stricter standard for when a lawyer can reveal confidential information to protect the client's interests, i.e., "significantly diminished capacity"; (3) provides more detailed guidance regarding what constitutes "significantly diminished capacity"; (4) provides that acting pursuant to paragraph (b) of the proposed Rule to reveal confidential client information in the client's interests is a last resort, and enumerates factors the lawyer should consider before taking such action; (5) emphasizes that the nature and extent of any disclosure pursuant to paragraph (b) is strictly circumscribed; and (6) clarifies that taking action pursuant to paragraph (b) is permissive, not mandatory, and that a lawyer is not subject to discipline for failing to take such action.

Minority. A minority of the Commission believes that the policy of abrogating confidentiality reflected in Model Rule 1.14 is the wrong policy for California because it impairs the trust relationship between clients and lawyers. In particular, the Commission's nonlawyer, public member asserts that the proposed rule wrongly assumes that all lawyers possess the expertise of a psychiatric professional necessary to make a threshold determination that a client's mental capacity is "significantly diminished." Absent this expertise, it is

* Proposed Rule 1.14, XDraft 14 (2/27/10).

INTRODUCTION (Continued):

argued that even well-intentioned lawyers will inevitably breach confidentiality to “protect the client” but that the actual result will be serious adverse consequences for the client. The proposed Rule is also opposed based on the following: (1) paragraph (b) does not impose a primary requirement that a lawyer act in a client’s best interest; (2) the Rule excludes representations of a minor, a client in a criminal matter, or a conservatee and this has an unintended effect of chilling the consideration of protective action by the lawyers for those clients; (3) the Rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the Rule does not require a lawyer to ask for a client’s permission before contacting a third party; and (5) the comments to the Rule fail to warn lawyers that the loss of trust and candor in the client-lawyer relationship, following a disclosure of confidential information, may be so severe that it warrants mandatory withdrawal from the client’s representation

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.	(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of ~~minority~~, mental impairment or ~~for~~ some other reason, the lawyer shall, as far as reasonably possible, maintain a normal ~~client-lawyer~~ <u>client</u> relationship with the client.	<u>Paragraph (a)</u> tracks the language of Model Rule 1.14, except that the reference in section (a) to diminished capacity due to "minority" has been deleted because under California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes. See, e.g., Family Code §3150, Welfare and Institutions Code §§300, 602, 675 et seq. See also Explanation of Changes for paragraph (b) and Comment [9]. The term "client-lawyer" has been changed to "lawyer-client" to conform with California Rule style.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.	~~(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.~~ <u>(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes</u> <u>(i) that the client has significantly diminished</u>	<u>Paragraph (b).</u> The prefatory language in paragraph (b), which permits a lawyer to take limited protective action on behalf of a client with significantly diminished capacity, excludes from its scope lawyers representing (1) minors, (2) criminal defendants and (3) persons who are the subject of conservatorship proceedings because under California law, The rights of such persons are regulated under other statutory schemes. (Family Code sec. 3150 and Welfare and Institutions Code §§300, 602, 675 et seq. in the case of minors; Penal Code section 1368 et seq. in the case of criminal defendants with diminished capacity, and the Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579, or Probate Code, Division 4, Parts 1-8, §§1400-3803 in the case of persons who are under conservatorship or who are the subject of a

* Proposed Rule 1.14, XDraft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity.</u> (ii) <u>the client is at risk of substantial physical, financial or other harm unless action is taken, and</u> (iii) <u>the client cannot adequately act in his or her own interest,</u> <u>the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.</u>	conservatorship or protective proceedings under those statutes). Subparagraphs (b)(ii) and (iii) track the language of Model Rule 1.14(b) but break out the two criteria into separate subparagraphs for ease of reference. In addition, subparagraph (b)(i) provides a clearer standard by requiring that the client have “significantly diminished capacity,” rather than the Model Rule’s reference to the loose concept of “diminished capacity.” Subparagraph (b)(i) also focuses the inquiry on whether the impairment specifically affects the client’s ability to make decisions in connection with the representation in order to increase client protection in the context of the lawyer-client relationship. Finally, the last, unnumbered subparagraph of paragraph (b) limits permissible action by the lawyer to notification of a person or organization that can take action to protect the client. The Commission voted to omit Model Rule 1.14’s reference to permitting the lawyer to seek appointment of a guardian <i>ad litem</i>, conservator or guardian because a lawyer who took such action would be engaging in conduct adverse to the client and that typically would require the lawyer to withdraw from the representation. Instead, the lawyer can address the problem by notifying an individual or organization with the ability to take action to protect the client, as provided in the proposed Rule.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.	(c) Information relating to ~~the representation of~~ a client with diminished capacity is protected by Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule ~~Rule 1.6(a)~~ to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's ~~interests~~interest, given the information known to the lawyer at the time of the disclosure.	<u>Paragraph (c)</u> refers to information protected under both Business and Professions Code section 6068(e) and Rule 1.6, because both address the lawyer's obligation to protect client confidential information under California law. Similar to the Model Rule approach, a lawyer is permitted to reveal information under the concept of "implied authorization." However, unlike the Model Rule approach, which implements "implied authorization" as a part of the confidentiality rule, Rule 1.6, the Commission is recommending that the concept of "implied authorization" only be recognized in this Rule. The Commission's more limited approach reflects California's strong policy in favor of protecting the client's confidential information. The Commission has determined that neither an "implied authorization" rubric nor a specific express exception to confidentiality in either Rule 1.6 or Business and Professions Code section 6068(e) is necessary to effectuate the purposes of proposed Rule 1.14. Analytically, the Commission does not regard the permissive disclosure of information pursuant to Rule 1.14 as an exception to the duty of confidentiality. Under the concept of "implied authorization," a lawyer's disclosure under Rule 1.14 to protect a client with diminished capacity is an act of loyalty and advocacy intended to further the client's interests. Ordinarily, a lawyer seeks the client's informed consent to disclose information in furtherance of the client's representation but when a client has a diminished capacity, obtaining the client's informed consent may not be possible. The

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
		Commission's proposed Rule 1.14 recognizes that fact and reflects a policy determination that "implied authorization" is a rule of necessity that is consistent with loyalty and advocacy rather than a breach of the duty of confidentiality.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.	[1] <u>The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests.</u> The normal ~~client-lawyer-client~~ relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client ~~is a minor or~~ suffers from a diminished mental capacity, however, maintaining the ordinary ~~client-lawyer-client~~ relationship may not be possible in all respects. In particular, a ~~severely incapacitated person~~<u>client with significantly diminished capacity</u> may ~~have no power~~<u>not be competent</u> to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about <u>many</u> matters affecting the client's own well-being. For example, ~~children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that~~some persons of advanced age ~~can be quite~~<u>are</u> capable of handling routine financial matters ~~while needing~~<u>but may need</u> special legal protection concerning major transactions. <u>In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy</u>	Comment [1] is based on Model Rule 1.14, cmt. [1], but (1) adds an introductory sentence to identify the purposes of the rule and (2) omits the reference to minors, representation of whom is addressed in the Family Code and the Welfare and Institutions Code. See Explanation Of Changes to paragraph (a) and the prefatory language of paragraph (b), above. The Commission has also substituted the standard it recommends in the Rule itself, "significantly diminished capacity," for the Model Rule phrase, "severely incapacitated person," which neither appears in the black letter of Model Rule 1.14 nor is defined. The remaining changes are stylistic. The last sentence was added in response to public comment. The Commission agreed that it was appropriate to remind lawyers of their obligations under the Unruh Act in this Rule. The term "lawyer-client" has been substituted for "client-lawyer" throughout the Rule to conform to California rule style.

* Proposed Rule 1.14, XDraft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).	
[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.	[2] The fact that a client suffers ~~a disability~~from diminished capacity does not ~~diminish~~affect the lawyer's obligation to treat the client with attention and respect. Even if the ~~person~~client has a legal representative, the lawyer should as far as possible accord the represented person the <u>full</u> status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.	Comment [2] uses the term "diminished capacity" rather than the Model Rule's term "disability" for consistency of reference with the title of the Rule. The remainder of the Comment tracks Model Rule 1.14, cmt. [2], except that a sentence has been added to clarify that the lawyer may need to adapt the method of communication to the client's capacity to comprehend and deliberate.
	[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action	Except for its last sentence, which is based on the last sentence of Model Rule 1.14, cmt. [6], Comment [3] has no Model Rule counterpart. It has been added to provide much-needed clarity to the significantly diminished capacity standard set forth in section (b)(1). It accomplishes this by reference to standards articulated in the Probate Code and by enumerating some of the factors to be considered and steps that may be taken in determining whether the client meets the significantly diminished capacity standard. The last clause of the Comment cautions that the lawyer must take care at all times to maintain lawyer-client confidentiality.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.</u>	Following public comment, the Commission determined that including the first sentence of Model Rule 1.14, cmt. [6], would be misleading and potentially confusing. Because the first two factors are covered by the Probate Code and the second two factors are inconsistent with the Probate Code, inclusion of the ABA language could create ambiguity as to the appropriate standard to apply and allow a lawyer to base a decision on the ABA factors, which are arguably too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality.
	<p><u>[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:</u></p> <p class="list-item-l1">(1) <u>the amount of time that the lawyer has to make a decision about disclosure;</u></p> <p class="list-item-l1">(2) <u>whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client</u></p>	Comment [4] has been added to emphasize that the lawyer's disclosure to a third party of a client's perceived significant diminished capacity should be a last resort, by identifying the steps to be taken and the factors to be considered before making such disclosure. The Comment is an attempt to balance the lawyer's obligation to protect the client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>may perceive as adverse to her or his interests;</u> (3) <u>whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;</u> (4) <u>the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and</u> (5) <u>the nature and extent of information that must be disclosed to prevent the risk of harm to the client.</u> <u>A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.</u>	

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.	[35] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally ~~does~~<u>will</u> not affect the applicability of the ~~attorney~~<u>lawyer</u>-client ~~evidentiary~~ privilege. ~~Nevertheless~~<u>See Evidence Code section 952.</u> ~~However,~~ the lawyer must keep the client's interests foremost and, except ~~for protective action~~<u>as</u> authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.	Comment [5] is based on Model Rule 1.14, Cmt. [3], but has been modified to add a reference to California Evidence Code 952, which governs in these situations.
[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).	~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~	Model Rule 1.14, Cmt. [4], has been deleted. As noted above, (see Explanation of Changes for paragraphs (a) and (b)), the rights of minors and conservatees are addressed in California statutes. See also Proposed Comment [9].

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
Taking Protective Action [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.	~~Taking Protective Action~~ ~~[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph~~Paragraph (b) permits the lawyer to take protective measures deemed necessary <u>to protect the client's interests</u>. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of ~~intruding~~<u>minimizing intrusion</u> into the client's decisionmaking autonomy ~~to the least extent feasible~~, maximizing client capacities and respecting the client's family and social connections.	Comment [6] is based on the latter half of Model Rule 1.14, Cmt. [5], which addresses section (b) of the Rule. The first part of the Model Rule comment merely repeats the language of the black letter rule as the predicate for the substantive comment and has been eliminated as surplusage.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.	~~[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.~~	The last sentence from MR 1.14, cmt. [6], as revised, has been inserted in Comment [3], above. See Explanation of Changes for Comment [3] concerning the deletion of the first sentence of MR 1.14, cmt. [6].
	<u>[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.</u>	Comment [7] has no Model Rule counterpart. It sets forth the rationale for paragraph (b) and also clarifies that a lawyer who makes a permitted disclosure pursuant to paragraph (b) is not subject to discipline.
[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian	~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian~~	Model Rule 1.14, Cmt. [7], has been deleted. As noted above, (see Explanation of Changes for paragraph (b)), the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian <i>ad litem</i> or conservator to be appointed for the client. Instead, the Commission has proposed substituting Comment [8], which clarifies that that this Rule does not permit a lawyer to file for appointment of a guardian or conservator where such conduct is not otherwise

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.	~~or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client. [8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.~~	permitted by Rule 1.7, or to take any action adverse to the client.
Disclosure of the Client's Condition [8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in	~~Disclosure of the Client's Condition~~ ~~[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in~~	Model Rule 1.14, cmt. [8], has been deleted. As noted above, (see Explanation of Changes for paragraph (c)), there is no counterpart in Business & Professions Code § 6068(e) to Model Rule 1.6's concept of "implied authorization," so this Comment does not clarify the strictly limited disclosure permitted under paragraph (b).

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.	~~consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.~~	
	[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code § 3150, Welfare and Institutions Code §§300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579; Probate Code, Division 4, Parts 1-8, §§1400-3803.	Comment [9], which has no counterpart in the Model Rule, explains that certain categories of person have been excluded from the rule because the rights of such persons are addressed in specific California statutes. See also Explanation of Changes for paragraphs (b) and (c).
	[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.	Comment [10] has no counterpart in Model Rule 1.14. It clarifies that the course of conduct described in paragraph (b) is not mandatory and that a lawyer is not subject to discipline for violation of the rule for failing to take action under paragraph (b).

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
Emergency Legal Assistance [9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.	~~Emergency Legal Assistance~~ ~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~	The Commission recommends deleting Comments [9] and [10], both of which are addressed to providing emergency legal assistance to a non-client. Comments that are concerned with a lawyer's interactions with non-clients have no place in a Rule that has been carefully crafted to balance the lawyer's obligation to protect a client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.	~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~	

Rule 1.14 Client with Diminished Capacity

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes
 - (1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,
 - (2) the client is at risk of substantial physical, financial or other harm unless action is taken, and
 - (3) the client cannot adequately act in his or her own interest,the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.
- (c) Information relating to ~~the representation of~~ a client with diminished capacity is protected by ~~Rule 1.6 and~~ Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's

interest, given the information known to the lawyer at the time of the disclosure.

COMMENT

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the

lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

- (1) the amount of time that the lawyer has to make a decision about disclosure;

- (2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;
- (3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;
- (4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except as authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members; using a reconsideration period to permit

clarification or improvement of circumstances; or using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) ~~who is~~ under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

[10] A lawyer is permitted to act under paragraph (b) but is never required

to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule –Clean Version)

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes
 - (1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,
 - (2) the client is at risk of substantial physical, financial or other harm unless action is taken, and
 - (3) the client cannot adequately act in his or her own interest,the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.
- (c) Information relating to a client with diminished capacity is protected by Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interest, given the information known to the lawyer at the time of the disclosure.

COMMENT

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), “significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation” shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client’s permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

- (3) whether the disclosure is likely to lead to proceedings which could have an effect on the client’s rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;
- (4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client’s interests foremost and, except as authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client’s behalf.

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client’s interests. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any

protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 7 Agree = 5 Disagree = 2 Modify = 0 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Allphin, Sondra J.	A	No		I strongly support this proposed rule because I believe it will make it easier for attorneys to protect their clients who have developed diminished capacity.	No response required.
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.14 and the Comments to the Rule.	No response required.
3	MacCarley, Lisa	D	No		The rule is wrong and should not be adopted, or better yet, should not be applicable to court appointed counsel as such counsel must have a separate role and must not become a tool to promote the agendas of those who are committing fraud.	The reasons stated for the commenter's opposition suggests a misunderstanding of the proposed rule. Under paragraph (b), the proposed rule would establish a new permissive standard allowing a lawyer to take action to prevent wrongful conduct, such as fraud, that threatens the interests of a client with diminished capacity. Also, while the rule does not exempt all appointed counsel, a lawyer who represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding is exempted under the terms of paragraph (b), in part, because the rights of such persons are protected under specifically applicable statutory schemes,
4	Office of Chief Trial Counsel	D	Yes		OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the confidentiality rules.	The Commission received a substantial amount of input from many stakeholders who confront the problems this Rule is intended to address. The Rule is substantially narrower than Model Rule 1.14 in the discretion permitted a lawyer who takes action

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 5
Disagree = 2
Modify = 0
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.14(b)	Subparagraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified assessment to permit the attorney to reveal a client's confidences. Further, this rule appears to be broadening the exceptions to confidentiality beyond what is permitted by Business & Professions Code section 6068(e). The Comments are more appropriate for treatises, law review articles, and ethics opinions.	pursuant to it. See previous response of the Commission. The Rule expressly limits the actions a lawyer might take to what a lawyer is impliedly permitted to do under current law to advance the interests of the client. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
				Comment [1]	Comment [1] is problematic as to when and how to utilize the rule. When and who decides a client is not capable of making decisions - - and how and to whom does the attorney reveal this? If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client's behalf as to the matter? Comment [3] attempts to address this, but in such broad terms that it is vague and leaves too much	The Commission has revised Comment [3] to remove the third sentence, which raised concerns with several commenters about the conflicting standards a lawyer might employ in determining whether a client suffers from significantly diminished capacity. That should assuage the concerns of the commenter concerning when and how to utilize the Rule. As to the confidentiality concerns the commenter expresses, paragraph (c) expressly provides that a lawyer may reveal information about

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 5
Disagree = 2
Modify = 0
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					discretion to the attorney. It also states that the attorney may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule or section 6068(e). Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counselor, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific. Comment [4] lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult. Comments [5] and [6] state the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interest foremost. Again, the question is to what extent is this consistent with Business & Professions Code section	the client to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interests, which is the purpose of consulting with a diagnostician. As noted above, paragraph (c) expressly permits reasonably necessary disclosures. The comment does not attempt to define the term "diagnostician" because the lawyer must act reasonably in making a determination in the specific factual circumstances of a particular representation. The Comment is meant to provide guidance on how to proceed under the black letter of the Rule. This is true in current rule 3-100, which concerns the disclosure of confidential information to prevent a crime likely to result in death or substantial bodily harm. The Discussion to that rule lists factors that a lawyer should consider in deciding how to proceed under the rule. See, e.g., Cal. Rule 3-100, Discussion ¶¶. [6], [9]. See response concerning Comment [1], above.

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 5
Disagree = 2
Modify = 0
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [7]	6068(e)? This Comment may make enforcement of the confidentiality rules much more difficult. Comment [7], which is different than the Model Rules Comment [7], explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline of almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?	As provided in the Rule, the lawyer must not only "believe," but must "reasonably believe." If the lawyer's belief is shown not to have been reasonable, the lawyer would be subject to discipline.
				Comment [8]	Comment [8] states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (Current Rule 3-310.) According to this Comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?	This Rule narrows the options a lawyer may take unilaterally. As noted in Comments [1] and [2], a lawyer must treat the client with respect and to the extent possible, maintain a normal lawyer-client relationship. Filing a petition for a conservatorship or guardianship is a radical departure from that relationship. Permitting disclosure to "an individual or organization that has the ability to take action to protect the client" helps assure that the client comes within the protection of an individual or organization that more likely than not is better situated to explore non-legal options on the client's behalf.

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 5
Disagree = 2
Modify = 0
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Ross, Scott	A	No		This rule, and the clarifications added by the comments, is an important step forward in protecting elders against financial and physical abuse. I strongly urge that this rule be adopted.	No response required.
6	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response required.
7	State Bar Trusts & Estates Section, Executive Committee [Peter Stern] (Public Hearing)	A	Yes		We have been very pleased to see the way Rule 1.14 and now Rule 1.6, which intermeshes with it, have been developed by the RRC, and we strongly encourage their endorsement by the State Bar Board of Governors and by the Supreme Court.	No response required.

Rule 1.14: Client with Diminished Capacity

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 rule comparable to ABA Model Rule 1.14.

Indiana adds Rule 1.14(d), which states: “This Rule is not violated if the lawyer acts in good faith to comply with the Rule.”

Massachusetts: Rule 1.14(b) permits a lawyer who reasonably believes that a client lacks capacity as described in Rule 1.14(a) to consult “family members, adult protective agencies, or other individuals or entities that have authority to protect the client, and, if it reasonably appears necessary, the lawyer may seek the appointment of a guardian ad litem, conservator, or guardian, as the case may be.” The lawyer “may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client only to the extent necessary to protect the client’s interests.” Massachusetts has no counterpart to ABA Model Rule 1.14(c).

New York: In the rules effective April 1, 2009, Rule 1.14 is substantially similar to the Model Rule equivalent, but New York adds Comment 7A, which states as follows: “Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action.”

Texas: Rule 1.02(g) provides: “A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”

Proposed Rule 1.15 [4-100] “Handling Funds and Property of Clients and Other Persons”

(Draft #17, 12/12/09)

Summary: Proposed Rule 1.15 is a complete rewrite of the general language of ABA Model Rule 1.15 to provide detailed standards for client protection and guidance of lawyers. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-100

Statute

Case law

- ☒ State Rule(s) Variations (See provided excerpt of selected state variations.)

Fifteen states have created their own rule or substantially amended ABA Model Rule 1.15; twelve states have made substantive amendments to the Model Rule. (See Introduction, at par. 6.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10
Opposed Rule as Recommended for Adoption 1
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

State Bar Office of the Chief Trial Counsel and local bar association ethics committees (see public commenter chart)

☒ Very Controversial – Explanation:

Local bar association ethics committees have differing views on whether Model Rule 1.15 is preferable to the proposed rule. Also, the Los Angeles County Bar Association believes that advance fees should not be required to be held in a client trust account until earned. However, the State Bar Office of the Chief Trial Counsel takes the opposite position on advance fees and favors a requirement that advance fees be held in a client trust account until earned.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.15* Safekeeping Property: Handling Funds and Property of Clients and Other Persons

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 1.15 is a complete rewrite of the general language of the ABA Model Rule to provide detailed standards for client protection and guidance of lawyers. The proposed Rule largely codifies existing California law rather than changing it. The existing California law, especially the case law, is complex and the proposed rule reflects that complexity. Codifying the existing law in a comprehensive rule promotes compliance by organizing within a rule structure otherwise disparate and inaccessible trust accounting duties. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

1. **The proposal satisfies the need for greater and specific regulation of lawyer conduct in handling entrusted funds and property:** ABA Model Rule 1.15 states general principles regarding lawyer handling of other people's funds and property, often with reference to principles of other fiduciaries or accountants that do not apply in this context. California experimented with such general language from 1927-1974 with former Rule 9, California Rules of Professional Conduct. Because lawyer mismanagement of trust funds and property continued to be a substantial percentage of disciplinary investigations and prosecution, Rule 4-100, adopted in 1975 and 1989, rejected continuation of a general approach and added other more specific regulations and standards for record keeping.

2. Although the Mandatory Continuing Legal Education requirement, the State Bar's publication of the *Handbook on Client Trust Accounting for California Attorneys* and the State Bar Ethics Hotline program have assisted in preventing mismanagement of trust funds and property, handling of trust funds and property continues to be a significant disciplinary issue.

* Proposed Rule, XDraft 17 (12/12/09).

3. According to the State Bar of California Annual Discipline Report for 2007, 12% of all disciplinary complaints arose from allegations of mishandling of funds, and banks made 2617 reports pursuant to Business and Professions Code section 6091.1 of instances of insufficient funds presented against an attorney's client trust account, regardless of whether the instrument was honored.

4. Moreover, when the State Bar Office of Chief Trial Counsel processing of disciplinary complaints was reduced to almost nothing from June 1998 until the system commenced significant operations in early 1999, due to absence of funding and during its 1999 resumption of disciplinary enforcement, the trust account mismanagement spiked dramatically:

(a) The highest number of insufficient funded trust account checks was reported: 4260 in 1998 and 4417 in 1999 (more than 500 reports in the prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 9.)

(b) Moreover, complaints about handling entrusted funds rose to 15% of all disciplinary complaints in 1999 from an average of 10-12% of all disciplinary complaints in prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 11.)

5. These statistics suggest that disciplinary enforcement acts as a deterrent. Therefore, more detailed regulation than provided by the Model Rule is necessary to serve as guidance to lawyers, to protect the public from improper handling of trust funds and property and to increase public confidence in the legal profession's abilities in safekeeping property.

6. A number of other jurisdictions have reached the conclusion that more detailed regulation is needed than is provided by ABA Model Rule 1.15.

(a) The following jurisdictions have either created their own rule or have substantially revised the ABA Model Rule with amendments and additions: Delaware, District of Columbia, Florida, Massachusetts, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and Wyoming.

(b) Many other states have made some substantive amendments to ABA Model Rule 1.15 (Alabama, Connecticut, Indiana, Iowa, Louisiana, Maryland, Mississippi, Montana, Nevada, North Dakota, Oregon, and South Carolina.) Gillers, Simon & Perlman (2009) *Regulation of Lawyers: Statutes and Standards*, ABA Model Rules of Professional Conduct, Rule 1.15, Selected State Variations, pp. 189-192; ABA Center for Professional Responsibility, Charts Comparing Professional Conduct Rules at:

<http://www.abanet.org/cpr/jclr/charts.html>

Proposed Rule 1.15:

7. As is true with the corresponding Rules adopted by several other jurisdictions, proposed Rule 1.15 elaborates in some detail on, and gives more specific guidance than, the ABA statements of general principles about how to handle funds and property of others that have been entrusted to the lawyer. The proposed Rule does so by adding sufficient detail designed to instruct the lawyer as to the minimum standards at every phase of handling the funds and property.

8. Proposed Rule 1.15 also expands the scope of ABA Model Rule 1.15 by including:

- (a) standards concerning the handling of electronic financial transactions;
- (b) requirements with respect disciplinary audits; and
- (c) identification of alternatives to keeping disputed property in trust (when a third party and a client dispute distribution of funds or property and do not want the lawyer to maintain the funds) that are available to the lawyer, such as by the use of interpleader.

Minority:

9. A minority believe that Model Rule 1.15 is a much more understandable and workable rule on safekeeping property for California lawyers than this very complex rule for the reasons stated by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee. In addition, California should provide the same level of public protection provided in the Model Rule and in the rule followed by most jurisdictions by requiring advance fees to be deposited in a client trust account. Having such a requirement would greatly simplify this rule and would reconcile this rule with proposed rule 1.5.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule</u>[*] Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.	(a) <u>Duty to deposit entrusted funds in trust account.</u> A lawyer shall ~~hold property of clients or third persons~~<u>deposit all funds that is in the lawyer receives or holds for the benefit of a</u> ~~lawyer's possession~~<u>client or other person</u> in connection with ~~a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent~~<u>performance of the client's legal service or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept</u><u>representation</u> by the lawyer ~~and shall be preserved, including an advance for a period of [five years] after termination of the representation~~<u>costs and expenses, in one or more trust accounts in accordance with this Rule.</u>	In the Commission's opinion, Model Rule 1.15(a) does not provide sufficient guidance or specific regulation necessary for adequate protection of California residents because: Sentence 1: Although the Rule requires segregation of entrusted funds and property from property of the lawyer, it does not require that trust funds be placed in a labeled trust account which can be located by the owner of the funds, and it does not require that any depository be a state or federal regulated financial institution or be federally insured. (See proposed 1.15(a), (b), and (c). The Commission has retained the concepts of segregation in proposed 1.15(a), (f), and (k)(2)). Sentence 2: The Model Rule permits trust funds to be held in another jurisdiction with the permission of the client or a third party. This concept was not adopted because it is contrary to existing California legislative policy regarding (1) requiring IOLTA accounts to be established with the interest to be paid to the State Bar for legal services for the indigent pursuant to Business and Professions Code §§ 6210-6228 and (2) requiring banks to make reports to the State Bar of instances of insufficient funds presented against an attorney's client trust account pursuant to Business and Professions Code § 6091.1; and the difficulty for State Bar Office of Chief Trial Counsel to acquire records from out of state financial institutions where there is no subpoena authority. (See proposed 1.15(b).) However, the Commission proposes adding 1.15(l), discussed below.

^{*} Proposed Rule, XDraft 17 (12/12/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
		Sentence 3: The Model Rule's standard that "other property shall be identified as such and appropriately safeguarded" is so general that it does not afford adequate public protection. This standard does not provide specific guidance to lawyers concerning what is "appropriate" safeguarding of other property (such as keeping other property in a safety deposit box which can be located in the event of the lawyer's death or disability) and it does not provide a minimal standard which prosecutors can enforce. (See proposed 1.15(k)(2) - (4).) Sentence 4: The Model Rule's standard of keeping complete records of all accounts and property provides no enforceable standard for disciplinary enforcement and no guidance for lawyers for preventive law purposes. The Commission also rejected the requirement that records be retained for a period of time after termination of the attorney client relationship. Since lawyers often terminate the attorney-client relationship while retaining client or other person's funds and property, the better public protection requires retention of all records for a period of time after the last funds or property are disbursed. (See 1.15(k).)

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.	~~(b)- A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.~~ (b) <u>Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.</u>	The Commission retained the subject of Model Rule 1.15(b) in proposed 1.15(f)(1)) (regarding an exception to commingling by depositing personal funds to pay bank service charges but without the limit on amount). The Commission has recommended other exceptions which protect the public including making restitution for funds wrongfully removed and holding disputed attorneys fees and costs in trust until the dispute is resolved. (See proposed 1.15(f).) Paragraph (b) is derived from current rule 4-100(A). The current standard has been modified to require that funds be held in California depositories unless there is a contrary court order or the circumstances fall into the category of multijurisdictional practice covered by paragraph (l).
	(c) <u>Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.</u>	Paragraph (c), which requires a lawyer to identify each trust account, is carried forward from current rule 4-100 and is intended to afford client protection.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:</u> (1) <u>subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and</u> (2) <u>if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.</u>	Added for public protection: The Commission rejected the concept of Model Rule 1.15(c), which requires that all advance fees be placed in a trust account until earned. Many lawyers can follow this principle as a matter of good risk management and to foster good client relations, but there are situations in which the requirement would create harm. For example, lawyers in certain fields of practice, such as criminal defense and family law lawyers, customarily utilize advance fee payments beginning when received and count on this in order to provide services to their clients. If their advance fees had to be deposited in a client trust account, the funds could be seized by client creditors or by law enforcement agencies, so the client would have no funds with which to pay for a defense. Adding the Model Rule's requirement would prevent some lawyers from representing clients, thereby limiting access to justice in those areas. In addition, there are situations in which the client could be harmed if advance fees were placed in the lawyer's trust account, such as when creditors attach or government agencies freeze client trust funds that otherwise would be held to pay legal fees and expenses (<i>S.E.C. v. Interlink Data Network of Los Angeles Inc.</i> (9th Cir. 1996) 77 F3d 1201). This, also, is a significant access to justice issue. Finally, our Supreme Court has historically refused to approve such a mandatory rule. The Commission believes these public protection issues are better addressed by a rule that regulates advanced fees and makes the standards for handling such fees explicit. (See Proposed Rule 1.15(d), above.)

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.	(~~ee~~) <u>Duties concerning maintenance and use of trust funds.</u> A lawyer shall <u>maintain inviolate all funds on deposit into a client trust account</u> ~~legal fees and expenses that have been paid in advance,~~ <u>all property entrusted to be withdrawn by the lawyer only as fees are earned for the benefit of a client or expenses incurred</u> ~~other person until distributed in accordance with this Rule.~~	Accepted, with clarifying amendments. The Commission adopted the concept of depositing trust funds , including advanced costs, in proposed Rule 1.15(a), believing that for guidance, the duty to deposit should be the first part of the rule. The concept of the rule has been retained here, but clarified to add the duty not to misappropriate entrusted funds. Rejected mandatory advance fee deposit in trust account: The Commission rejected one concept of Model Rule 1.15(c), which requires that all advance fees be placed in a trust account until earned. Many lawyers can follow this principle as a matter of good risk management and to foster good client relations, but there are situations in which the requirement would create harm. For example, lawyers in certain fields of practice, such as criminal defense and family law lawyers, customarily utilize advance fee payments beginning when received and count on this in order to provide services to their clients. If their advance fees had to be deposited in a client trust account, the funds could be seized by client creditors or by law enforcement agencies, so the client would have funds with which to pay for a defense. Adding the MR's requirement would prevent some lawyers from representing clients, thereby limiting access to justice in those areas. In addition, there are situations in which the client could be harmed if advance fees were placed in the lawyer's trust account, such as when creditors attach or government agencies freeze client trust funds that otherwise would be held to pay legal fees and expenses (<i>S.E.C. v. Interlink Data Network of Los Angeles Inc.</i> (9th Cir. 1996) 77 F3d 1201). This, also, is a significant access to justice issue. Finally, our Supreme Court has historically refused to approve such a mandatory rule.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
		The Commission believes these public protection issues are better addressed by a rule that regulates advanced fees and makes the standards for handling such fees explicit. (See Proposed Rule 1.15(d), above.)
	(f) <u>Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:</u> (1) <u>funds reasonably sufficient to pay bank charges;</u> (2) <u>deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;</u> (3) <u>the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;</u> (4) <u>funds in which the lawyer claims an interest but which are disputed by the client or other person; or</u> (5) <u>funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.</u>	Added for public protection: Proposed paragraph (f) adds in mandatory form important details not found in Model Rule 1.5. The Commission believes these additions are needed to assure full compliance with the client-protective purpose of paragraph (a). Each of these requirements is consistent with the Model Rule 1.15, current California rule 4-100, and California case law.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule</u>[*] Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(g) <u>Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed.</u> In the case of property, or funds held in a trust account, that belong in part to a client or other person and in part to the lawyer, the lawyer shall withdraw or distribute the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that: (1) <u>the client or other person may still dispute that the lawyer is entitled to the funds or property;</u> (2) <u>when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;</u> (3) <u>a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and</u> (4) <u>if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.</u>	Added for public protection: Because there continues to be much confusion about when a lawyer's entitlement to entrusted funds occurs [<i>Matter of Davis</i> (Review Dept. 2003) 4 Cal.State Bar Ct. Rptr. 576, 586-587 [withdrawal of disputed fees from trust account]], this part of the rule has been expanded. It retains the concept of ABA Model Rule 1.15(d)(e) which was not clear concerning the application of the rule to lawyers' fees and cost.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(h) <u>Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).</u>	Added for public protection: Consistent with current California case law, proposed paragraph (h) mandates that a lawyer not unilaterally determine entitlement to entrusted funds or property held by the lawyer when the entitlement is disputed by the client or a third party. Such a unilateral determination by a lawyer is an act of moral turpitude under Business & Professions Code § 6106. (<i>Matter of Davis</i> (Review Dept. 2003) 4 Cal.State Bar Ct. Rptr. 576, 589 [knowing an wilful withdrawal of disputed fees from trust account constituted moral turpitude].) Placing this requirement in Rule 1.15 makes the lawyer's obligation more apparent and therefore fosters compliance.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.	(~~di~~) ~~Upon receiving~~<u>Duties when entitlement to funds or other property in which is disputed by third party.</u> <u>When the right of</u> a client or ~~third~~other person ~~has an interest to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the~~ lawyer shall ~~promptly notify~~<u>not distribute</u> the ~~client~~<u>disputed portion until the dispute is resolved, the lawyer interpleads the funds or third person. Except as stated in this rule</u>property, <u>or otherwise permitted the distribution is authorized</u> by law or ~~by agreement with court order.~~ <u>Nevertheless</u> the ~~client,~~ a lawyer shall ~~promptly deliver to the client or third person~~<u>distribute</u> any <u>undisputed entrusted</u> funds or ~~other property that the client or third person is entitled to receive and, upon request~~<u>as required</u> by the client or third person, shall ~~promptly render a full accounting regarding such property~~<u>paragraph (k)(7).</u>	Sentence 1: The Model Rule's notification requirement does not adequately protect the public, because it does not require notification of the amount of funds or the identity or quantity of property received by a lawyer on behalf of another. Therefore, the Commission has retained the concept of notification upon receipt of funds and property but added a component requiring disclosure of what has been received on behalf of another. (See proposed 1.15(k)(1).) Sentence 2: This part of the Model Rule is confusing, and therefore more likely to cause non-compliance, because it mixes concepts of distribution of funds and property with accounting for the use of funds. The Commission has separated these important provisions in proposed 1.15(k)(4) and (7). Moreover, the requirement of rendering a "full accounting" does not provide sufficient public protection because the minimal components of a full accounting are not included in the Rule. The Commission has added such accounting features in proposed 1.15(k)(4) for entrusted funds and in proposed 1.15(d) and Comment [10].

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.	~~(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.~~	Sentence 1: This sentence inaccurately merges concepts of handling funds and property disputed between clients and third parties with disputes about the lawyer's fees and costs and requires that disputed funds be segregated until the dispute is resolved. As noted above, segregation is not adequate public protection. This concept does not adequately protect the public because it does not include within its scope court orders that lawyers hold funds or property, which commonly occurs in litigation or in family law matters. The Commission has separated the types of disputes for clarity of application and has included court orders (see proposed 1.15(h) and (i)). Moreover, maintenance in a trust fund may expose the funds to attachment by judgment creditors of one of the disputants or seizure by government agencies, thereby affording little protection to other disputants. Accordingly, the Commission has provided for interpleader as an alternative to holding funds or property in trust. Sentence 2: The Commission has retained this concept, as reworded to fit the context of proposed 1.15(h) and (i).

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(j) <u>Credit card, debit, or other electronically transferred payments.</u> A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.	New concept, added for public protection and guidance: Model Rule 1.15 does not address electronically transferred payments, although they are increasingly common. Proposed paragraph (j) is consistent with current California law as explained in State Bar. Formal Opn. 2007-172 and likely is consistent with the Model Rule. Placing this requirement in Rule 1.15 makes the lawyer's obligation more apparent and therefore fosters compliance.
	(k) <u>Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:</u> (1) <u>promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;</u> (2) <u>identify and label securities and property of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;</u>	Concepts similar to Model Rule 1.15(d) but separated, added and clarified for the protection of the public. The Commission believes that proposed paragraph (k) is consistent with concepts in the Model Rule, but it expresses the Model Rule's general concepts in considerable detail in order to foster lawyer compliance. Greater specificity about the duties of the lawyer for each phase of the rule will give clear guidance about how to handle entrusted funds or property and will provide for easier charging of disciplinary violations. Subparagraph (k)(1) includes the concept of Model Rule 1.15(d) sentence 1, but adds the duty to disclose the amount of such funds or the identity or quantity of such property. Subparagraph (k)(2) includes the concept of Model Rule 1.15(a) sentence 3, reworded slightly for conformity and adds a notification requirement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(3) <u>maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;</u> (4) <u>account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;</u> (5) <u>preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;</u>	Subparagraph (k)(3) restates the concept of Model Rule 1.15(a), sentence 4, first clause ["Complete records of such account funds and other property shall be kept by the lawyer . . ."]. The Commission has opted for the active voice consistent with the policy of the State Bar, following the Administrative Office of the Courts, to make all rules be in the active not passive voice unless there was a compelling reason. The Commission opted to retain the concept Subparagraph (k)(4) restates the concept of Model Rule 1.15(d), sentence 2, last clause [". .and, upon request by the client or third person, shall promptly render a full accounting regarding such property."] Although Bus. & Prof. C., §6091 creates a duty to provide an accounting upon request, <i>Matter of Brockway</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, suggests that the duty to account under present rule 4-100(B)(3) does not require a client's or other person's request. Because the latter provides greater public protection, the Commission adopted the latter. Subparagraph (k)(5) restates the concept of Model Rule 1.15(a), sentence 4, last clause ([trust account records] "shall be preserved for a period of [five years] after termination of the representation") but changes the trigger [distribution of funds or property] for when the five (5) years starts to run. Because lawyers can terminate representation, without making appropriate distributions of trust funds or property, the records can be destroyed before the client ever learns of any misconduct and before a disciplinary complaint is filed. Therefore, to provide maximum protection for the public, the Commission has recommended that the five years run from the appropriate distribution of trust funds or property.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and</u> <u>(7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.</u>	Subparagraph (k)(6) has been added to protect the public in disciplinary proceedings to require lawyers to comply with State Bar Court ordered audits. This concept does not exist in Model Rule 1.15 and is needed for greater public protection. Subparagraph (k)(7) restates Model Rule 1.15(d), sentence 2 ("Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive...") The Commission has opted for a request of the client or other person as a trigger to the duty to distribute funds or property, because it is clearer and because it empowers the client or other person. The proposed rule has been clarified that only "undisputed" funds or property may be distributed by the lawyer.
	<u>(l) Scope and Application of Rule. This Rule does not apply to the following:</u> <u>(1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).</u>	This paragraph clarifies application of this Rule to multijurisdictional practice. In particular, subparagraph (l)(4) has been added to help assure accountability and recordkeeping when funds are held in a non-California bank or financial institution. The language used in subparagraph (l)(4) was drafted with input from a representative of the Office of the Chief Trial Counsel.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(2) <u>Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.</u> (3) <u>Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.</u> (4) <u>At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (1)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds, including, but not limited to, requested bank or financial institution records.</u>	

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(m) <u>Board of Governors' Standards.</u> The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.	The proposed rule includes a provision authorizing the Board of Governors to set standards for record keeping of entrusted property and funds. The lack of adequate record keeping is often the cause of trust account mismanagement and loss of entrusted funds. Standards for appropriate record keeping have reduced the incidence of such misfeasance.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.	~~[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.~~	Rejected entirely for lack of public protection and guidance: Sentence 1: Since there are many different standards of care for professional fiduciaries in California, this offers no guidance for lawyers who desire to handle funds properly or standards for discipline for the protection of the public. It also is inconsistent with legal duties that lawyers have under law, such as maintaining IOLTA trust accounts (Bus. & Prof. §§6210, et sec.) Sentence 2: This concept (with the added protection of requiring the labelling of securities as belonging to a particular person) has been incorporated into the proposed Rule as 1.15(k)(2). Placing these requirements in the Rule makes them enforceable in disciplinary proceedings for the protection of the public. Sentence 3: The concept of prohibiting commingling is set forth in the proposed Rule. Because this sentence neither clarifies what the duty is nor provides guidance or a disciplinary standard, it was deleted. Sentence 4: Rejected because it is incomplete and therefore may confuse. The concept is discussed more directly in the latter part of added Comment [2]. Sentences 5-6: These sentences are overbroad and provide little guidance. Moreover, they conflict with the record keeping standards which the Board has adopted to give specific guidance regarding the frequency, nature and extent of record keeping for the protection of the public.

* Proposed Rule, Draft 15.3 (5/29/09). Note that Proposed Rule 1.15 includes a "Definitions" sections which precedes the "Comments" section.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Definitions</u> <u>[1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.</u>	New comment [1]: Added to clarify for guidance and enforcement purposes the fundamental issues of what "property" and whose "property" are governed by the Rule.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.	~~[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.~~ [2] <u>As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. <i>Kelly v. State Bar</i> (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298]. Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. See, e.g., Business and Professions Code section 6106.</u>	Rejected entirely for redundancy: Sentence 1: This merely repeats the Rule and therefore is deleted as unnecessary. Sentence 2: This also merely repeats the Rule regarding record keeping and is deleted as unnecessary. New Comment [2]: Proposed for definition and clarification of another concept that is essential to the application of the Rule, which is that the Rule applies only when a lawyer acts "in connection with the performance of a legal service or representation". Other laws and regulations might apply to other fiduciary roles, such as when a lawyer acts as the personal representative of a probate estate. This clarification is for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.	~~[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.~~ [3] <u>As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.</u>	Rejected this language as a comment but incorporated the concepts into the proposed Rule. (See proposed Rule 1.15(d),(g) and (h).) Also, the concepts are clarified in added Comments [12], [13].) New Comment [3]: Proposed for definition of the essential term "client", for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.	~~[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.~~ <u>[4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.</u>	Rejected this language as a comment but incorporated the concepts into the proposed Rule. (See proposed Rule 1.15(g) and (h).) New Comment [4]: Proposed for definition and clarification of another essential term, which is what "entrusted funds" are governed by the Rule itself, for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.	~~[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.~~ [5] <u>As used in this Rule, "advance for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf.</u>	Adopted the concept but rejected its expression: Lawyers acting as escrow agents in a transaction involving a client owe fiduciary duties to the non-client, requiring application of this Rule. (See e.g., <i>Matter of Lilly</i> (Review Dept. 1992) 2 Cal.State Bar Ct. Rptr. 185) This provides important public protection. In order to prevent confusion, the concept has been rewritten as proposed Comment [2]. New Comment [5]: Proposed for definition and clarification of an essential term, for guidance and enforcement.
[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.	~~[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.~~ [6] <u>As used in this Rule, "bank charges" include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.</u>	Rejected entirely because the Client Security Fund is established independently of these Rules, and participation in it is not voluntary. (Bus. & Prof. Code §6140.5.) New Comment [6]: Proposed for definition and clarification of an essential term, for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Application of Rule</i></u> <u>[7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer's misuse of a client trust account can result in discipline. In the Matter of McKiernan (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)</u>	Added for public protection and guidance: This Comment clarifies that a lawyer is subject to professional discipline for depositing the lawyer's own funds or for depositing non-client business operating funds in a trust account. The purpose of this prohibition is to protect client funds from attachment or execution by the lawyer's or non-client's creditors or other claimants.
	<u><i>Paragraph (a) - Application to true retainer fees</i></u> <u>[8] Because a true retainer fee, as defined in Rule 1.5(f)(1), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. Baranowski v. State Bar (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].</u>	Added for public protection and guidance to clarify the prohibition against commingling as applied to true retainers.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. <i>Baranowski v. State Bar</i> (1979) 24 Cal.3d 153, 164, fn.4 [154 Cal.Rptr. 752]; <i>In the Matter of Fonte</i> (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757. When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].	Added for public protection: This Comment clarifies proper handling of a true retainer converted to an advance for fees. It also clarifies that a converted true retainer should be afforded the same accounting and other protections afforded an advance for fees.
	Paragraph (d) - Advances for fees; accounting for advances for fees [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). <i>In the Matter of Fonte</i> (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756-758.	Added for public protection and guidance to lawyers: This Comment clarifies that a lawyer has a duty to account to the client for an advance for fees and provides guidance for the form of the accounting.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Paragraph (e) - Duty to hold funds inviolate</i></u> <u>[11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not intended to prohibit electronic transfers or to preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.</u>	Added for guidance and public protection by providing clarification about proper record keeping.
	<u><i>Paragraphs (g) - (i) - Disputed fees</i></u> <u>[12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.</u>	Added in place of Model Rule Comment [2] for clarification.
	<u>[13] A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. <i>Friedman v. State Bar</i> (1990) 50 Cal.3d 235, 240-241 [266 Cal.Rptr. 632].</u>	Added for public protection: This Comment clarifies that undisputed funds must be disbursed to prevent loss of use of the money by the owner.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	[14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.	Added for public protection: This Comment clarifies that a lawyer may not unilaterally withdrawal entrusted funds.
	Paragraph (k) - Duties to maintain records and account for receipt of trust funds or property [15] A lawyer who receives client funds in which another person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. <i>In the Matter of Respondent P</i> (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632. Certain statutory liens may have statutory notice requirements applicable to lawyers. See, e.g., Welfare and Institutions Code section 14124.79.	Added for public protection: This Comment clarifies important aspects of a lawyer's duty when holding entrusted funds in which someone other than the client claims an interest.
	[16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.	Added for public protection: This Comment provides clarification by its cross-reference to a related statutory provision.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Other Guidance</i></u> <u>[17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.</u>	Added for public protection: Because of the wide range of factual situations that can arise under this Rule and its central role in client protection and lawyer discipline, this Comment refers lawyers to additional sources of guidance on the application of the Rule.

Rule ~~4-100~~ Preserving Identity of 1.15: Handling Funds and Property of a Client Clients and Other Persons

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A) All~~ Duty to deposit entrusted funds ~~received~~ in trust account. A lawyer shall deposit all funds that the lawyer receives or ~~held~~ holds for the benefit of ~~clients by a member~~ client or law firm other person in connection with the performance of a legal service or representation by the lawyer, including ~~advances~~ an advance for costs and expenses, ~~shall be deposited~~ in one or more identifiable bank trust accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, ~~accordance~~ with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction ~~this Rule. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:~~
- (b) Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.
- (c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.
- (d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:
- (1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and
- (2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.
- (e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.
- (f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:
- (1) ~~Funds~~ funds reasonably sufficient to pay bank charges;
- (2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;
- (3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;
- (4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or

(5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.

(g) ~~(2) Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed. In the case of property, or funds belonging held in a trust account, that belong in part to a client or other person and in part presently or potentially to the member or lawyer, the law firm, lawyer shall withdraw or distribute the portion belonging to the member or law firm must be withdrawn lawyer at the earliest reasonable time after the member's lawyer's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved, provided that:~~

~~(B) — A member shall:~~

~~(1) — Promptly notify a client of the receipt of the client's funds, securities, or other properties.~~

(1) the client or other person may still dispute that the lawyer is entitled to the funds or property;

(2) when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;

(3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and

(4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.

(h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).

(i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).

(j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic

payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.

(k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:

- (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;
- (2) ~~Identify~~identify and label securities and ~~properties~~property of a client or other person promptly upon receipt~~and~~, place them in a safe deposit box or other place of safekeeping as soon as practicable~~;~~, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;
- (3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;
- (4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a

statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;

- (5) ~~(3) Maintain complete~~preserve records of all entrusted funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; ~~preserve such records~~property for a period of no less than five years after final appropriate distribution of such funds or ~~properties~~property; ~~and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.~~
 - (6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and
 - (7) ~~(4) Promptly pay or deliver~~promptly distribute, as requested by ~~the~~a client, ~~any funds, securities,~~ or other ~~properties~~person, any undisputed funds or property in the possession of the ~~member which~~lawyer that the client or other person is entitled to receive.
- (l) Scope and Application of Rule. This Rule does not apply to the following:
- (1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives

funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).

(2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.

(3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.

(4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds, including, but not limited to, requested bank or financial institution records.

(m) ~~(C)~~Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by ~~members and law firms~~lawyers in accordance with ~~subparagraph~~paragraph ~~(Bk)~~(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

COMMENT

Definitions

[1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.

[2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (Kelly v. State Bar (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)

- [3] As used in this Rule “client” means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.
- [4] As used in this Rule “entrusted funds” means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.
- [5] As used in this Rule, “advance for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf.
- [6] As used in this Rule, “bank charges” include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.

Application of Rule

- [7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer’s misuse of a client trust

account can result in discipline. *In the Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)

Paragraph (a) - Application to true retainer fees

- [8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)
- [9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) - Advances for fees; accounting for advances for fees

- [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). (*In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756-758.)

~~Standards:-~~

~~Pursuant to rule 4-100(C) the Board of Governors of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).~~

- ~~(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:~~
 - ~~(a) a written ledger for each client on whose behalf funds are held that sets forth:~~
 - ~~(i) the name of such client;~~
 - ~~(ii) the date, amount and source of all funds received on behalf of such client;~~
 - ~~(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client; and~~
 - ~~(iv) the current balance for such client~~
 - ~~(b) a written journal for each bank account that sets forth:~~
 - ~~(i) the name of such account;~~
 - ~~(ii) the date, amount and client affected by each debit and credit; and~~

~~(iii) the current balance in such account;~~

~~(c) all bank statements and canceled checks for each bank account; and~~

~~(d) each monthly reconciliation (balancing) of (a), (b), and (c).~~

Paragraph (e) - Duty to hold funds inviolate

[11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not intended to prohibit electronic transfers or to preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.

Paragraphs (g) - (i) - Disputed fees

[12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.

[13] A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240-241 [266 Cal.Rptr. 632].)

[14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

~~(2) — A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:~~

~~(a) — each item of security and property held;~~

~~(b) — the person on whose behalf the security or property is held;~~

Paragraph (k) - Duties to maintain records and account for ~~(c) the date of receipt of the security~~trust funds or property;

~~(d) — the date of distribution of the security or property; and~~

~~(e) — person to whom the security or property was distributed.~~

[15] A lawyer who receives client funds in which another person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. (*In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632) Certain statutory liens may have statutory notice requirements applicable to lawyers. (See, e.g., Welfare and Institutions Code section 14124.79.)

[16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.

Other Guidance

[17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.

Rule 1.15: Handling Funds and Property of Clients and Other Persons
(Commission's Proposed Rule – Clean Version)

- (a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.
- (b) Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.
- (c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.
- (d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:
 - (1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and
 - (2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.
- (e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.
- (f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:
 - (1) funds reasonably sufficient to pay bank charges;
 - (2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;
 - (3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;
 - (4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or
 - (5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.
- (g) Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed. In the case of property, or funds held in a trust account, that belong in part to a client or other person and in part to the lawyer, the lawyer shall withdraw or distribute the

portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

- (1) the client or other person may still dispute that the lawyer is entitled to the funds or property;
 - (2) when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;
 - (3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and
 - (4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.
- (h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court

order, except that the lawyer shall make any distribution required by paragraph (k)(7).

- (i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).
- (j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.
- (k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:
 - (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;

- (2) identify and label securities and property of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;
- (3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;
- (4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;
- (5) preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;
- (6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and

- (7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.

(l) Scope and Application of Rule. This Rule does not apply to the following:

- (1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).
- (2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.
- (3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.
- (4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds,

including, but not limited to, requested bank or financial institution records.

- (m) Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

Definitions

- [1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.
- [2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298]. Although lawyers who provide fiduciary services that are not related to

the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. See, e.g., Business and Professions Code section 6106.

- [3] As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.
- [4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.
- [5] As used in this Rule, "advance for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf.

- [6] As used in this Rule, “bank charges” include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.

Application of Rule

- [7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer’s misuse of a client trust account can result in discipline. *In the Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)

Paragraph (a) – Application to true retainer fees

- [8] Because a true retainer fee, as defined in Rule 1.5(f)(1), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].
- [9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn.4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757. When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) – Advances for fees; accounting for advances for fees

- [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.

Paragraph (e) – Duty to hold funds inviolate

- [11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) do not prohibit electronic transfers or preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.

Paragraphs (g) – (i) – Disputed fees

- [12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.
- [13] A lawyer may not withhold the undisputed portion of a client’s or other person’s funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. *Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632].

- [14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

Paragraph (k) – Duties to maintain records and account for receipt of trust funds or property

- [15] A lawyer who receives client funds in which another person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. *In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632. Certain statutory liens may have statutory notice requirements applicable to lawyers. See, e.g., Welfare and Institutions Code section 14124.79.
- [16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.

Other Guidance

- [17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	D	Yes		The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements. However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary <i>and wary</i> practitioners. We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics. The Board should return this rule to the Commission with appropriate instructions.	The Commission disagrees for all of the reasons stated in the Introduction, including the number of jurisdictions that have adopted considerably lengthened and complicated trust account rules.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 1 Modify = 1 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel	M	Yes	1.15(d)	While OCTC supports some of the Commission's additions or changes to the Model Rules and there is much merit to the Commission's explanation that costs are covered by the rule, OCTC disagrees with subparagraph (d) of this rule with allows, but does not require, attorneys to place advanced fees in the trust account. We believe this creates confusion and a lack of consistency. Either every lawyer should be placing advanced fees in the Client Trust Account ("CTA") or no lawyer should be placing advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will protect clients. At least one state appellate court has found that the Current Rule requires attorneys to place advanced fees into the CTA. (See <i>T & R Foods, Inc v. Rose.</i>) Further, the Model Rules and most other jurisdictions require attorneys to place advanced fees in the trust account.	The Commission disagrees on a policy for the reasons stated in the Introduction and due to comments from practitioners in the criminal and civil fields advising that such a requirement would result in seized advanced fee, denying access to justice.
				Comment [10]	If the change requested above is adopted, the first sentence of Comment [10] should be stricken.	The Commission disagrees.
				1.15(d), (g), (h) & (j)	OCTC finds very confusing and inconsistent the proposed rules as to when disputed funds need to be placed in the client trust account. (See Proposed Rules 1.15(d), (g), (h), and	The Commission disagrees. These provisions track California case law, which has not been adopted by the ABA.

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.15(e)	(i.) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments [12] – [14]. OCTC suggests that the term “inviolate” in Proposed Rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them. OCTC would also suggest that the rule specifically provide that the misappropriation of funds violates this rule.	The Commission disagrees that it is confusing, since the term has been part of a California trust account rule since 1927 and has been part B&P Code section 6068(e) since 1872.
				1.15(f)	OCTC finds Proposed Rule 1.15(f) confusing and inconsistent. OCTC sees no compelling reason to deviate from the ABA Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the ABA Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule.	The Commission disagrees and recommends the rule as less confusing because it codifies the existing circumstances which are not commingling.
				1.15(k)(6)	OCTC is concerned that subparagraph (k)(6) does not provide for the Supreme Court or other courts to issue an order for an audit. The rule should not determine jurisdiction or send a message that attorneys can violate a	The Commission disagrees. See B&P Code section 6103.

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					court order. The Supreme Court has always provided that is has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See <i>Brotsky v. State Bar</i> (1962) 57 Cal.2d 287, 301; <i>In re Rose</i> (2000) 22 Cal.4th 430, 439; <i>Obrien v. Jones</i> (2000) 23 Cal.4th 40, 48. See also <i>In re Accusation of Walker</i> (1948) 32 Cal.2d 488, 490.)	
				1.15(k)(7)	OCTC also believes that subparagraph (k)(7) should add the word "authorized" to other person to clarify that only authorized persons can request undisputed funds	The Commission disagrees that any such clarification is needed in the context of the provision.
				1.15(l)	OCTC is concerned that the language of subparagraph (l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is concerned that rule 1.15(l)(2) and (3) do not state, as rule 1.15(l)(1) does, that if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC also is concerned how this paragraph is impacted by the Choice of Law Rule (Proposed Rule 8.5).	The Commission disagrees.
					OCTC supports subparagraph (l)(4).	No response required.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 1 Modify = 1 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					There are too many Comments and some of them appear to belong in the Proposed Rule.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.

Rule 1.15: Safekeeping Property

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: Effective January 1, 2009, Arizona adopted an emergency, interim rule change to Rule 1.15, permitting lawyers to accept credit card payments to cover advance fees, costs, and expenses. The rule change is open for public comment and may be subsequently amended.

District of Columbia: The language of D.C. Rule 1.15 differs significantly from the ABA Model Rule, though the basic requirements are the same. D.C.'s version of Rule 1.17 deals with notification of trust account overdrafts.

Florida: Chapter 5 of Florida's Supreme Court Rules regulates lawyer trust accounts.

Georgia: Rule 1.15(I) generally tracks the 1983 version of ABA Model Rule 1.15, but Georgia adds Rule 1.15(II) to govern trust accounts and IOLTA accounts, and Rule 1.15(III) to govern trust account recordkeeping, overdraft notification, and auditing by disciplinary authorities. Rule 1.15(III) requires that

lawyers deposit trust funds in a financial institution that agrees "to report to the State Disciplinary Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored." The Comment to Rule 1.15(III) explains the overdraft agreement as follows:

[2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution's promise to delay or not to report an overdraft. . . .

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws

a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Illinois: In the rules effective January 1, 2010, Rule 1.15(c) provides that an “advance payment retainer” must be in writing, signed by the client, and include a number of disclosures regarding how the lawyer intends to handle the advance payment. Comment 3B instructs lawyers to read the provision in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), which distinguishes different types of retainers. According to the Comment, an “advance payment retainer” is “a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment.”

Rule 1.15(i) contains a highly unusual provision, originally adopted in 1998 at the urging of the real estate bar, which under certain circumstances permits lawyers to hold funds that have been “deposited but not collected” in a separate Real Estate Funds Account (REFA).

Massachusetts: Rule 1.15 has extensive provisions for deposit of client funds in IOLTA accounts,

and contains provisions to ensure that disciplinary authorities are notified in the event a lawyer’s check is dishonored.

Michigan provides for IOLTA accounts in Rule 1.15(d).

Minnesota: Rule 1.15 differs significantly in structure and substance from ABA Model Rule 1.15.

New Jersey: Under Rule 1.15(a), funds must be deposited in New Jersey institutions, without exception. Rule 1.15(a) also incorporates the substance of ABA Model Rule 1.15(b), and requires lawyers to keep trust account records for seven years. New Jersey deletes ABA Model Rule 1.15(c), and New Jersey Rule 1.15(b) deletes the requirement in ABA Model Rule 1.15(d) that a lawyer promptly render a full accounting of property upon request. New Jersey adds 1.15(d), which refers lawyers to section 1:21-6 of the Court Rules on recordkeeping.

New York: In the rules effective April 1, 2009, Rule 1.15 addresses the same issues as the Model Rule, but in more detail. For example, New York imposes a seven-year recordkeeping requirement for eight specified categories of documents, such as “records of all deposits in and withdrawals from” trust accounts, and copies of “all retainer and compensation agreements with clients,” “all bills rendered to clients,” and “all records showing payments to lawyers,

investigators or other persons, not in the lawyer's regular employ, for services rendered or performed."

Ohio: Rule 1.15 differs significantly from ABA Model Rule 1.15. Among other things, Rule 1.15(f) provides as follows: "Upon dissolution of any law firm, the former partners, managing partners, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records...." Rule 1.15(h) imposes strict requirements on every lawyer or law firm that "owns an interest in a business that provides a law-related service...."

Pennsylvania: The Pennsylvania rules include requirements and definitions that are far more detailed and nuanced than the Model Rule.

Virginia: Rule 1.15, which substantially incorporates provisions from Virginia's former Code of Professional Responsibility, differs significantly from ABA Model Rule 1.15. Virginia Rule 1.15(d) prescribes the responsibility of lawyers who receive funds or other property in which a client or third person has an interest.

Washington: Rule 1.15A(e) provides that a lawyer "must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds."

Wisconsin: Rule 1.15 is so highly detailed and so long (about 16 pages) that it has its own table of contents. Rule 1.15(a) defines 10 separate terms (such as "Demand account," "Fiduciary property," and "Financial institution"). Rule 1.15(b)(4) provides: "Unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer.... Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred." Particularly interesting is Rule 1.15(e)(4), which elaborates on a series of "Prohibited transactions," including:

a. **Cash.** No disbursement of cash shall be made from a trust account or from a deposit to a trust account, and no check shall be made payable to "Cash."

b. **Telephone transfers.** No deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. This section does not prohibit any of the following: (1) wire transfers, and (2) telephone transfers between separate, non-pooled demand and separate, non-pooled, non-demand trust accounts that a lawyer maintains for a particular client.

c. **Internet transactions.** A lawyer shall not make deposits to or

disbursements from a trust account by way of an Internet transaction.

d. Electronic transfers by 3rd parties. A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A lawyer shall not authorize a 3rd party to deposit funds into the lawyer's trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

e. Credit card transactions. A lawyer shall not authorize transactions by way of credit card to or from a trust account. However, earned fees may be deposited by way of credit card to a lawyer's business account. . . .

Proposed Rule 1.16 [3-700]

“Declining or Terminating Representation”

(XDraft # 9, 6/29/09)

Summary: Proposed Rule 1.16 and the Model Rule 1.16 generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court’s rules so require, and the lawyer’s conduct when a representation is terminated. The proposed Rule, however, involves several substantive changes to the Model Rule. In addition, following the second round of public comment, a new comment [6A] was added and revisions were made to Comment [9] to clarify a lawyer’s duties upon withdrawal. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 3-700.

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 1

Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

A representative from the Alameda Public Defender's Office expressed a concern that the Rule's requirement that a lawyer return the client's file have an exception for materials a criminal defense lawyer is prohibited by statute from providing a client. See Explanation of Changes for paragraph (e)(1).

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.16* Declining Or Terminating Representation

July 2010

(Draft rule following consideration of second round of public comment)

INTRODUCTION:

This proposed Rule and the Model Rule generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court's rules so require, and the lawyer's conduct in terminating a representation. However, the Commission's recommendation includes a number of substantive and drafting changes in the Model Rule. These generally can be summarized as designed to enhance client protection either by narrowing the situations in which a lawyer is permitted to withdraw or by making Rule language clearer and more detailed.

The most fundamental of these changes is the removal of Model Rule 1.16(b)(1), a provision that permits a lawyer to withdraw from a representation whenever this can be accomplished "without material adverse effect on the interest of the client". The Commission views this as nearly *carte blanche*, permitting a lawyer to abandon a client whenever it is profitable or convenient for a lawyer to do so, limited only by the indefinite, unexplained, and indefinable standard of "material adverse effect" on the client. As more fully explained in the accompanying comparison chart, the Commission believes that, because clients properly place heavy reliance on their lawyers, a lawyer's acceptance of a representation involves a serious commitment to the client. As a result, a lawyer should not make this commitment lightly or only for so long as it might suit the lawyer's convenience, and a lawyer should withdraw from a representation only as permitted by one of the express provisions of this Rule.

* Proposed Rule 1.16, XDraft 9 (6/29/09).

Response to Public Comment. Following the second round of public comment, the Commission made several clarifying changes to the Rule Comment about the lawyer’s duties when a representation is terminated. First, the Commission added new Comment [6A] under the heading, “Scope of Withdrawal.” It clarifies that a lawyer who represents a client in multiple matters, or who works for a single client-employer (e.g., as in-house counsel or for the government), might not be obligated to resign from all representations, or from employment, when the lawyer withdraws in a particular matter. Second, the Commission made revisions to Comment [9] to refer lawyers to other authority in determining whether fees and expenses have been earned and incurred, respectively, and thus need not be returned to a client upon termination of the representation. See Explanation of Changes for Comment [9].

Variations in other jurisdictions: There are a number of local variations in this Rule. These include the following: North Carolina includes in its paragraph (b) counterparts to our recommended paragraphs (b)(1) [client insists on taking a legally unsupported legal position] and (b)(6) [termination of a representation by client consent]. Ohio and New York also have provisions similar to the Commission’s recommended (b)(6). North Dakota has added “reasonably believes” in paragraph (a)(1), like the Commission’s recommendation. Virginia omits paragraph MR (b)(1), as does the Commission’s recommendation. D.C. and New York have the equivalent of the Commission’s recommended (b)(10) [the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal]. N.Y. in its (c)(7) has an equivalent to our recommended (b)(4) [the client renders it unreasonably difficult for the lawyer to provide effective legal services], in its (c)(8) an equivalent to our recommended (b)(7) [the difficulty of working with co-counsel makes it in the best interests of the client for the lawyer to withdraw], and in its (c)(9) an equivalent to our (b)(8) [the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively].

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law;	(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) <u>the lawyer knows or reasonably should know that</u> the representation will result in violation of ~~the rules of professional conduct~~<u>these Rules</u> or ~~other law~~<u>of the State Bar Act</u>;	Paragraph (a) is substantially the same as the Model Rule but makes two changes. First, the Model Rule requires a lawyer to withdraw from a representation if the representation “will” result in a violation by the lawyer. That standard appears to require withdrawal only when the lawyer can predict with certainty that a violation will occur. The Commission proposes to broaden this duty by requiring the lawyer to withdraw if the lawyer “knows or reasonably should know”. Second, the Model Rule phrase “of the rules of professional conduct” is changed to “of these Rules or the State Bar Act” in order to include the related statutory provisions and conform to our style.
(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or	(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client <u>competently</u>; or	Model Rule paragraph (a) implies but does not state that a lawyer must withdraw from a representation when the lawyer’s physical or mental condition impairs the lawyer’s ability to represent the client competently, but it omits the word “competently”. The Commission proposes to add that word for clarity.
(3) the lawyer is discharged.	(3) the <u>client discharges the</u> lawyer ~~—is discharged.~~	Paragraph (c) is substantively the same as the Model Rule but has been restated in the active voice to conform to the Guidelines for Drafting and Editing Court Rules.

* Proposed Rule 1.16, XDraft 9 (6/29/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client;	(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ~~(1) withdrawal can be accomplished without material adverse effect on the interests of the client;~~	Paragraph (b) lists a number of situations in which a lawyer may, but is not required to, withdraw from a representation. The first of these is that a lawyer may terminate a representation whenever doing so will have no “material adverse effect on the interests of the client”, thus permitting withdrawal when it is in the lawyer’s interests but not the client’s. The Commission has rejected this broad authorization, primarily for client protection reasons but also because of the role of lawyers in the legal system. The Commission believes that lawyers generally should accept a representation only with the intent of seeing it through to completion, and that a lawyer’s termination of a representation for the lawyer’s benefit: (i) would be contrary to client expectations and would damage the reputation of lawyers generally and of the legal system; (ii) would allow lawyers to place their own convenience above the protection of the interests of their clients; and (iii) would give to lawyers the unacceptably broad discretion to terminate under the vague standard of a “material adverse effect” on the client (how much financial or other injury to the client would trigger the Model Rule standard?). In summary, a lawyer should not be permitted to terminate a representation for personal convenience, such as in order to accept another, more profitable or prestigious engagement.
	<u>(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;</u>	In place of Model Rule paragraph (a)(1), the Commission proposes to add this paragraph (a)(1), which in substance tracks proposed Rule 3.1 (titled “Meritorious Claims and Contentions”).

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;	(2) the client ~~persists in~~ <u>either seeks to pursue a criminal or fraudulent course of action involving conduct or has used</u> the lawyer's services <u>to advance a course of conduct</u> that the lawyer reasonably believes ~~is criminal~~ <u>was a crime</u> or ~~fraudulent~~ <u>fraud</u>;	Proposed paragraph (b)(2) combines the topics of Model Rule paragraph (b)(2) and (3) in a single paragraph, but with a broadening of Model Rule (b)(3). Model Rule paragraph (b)(3) permits a lawyer to terminate a representation if the "client has used" the lawyer's services to perpetrate a crime or fraud, a phrasing that would seem to require the lawyer's to be certain. This proposal expands the Model Rule to permit termination when the lawyer "reasonably believes" the client has acted in that way. In addition, the drafting of the Model Rule incorrectly has "criminal or fraudulent" modify "the lawyer's services", which is not intended and is eliminated by this revision.
(3) the client has used the lawyer's services to perpetrate a crime or fraud;	(3) the client ~~has used~~ <u>insists that</u> the ~~lawyer's services to perpetrate~~ <u>lawyer pursue a</u> ~~crime~~ <u>course of conduct that is criminal</u> or ~~fraud~~ <u>fraudulent</u>;	In place of Model Rule paragraph (b)(3), which now is part of paragraph (b)(2), this proposal adds the situation in which a client insists that the lawyer pursue a course of conduct that itself would be criminal or fraudulent. This supplements proposed paragraph (b)(2), which addresses the situation in which the lawyer's actions might be perfectly legal, such as simply forming a corporation for a client, but the client's actions are not proper.
(4) a the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;	(4) ~~a the client insists upon taking action that by other conduct renders it unreasonably difficult for the lawyer considers repugnant or with which to carry out the lawyer has a fundamental disagreement~~ <u>employment effectively</u>;	The Commission has rejected Model Rule paragraph (b)(4). The concept that a client's conduct is "repugnant" to a lawyer is divorced from the proper concern, which is the ability of the lawyer to competently and loyally represent the client and would give the lawyer a broad subjective basis for terminating representations. In its place, proposed paragraph (b)(4) identifies as a basis for permissive withdrawal conduct of the client that materially interferes with the lawyer's ability to act competently. The Commission's rejection was informed by the requirement of Bus. & Prof. C. § 6068(h).

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;	(5) the client ~~fails—substantially—to fulfill~~<u>breaches a material term of an agreement with or</u> obligation to the lawyer ~~regarding~~<u>relating to</u> the ~~lawyer's services~~<u>representation</u>, and <u>the lawyer</u> has ~~been~~ given <u>the client a</u> reasonable warning <u>after the breach</u> that the lawyer will withdraw unless the <u>client fulfills the agreement or performs the</u> obligation ~~is fulfilled~~;	Proposed paragraph (b)(5) narrows the Model Rule counterpart in order to advance the goal of better client protection. First, the lawyer's right to withdraw is limited to the client's breach of a <i>material</i> term of an agreement with the lawyer. Second, the lawyer's obligation to warn the client of possible termination must come after the client's breach so that, for example, it cannot be buried in a much earlier fee agreement.
	(6) <u>the client knowingly and freely assents to termination of the representation;</u>	The Model Rule and the Commission's proposal include as a mandatory withdrawal the situation in which the client discharges the lawyer. However, the Model Rule overlooks the possibility that a lawyer and client will agree to terminate a representation. Because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.
	(7) <u>the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;</u>	The Model Rule recognizes certain situations in which the lawyer's ability to represent the client might have been materially affected by the client's conduct. However, it overlooks the possibility that a lawyer will not be able to perform in the best interest of a client because of the conduct of co-counsel. As stated above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;</u>	The Model Rule also overlooks the possibility that a lawyer's own condition might interfere materially with the lawyer's ability to advance the interests of a client. As explained above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or	~~(6)~~ <u>a continuation of the representation will likely to result in an unreasonable financial burden on the lawyer a violation of these Rules or has been rendered unreasonably difficult by the client</u> <u>State Bar Act</u>; or	The Commission rejected Model Rule paragraph (b)(6). As written, it appears to be broad enough to permit a lawyer to terminate a representation simply because of more profitable representation is available. See the explanation above for the Commission's rejection of Model Rule paragraph (b)(1). The lawyer's financial situation would come into play only when so grave that it would affect the lawyer's ability to fulfill the duty of competence.
(7) other good cause for withdrawal exists.	~~(7) other good cause for withdrawal exists.~~	Model Rule paragraph (b)(7) grants to the lawyer the unilateral authority to determine when it is ok to terminate a representation. The Commission has rejected that broad authority for the same reason that it rejected Model Rule paragraph (b)(1), as explained above.
	<u>(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.</u>	Proposed paragraph (b)(10) is a narrow substitute for Model Rule paragraph (b)(7). This broadly allows a lawyer to seek court permission to withdraw, leaving the court to control its proceedings.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.	(c) ~~A lawyer must comply with applicable law requiring notice to or~~ permission <u>for termination</u> ~~of a tribunal when terminating a representation. When ordered to do so is~~ required by <u>the rules of</u> a tribunal, a lawyer shall ~~continue~~<u>not terminate a</u> representation ~~notwithstanding good cause for terminating the representation before that tribunal without its permission.~~	Proposed paragraph (c) is substantively the same as the Model Rule. However, it eliminates what appears to be a Model Rule assumption that there always is applicable law governing termination of a representation and clarifies that, when there is applicable law, that law takes precedence even if there is no court order directing the lawyer to continue a representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.	~~(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.~~	The Commission believes that a lawyer's conduct upon termination of a lawyer-client relationship involves client-protection issues of the highest importance. It therefore has rejected the generalized, unspecific language of Model Rule paragraph (d) in favor of the considerably more detailed requirements of proposed paragraphs (d) and (e). The Commission believes that the definition of a lawyer's duties in this situation should be robust so that lawyers will not be left in doubt as to their obligations and in order to facilitate discipline of lawyers who do not fulfill their obligations. The proposed replacement provisions also make substantive changes, as explained below.
	<u>(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).</u>	Model Rule paragraph (d) requires a lawyer to take certain protective steps upon termination of a representation. The Commission has rejected the timing of this obligation as coming too late. This proposed paragraph obligates the lawyer to take protective steps before terminating a representation.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
	(e) <u>Upon the termination of a representation for any reason:</u> (1) <u>Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and</u>	Proposed paragraph (e) contains a detailed elaboration of a lawyer's duties to a former client upon the termination of a representation. It is substantively consistent with Model Rule paragraph (d). In adding a reference to limitations imposed by applicable protective order, non-disclosure agreements or statutes, this recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. See proposed Comment [9], below.
	(2) <u>The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.</u>	Model Ruled paragraph (d) requires the lawyer to refund any advance payment of fee or expense that has not been earned or incurred. This proposal requires that the lawyer <i>promptly</i> refund. Also, this adds a reminder about true retainers because they have caused considerable confusion among lawyers.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].	[1] A lawyer should not accept <u>a representation unless the lawyer reasonably believes the lawyer can complete the representation in a matter unless it can be performed competently, promptly compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without improper conflict of interest and limitation, to completion any sale under Rules 1.17.</u> Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. <u>(See Rules 1.2(c) and 6.5.) A lawyer can be subject to discipline for improperly threatening to terminate a representation.</u> See ~~also Rule 1.3~~<u>Matter of Shalant, Comment [4]</u> <u>Cal. State Bar Ct. Rptr. 829 (2005).</u>	This proposed Comment restates the Model Rule Comment as a declarative sentence in line with the Guidelines for Drafting and editing Court Rules. It adds the important substantive reminder that Rule 1.16 provides the exclusive statement of when and how a lawyer may terminate a lawyer-client relationship. Also, it adds references to the State Bar Act and California case law and uses the phrase “these Rules”

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Mandatory Withdrawal [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.	Mandatory Withdrawal [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that ~~is illegal or violates~~<u>would violate these Rules or other law</u><u>the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106.</u> The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client ~~may~~<u>might</u> make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. <u>Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. See Rules 1.2(c) and 1.4.</u>	This proposed Comment is substantively the same as the Model Rule Comment but tracks the Rule changes explained above and adds several references to pertinent California statutes.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.	[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. ~~Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.~~	The Commission has rejected the last four sentences of the Model Rule Comment because it discusses topics covered by court rules and because it presumes to tell courts what standard of proof they should accept without regard to other facts and circumstances the court might be aware of.
	<u>[4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.</u>	Proposed Comment [4] has no Model Rule counterpart. It is based on Restatement § 32, Comment <i>f</i>.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Discharge [4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.	Discharge ~~[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.~~	The Commission has rejected Model Rule Comments [4] – [6]. The purpose of a Comment is to explain the Rule to which it is attached, and Model Rule Comments [4] – [6] do not do so. Instead, Comment [4] is a practice pointer together with a statement of other law. As a statement of other law, it is not entirely correct because it overlooks the wrongful discharge rights of house counsel under the <i>General Dynamics v. Superior Court</i> line of cases.
[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.	~~[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.~~	See the explanation of the rejection of Model Rule Comment [4], above.
[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.	~~[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.~~	See the explanation of Model Rule Comment [4], above. Also, because of the extreme sensitivity of the Rule 1.14 treatment of a lawyer's relationship to a client with diminished capacity, the Commission believes the entire discussion of that subject should be in a single place where the drafters' and the readers' attention can be focused.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Optional Withdrawal [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.	Optional Withdrawal ~~[7] A~~ <u>Paragraph (b)(2) permits a</u> lawyer ~~may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified~~ <u>from a representation even</u> if the ~~client persists~~ <u>lawyer is not asked to participate in or further</u> a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct ~~even if.~~ <u>Even when a withdrawal is in these circumstances,</u> the lawyer ~~does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or~~ <u>must comply with which the lawyer has a fundamental disagreement</u> <u>this or her duties under Business and Professions Code, section 6068(e)(1) and [Rule 1.6].</u>	This proposed Comment substantially revises Model Rule Comment [7] because of the Commission's rejection of Model Rule paragraph (b)(1). Instead, this provision is directed only to proposed paragraph (b)(2), which as explained above is a combination of Model Rule paragraphs (b)(2) and (b)(3).

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.	[86] ~~A~~ Paragraph (b)(5) allows a lawyer ~~may to~~ withdraw <u>from a representation</u> if the client refuses to abide by ~~the terms~~ <u>a material term</u> of an agreement relating to the representation, such as an agreement concerning fees ~~or~~ court costs <u>or other expenses</u>, or an agreement limiting the objectives of the representation.	This paragraph is substantially the same as the corresponding Model Rule Comment but tracks the two substantive changes in the Commission's proposed Rule: (i) the lawyer may terminate a representation under paragraph (b)(5) only if the client has breached a <i>material</i> term of an agreement with the lawyer; and (ii) the Commission's proposed paragraph (b)(5) specifies that an agreement regarding <i>expenses</i> is within the scope of the provision.
	<u>Scope of Withdrawal</u> [6A] <u>When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.</u>	Comment [6A], which has no counterpart in the Model Rule, was added in response to final public comment. It clarifies that a lawyer who represents a client in multiple matters, or who works for a single client-employer (e.g., as in-house counsel or for the government), might not be obligated to resign from all representations, or from employment when the lawyer withdraws in a particular matter.
	<u>Permission to Withdraw</u> [7] <u>Lawyers must comply with their obligations to their clients under Rule 1.6 and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and</u>	Paragraph (c) of both the Model Rule and the Commission's proposed Rule requires that the lawyer comply with any applicable court rules regarding termination of a representation. However, the Model Rule has no explanatory Comment. The Commission has added this paragraph for that purpose and has included references to potentially applicable California statutes

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Professions Code sections 6068(b), and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).	and court rules.
Assisting the Client upon Withdrawal [9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.	~~[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.~~	Model Rule Comment [9] expresses a general principle with which the Commission agrees, but it instead recommends the adoption of Comments [8] – [10] in order to more fully explain the extremely important topic of what a lawyer is required to do after the termination of a lawyer-client relationship. This elaboration is believed to advance client protection materially.
	[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.	Proposed Comment [8] is much the same as Model Rule Comment [9], but with two changes. First, this does not include the Model Rule to retaining liens because they are prohibited under California law. Second, this adds the explanation that a lawyer's post-termination duty to a former client normally does not include an obligation to provide additional legal services – a duty that arguably is implied by the Model Rule's language.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[9] A lawyer's duties under paragraph (e)(1) arise after termination of a representation for any reason and include client papers and property held by a lawyer in any form or format. This obligation codifies existing case law. See <i>Academy of California Optometrists v. Superior Court</i> (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; <i>Weiss v. Marcus</i> (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]. See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) applies equally to the duty to provide papers to that other person. See Penal Code section 1054.2(b). Paragraph (e) also requires the lawyer to "promptly" return fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15.	Proposed Comment [9] adds a detailed explanation of the extremely important question of how a lawyer is obligated to handle client files post-termination. It also adds references to important California statutory and case law authority. It also clarifies that the issue of whether fees and expenses have been earned or incurred is governed in part by Rule 1.5, recognizing that other provisions of law might be applicable. E.g., Bus. & Prof. Code §§ 6147 & 6148. Finally, it adds a reference to Rule 1.15 with respect to the lawyer's handling of unearned fees when the lawyer and client disagree as to the lawyer's entitlement to additional payment.
	[10]A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the	Proposed Comment [10] further elaborates on the lawyer's post-termination duties with respect to the former client's file. It: (i) further explains what is included in the client's file by referring to the Evidence Code definition of "writing"; (ii) clarifies that the lawyer's duty to make the file available to the former client does not mean that the lawyer is not permitted to copy the file at the lawyer's own expense; and (iii) explains that, although the Rule

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.	does not grant the lawyer the right to copy the file, there might be contractual, court order, or other reasons why the lawyer does not have the right to copy.

Rule 1.16 Declining Or Terminating Representation

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
 - (3) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly and freely assents to termination of the representation;
 - (7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
 - (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.

- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
 - (1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
 - (2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMMENT

- [1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without

limitation, to any sale under Rule 1.17. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. A lawyer can be subject to discipline for improperly threatening to terminate a representation. ~~(See~~ *In the Matter of Shalant* 4 Cal. State Bar Ct. Rptr. 829.

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. See Rules 1.2(c) and 1.4.
- [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2.
- [4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

- [5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Rule 1.6 and Business and Professions Code section 6068(e).
- [6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Scope of Withdrawal

- [6A] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.

Permission to Withdraw

- [7] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph

(c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code sections 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

- [8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.
- [9] ~~Paragraph~~A lawyer's duties under paragraph (e)~~—states a lawyer's duties when, (1) arise~~ after termination of a representation for any reason,~~new counsel seeks to obtain client files from the lawyer. It applies to and include~~ client papers and property held by a lawyer in any form or format~~and~~. This obligation codifies existing case law. ~~(See Academy of California Optometrists v. Superior Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; Weiss v. Marcus (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].)~~ See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the

client, and in those situations paragraph (e) ~~is intended to apply~~ applies equally to the duty to provide papers to that other person. See Penal Code section 1054.2(b). Paragraph (e) also requires the lawyer to “promptly” return ~~unearned~~ fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15.

- [10] A lawyer's duty under paragraph (e)(1) to release “writings” to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

Rule ~~3-700 Termination of Employment~~ Rule 1.16 Declining Or Terminating Representation

(Redline Comparison of the Proposed Rule to Current California Rule)

~~(A) In General.~~

~~(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:~~

- ~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~
- ~~(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~(B) Mandatory Withdrawal.~~

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

- ~~(1) The member knows or should know that the client is 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; or~~

- ~~(2) The member~~the lawyer knows or reasonably should know that ~~continued employment~~the representation will result in violation of these ~~rules~~Rules or of the State Bar Act; ~~or~~
- ~~(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.~~
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or

~~(C) Permissive Withdrawal.~~

~~If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:~~

- ~~(1) The~~the client discharges the lawyer.

~~(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:~~

- ~~(a) the client~~the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; ~~or;~~

- (b) ~~seeks to pursue an illegal course of conduct, or~~
- (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
- (e3) the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal~~criminal or ~~that is prohibited under these rules or the State Bar Act, or~~fraudulent;
- (d4) the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer to carry out the employment effectively, ~~or~~
 - (e) ~~insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or~~
- (5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
- (f6) ~~breaches an agreement or obligation to the member as~~ client knowingly and freely assents to expenses or fees. termination of the representation;
- (2) ~~The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~

- (37) ~~The~~the lawyer believes in good faith that the inability to work with co-counsel ~~indicates that~~makes it in the best interests of the client ~~likely will be served by withdrawal~~to withdraw from the representation; ~~or~~
- (48) ~~The member's~~the lawyer's mental or physical condition renders it difficult for the ~~member~~lawyer to carry out the employment effectively; ~~or~~
- (5) ~~The client knowingly and freely assents to termination of the employment; or~~
- (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
- (610) ~~The member~~the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (De) ~~Papers, Property, and Fees.~~ Upon the termination of a representation for any reason:

~~A member whose employment has terminated shall:~~

- (1) Subject to any applicable protective order ~~or~~, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all ~~the~~ client ~~papers~~materials and property. "Client ~~papers~~materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, ~~expert's reports~~whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
- (2) ~~Promptly~~The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been~~ earned or incurred. This provision is not applicable to a true retainer fee ~~which is~~ paid solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.

Discussion:

COMMENT

- [1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rule 1.17. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. A lawyer can be subject to

discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* 4 Cal. State Bar Ct. Rptr. 829.

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. See Rules 1.2(c) and 1.4.
- [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2.
- [4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

- [5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Rule 1.6 and Business and Professions Code section 6068(e).
- [6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Scope of Withdrawal

- [6A] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.

Permission to Withdraw

- [7] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph

(c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code sections 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

~~Subparagraph [8] Paragraph (Ad)(2) provides that "a member shall not withdraw from employment until requires the member has taken lawyer to take~~ "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the ~~clients~~ client." ~~What such These steps would include, of course,~~ will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and ~~rule 3-700~~ the lawyer has satisfied paragraph (De). The lawyer must satisfy paragraph (d) even if the lawyer has been satisfied unfairly discharged by the client.

~~Paragraph (D) makes clear the member's [9] A lawyer's duties in the recurring situation in which new counsel seeks to obtain client files from under paragraph (e)(1) arise after termination of a member discharged by the representation for any reason and include client papers and property held by a lawyer in any form or format. # This obligation~~ codifies existing case law. ~~(See Academy of California Optometrists v. Superior Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; Weiss v. Marcus (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]. See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers.~~

Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) applies equally to the duty to provide papers to that other person. See Penal Code section 1054.2(b). Paragraph (De) also requires ~~that the member~~lawyer to “promptly” return ~~unearned~~ fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5. If a client disputes the amount to be returned, the ~~member~~lawyer shall comply with ~~rule 4-100(A)(2)~~Rule 1.15.

- [10] A lawyer's duty under paragraph (e)(1) to release “writings” to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (De) ~~is~~(1) does not ~~intended to~~ prohibit a ~~member~~lawyer from making, at the ~~member's~~lawyer's own expense, and retaining copies of papers released to the client, ~~nor~~or to prohibit a claim for the recovery of the ~~member's~~lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

Rule 1.16 Declining Or Terminating Representation
(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
 - (3) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly and freely assents to termination of the representation;
 - (7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
 - (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.

- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
 - (1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
 - (2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMMENT

- [1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without

limitation, to any sale under Rule 1.17. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* 4 Cal. State Bar Ct. Rptr. 829.

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. See Rules 1.2(c) and 1.4.
- [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2.
- [4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

- [5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Rule 1.6 and Business and Professions Code section 6068(e).
- [6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Scope of Withdrawal

- [6A] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.

Permission to Withdraw

- [7] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph

(c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code sections 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

- [8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.
- [9] A lawyer's duties under paragraph (e)(1) arise after termination of a representation for any reason and include client papers and property held by a lawyer in any form or format. This obligation codifies existing case law. See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]. See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) applies equally to the duty to provide papers to that other person. See Penal Code section 1054.2(b). Paragraph (e) also requires the lawyer to "promptly" return

fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15.

- [10] A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

**TOTAL = 6 Agree = 3
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No		The Proposed Rule should be clarified as to the meaning of the term “a representation.” In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the <u>particular matter</u>, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to	This comment observes that a lawyer who terminates a representation under proposed paragraph (a) or (b) does not necessarily have to terminate the entire representation. The letter is written from the standpoint of an in-house governmental lawyer, but the commenter’s point applies not only to all in-house lawyers but also to any lawyer who represents a client in multiple matters. The Commission agrees with the commenter’s observation and has added new Comment [6A] under a new heading: “Scope of Withdrawal”.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the overall relationship between an in-house public counsel and his or her employer.	
2	Committee on Professional Responsibility and Conduct ("COPRAC")	A	Yes		COPRAC supports the adoption of Proposed Rule 1.16 and the Comments to the Rule.	No response required.
3	Law Practice Management & Technology Section of California State Bar ("LPMT")	3	Yes	(e)(2)	LPMT believes that Proposed rule 1.16(e)(2) should be revised to clarify that, when a lawyer terminates a representation, the lawyer's obligation to return unearned fees to the client would be subject to Rule 1.5 (which requires flat fee agreement to state that a client may be entitled to a refund of fees if services have not been completed. LPTM suggests that the following language be added to the end of the first sentence of Proposed Rule 1.16(e)(2): "... consistent with Rule 1.5."	This letter is correct that Rule 1.5 is not cited either in Rule 1.16 or in its Comment, and the Commission does believe that there properly is a connection to be made between the two rules. However, the Commission has concluded that the language recommended by LPMT is not accurate because it suggests that the only measure of whether a lawyer has earned a fee is found in Rule 1.5. In fact, there are other measures such as what the fee agreement says and whether the lawyer is permitted by B&P C sections 6146, <i>et seq.</i> to enforce the fee agreement. Instead, the Commission has added a Rule 1.5 reference to Comment [9], and has done so in language that differs from that recommended.
4	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.16(b)	OCTC is concerned that subparagraph (b)(1) and (3) should mandate withdrawal. Proposed rule 1.16(a)(1) requires an attorney to not represent or withdraw from representation if the lawyer knows or reasonably should know that the representation will result in a violation of these rules. If the client insists upon presenting a defense in litigation or asserting a position or making a demand that is not warranted under	The Commission disagrees and did not make the requested change. OCTC argues that paragraphs (b)(1) and (3) should be mandatory rather than permissive withdrawal situations. These are the two "client insists" categories – the client insists that the lawyer pursue a frivolous claim or defense or that the lawyer pursue a course of conduct that is criminal or fraudulent. The Commission believes that a client's improper direction to a lawyer should not be treated by the lawyer as an escape hatch that

**Rule 1.16 Declining or Terminating Representation.
[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
					existing law and cannot be supported by a good faith argument an attorney's following the client's instruction would be a violation of B&P Code sections 6068(c) and (g) and Proposed Rule 3.1. So, how can it just be permissive? OCTC recognizes that Current Rule 3-700 has the same language (although the Current Rule also had language requiring withdrawal if the client is bringing an action, conducting a defense, asserting a position, or taking a appeal without probable cause and for the purpose of harassing or maliciously injuring any person. We assume this mandatory requirement was taken out because it is already covered by subparagraph (a)(1)). It makes no sense to make the taking of the position a violation but not require withdrawal for a client insisting (as compared to initially requesting) that the attorney take that position. Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. (See <i>Molski v. Evergreen Dynasty Corp</i> (9 th Cir. 2007) 500 Fed.3d 1047, 1060-1, rehearing denied.) Likewise, withdrawal should be mandated if the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent since doing so would be a violation of the these rules and the State Bar Act. Comment [2], in fact, seems inconsistent with placing	permits immediate and automatic withdrawal. Instead, a lawyer's initial response to an improper client demand is not to resign but to fulfill the duty to competently represent the client, including the duty to consult with the client as described in Rule 1.4. In addition, the Commission notes that the two paragraphs to which OCTC points are found in the current rule as rule 3-700(C)(1)(a) and (c), and it does not suggest that they have caused any problem (nor is the Commission otherwise aware of any such problem with the current rule).

**Rule 1.16 Declining or Terminating Representation.
[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
					Proposed Rule 1.16(b)(1) and (3) as permissive and consistent with OCTC's view that (b)(1) and (b)(3) should be mandatory. Comments [4], [5], [6], [8], and the first sentence of Comment [9], seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees and has retained these paragraphs except as modified in response to other comments.
5	Rothschild, Toby	A	No	(e)(1) & Comment [9]	1.16(e)(1) requires files be released "to the client, at the request of the client." Comment [9] defines this duty to apply when "new counsel seeks to obtain client files from the lawyer." The rule and comment should be consistent and make clear that the request can only come from the client, or from a new attorney with client's consent.	The Commission agrees and has modified Comment [9] accordingly.
6	San Diego County Bar Association	A	Yes		Clearer than existing rule	No response required.

Rule 1.16: Declining or Terminating Representation

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 1.16(d) adds that “upon the client’s request, the lawyer shall provide the client with all of the client’s documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client’s rights.”

California: Rule 3-700 allows a lawyer to withdraw if a client “by other conduct renders it unreasonably difficult for the member to carry out the employment effectively” or if the client “breaches an agreement or obligation to the member as to expenses or fees.” A lawyer may also withdraw if the “inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.”

Connecticut: Connecticut adds the following sentence at the end of Rule

1.16(d): “If the representation of the client is terminated either by the

lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation.”

Florida: In Rule 1.16(a), Florida also requires withdrawal if:

(4) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

Florida Rule 1.16(b)(2) permits withdrawal if the client insists upon taking action that the lawyer

considers repugnant, “imprudent,” or with which the lawyer has a fundamental disagreement. Rule 1.16(d) provides that, upon termination, a lawyer may retain papers “and other property relating to or belonging to the client” to the extent permitted by law.

Louisiana: Rule 1.16(d) adds the following:

Upon written request by the client, the lawyer shall promptly release to the client or the client’s new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Maryland: Rule 1.16(b)(4) permits withdrawal if the client insists upon taking action “or inaction” that the lawyer considers repugnant.

Massachusetts: Rule 1.16(e) provides as follows:

A lawyer must make available to a former client, within a reasonable time following the client’s request for his or her file, the following:

1. all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.
2. all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer’s actual cost for these materials, unless the client has already paid for such materials.
3. all investigatory or discovery documents for which the client has paid the lawyer’s out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

4. if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.
5. if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.
6. for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her

employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

7. notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

Minnesota deletes the last sentence of Rule 1.16(d) ("The lawyer may retain papers relating to the client to the extent permitted by other law") and adds a detailed set of rules regarding a client's right to documents.

Missouri: Rule 1.16(c) provides that, when a lawyer has filed a limited appearance pursuant to Missouri's version of Rule 1.2(c), the lawyer is not subject to the usual rule regarding termination of representation. Rule 1.16(c) provides as follows:

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation unless the lawyer has filed a notice of termination of limited appearance. Except when such notice is filed, a lawyer shall continue representation when ordered to do so by a tribunal notwithstanding good cause for terminating the representation.

New Hampshire: New Hampshire makes the protective steps in Rule 1.16(d) a “condition” to terminating a representation.

New York: In the rules effective April 1, 2009, Rule 1.16(a) and (b) is substantially similar to DR 2-109 and 2-110(B) of the old Model Code, respectively. Rule 1.16(c) adds numerous bases for discretionary withdrawals, which are drawn nearly verbatim from DR 2-110(C) of the old Model Code. Finally, Rule 1.16(d) specifies that, “if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission.”

North Carolina: Rule 1.16(b)(4) retains the word “imprudent” and permits withdrawal if the client insists upon taking action “contrary to the advice and judgment of the lawyer. . . .” North Carolina also adds Rule 1.16(b)(8), which permits withdrawal if “the client insists

upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.”

Texas: Rule 1.15(d) permits a lawyer to retain papers relating to the client to the extent permitted by other law “only if such retention will not prejudice the client in the subject matter of the representation.”

Virginia: Rule 1.16(b)(1) replaces “criminal or fraudulent” with “illegal or unjust.” Rule 1.16(e) specifies in detail the papers to which a client is entitled after a lawyer withdraws and whether the client or the lawyer must bear the cost of duplication. The client’s entitlement does not depend upon “whether or not the client has paid the fees and costs owed a lawyer.”

Proposed Rule 1.17 [2-300]

“Purchase and Sale of a Law Practice”

(Draft #9, 6/30/10)

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 rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 2-300.

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

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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.

* Proposed Rule 1.17, XDraft 9 (6/30/10).

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.

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" is 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.

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
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, <u>a substantive field of practice, or a geographic</u> area of ~~law~~ practice, including good will, <u>only</u> if the ~~following~~ conditions <u>set forth in paragraphs (a) through (g)</u> 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, XDraft 9 (6/30/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>entirely</u>, or in the ~~area of practice that has been sold, [in the~~ <u>substantive field or geographic area]</u> ~~[in the jurisdiction] (a jurisdiction may elect either version)~~ in which the ~~practice has been~~ <u>seller</u> conducted; <u>the portion of the practice being sold.</u>	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 <u>seller makes the</u> entire practice, or the entire <u>substantive field or geographic</u> area of <u>the</u> practice, ~~is sold~~ <u>available for sale</u> 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, <i>available for sale</i>, and recommends that the <i>actual transaction</i> 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) <u>The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.</u>	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

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
		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:~~ <u>(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 Business and Professions Code section 6068(e) and Rule 1.6, then:</u>	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;~~ <u>(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer</u>	See Explanation of Changes for paragraph (d).

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:</u>	
	(i) <u>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</u>	See Explanation of Changes for paragraph (d).
	(ii) <u>shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise</u>	See Explanation of Changes for paragraph (d).

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
	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).

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
	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).

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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.</u>	
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.~~ <u>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.</u>	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) <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice	<u>Commission's Proposed Rule*</u> Rule 1.17 Purchase and Sale of a Law Practice	<u>Explanation of Changes to the ABA Model Rule</u>
	(g) <u>A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.</u>	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) <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.
	<u>[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.</u>	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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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 a ~~an~~ <u>substantive field or geographic</u> area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the <u>entire substantive field or geographic</u> 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, <u>or refuse to discharge the selling lawyer</u>, therefore, does not result in a violation. <u>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.</u>	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, <u>or return to the practice in the substantive field or geographic area of the practice that was sold</u>, 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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	retention election for the office or resigns <u>or retires</u> from a ~~judiciary~~<u>judicial</u> 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].
	<u>[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.</u>	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~~<u>This</u> Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within <u>this state or within a defined geographic area of this state.</u> ~~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

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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 geographically~~<u>law firm that sells the practice in this state or in a geographic</u> area ~~typically would sell of this state must make~~ the entire practice <u>in this state or in the geographic area available for purchase</u>, this Rule permits the ~~lawyer~~<u>seller</u> to limit the sale to one or more ~~areas~~<u>substantive fields</u> 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] ~~The~~<u>This</u> Rule requires that <u>all or substantially all of</u> the seller's entire <u>law</u> practice, or an entire <u>geographic or substantive</u> area of practice, be sold. The prohibition against sale of less than <u>substantially all of</u> an entire <u>law</u> practice, <u>entire geographic area of practice or entire substantive field of practice</u> 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 <u>law</u> practice ~~or practice, geographic area of practice, or substantive field of practice~~, subject to client consent <u>or other contingencies</u>. 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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	<u>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.</u>	
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~~<u>Disclosures in confidence of client identities and matters</u> during negotiations between seller and prospective purchaser ~~prior to disclosure for the purpose of information relating to a specific representation~~<u>ascertaining actual or potential conflicts of an identifiable client interest</u> no more violate the confidentiality provisions of ~~Model Business and Professions Code section 6068(e) and~~ 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	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 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, and the word “confidential” has

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	access to client-specific information ~~relating to the representation~~ <u>protected by Business and Professions Code section 6068(e) and Rule 1.6</u> ~~and~~ <u>to the file</u>, however, requires client consent. ~~The~~ <u>This</u> 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 ~~purchaser~~ <u>purchasing lawyer or law firm</u>, 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. <u>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.</u>	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	[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~~	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 <i>in camera</i>, because that may waive confidentiality of the information.

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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 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).	~~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 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 <u>law</u> practice ~~or, a geographic~~ area <u>of the practice, or a substantive field</u> 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~~<u>Paragraph (e) provides that the</u> sale may not be financed <u>solely</u> by increases in fees charged the clients of the <u>law</u> practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser <u>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.</u>	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

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		remind purchasers that under this Rule, they must comply with California requirements regarding fee agreements, such as Business & Professions Code sections 6147 and 6148.
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).~~ <u>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</u>	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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Business & Professions Code section 6068(e) and Rule 1.6) 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, 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, <u>but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter.</u> 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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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, ~~disabled~~<u>impaired</u> or disappeared lawyer, <u>or by a trustee</u>. 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 ~~participate~~<u>assist</u> in a sale of a law practice ~~which that~~ does not ~~conform to the requirements of comply with~~ this Rule, ~~the representatives of the seller as well as a 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 met~~<u>must all comply with this Rule. See, e.g., Rule 8.4(a).</u>	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] <u>[RESERVED]</u> ~~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.

<u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment	<u>Commission's Proposed Rule</u> Rule 1.17 Purchase and Sale of a Law Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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<del> or</del> <u>or, a geographic area of practice, or a substantive field of practice.</u>	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.
	<u>[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).</u>	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).
	<u>[15B]Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.</u>	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.
	<u>[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.</u>	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.

Rule 1.17: Purchase and Sale of a Law Practice
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

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) and Rule 1.6, 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 Business and Professions Code section 6068\(e\) and 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 protected by Business and Professions Code section 6068(e) and Rule 1.6~~ 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)(~~4~~) [and Rule 1.6](#)) 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.

Rule ~~2-300 Sale or~~ 1.17: Purchase and Sale of a Law Practice ~~of a Member, Living or Deceased~~

(Redline Comparison of the Proposed Rule to Current California Rule)

~~All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:~~

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) Fees charged to clients shall not be increased solely by reason of such sale.~~

(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.

~~(Bd)~~ If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, ~~subdivision (e) and Rule 1.6~~, then:

(1) ~~if~~ if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no ~~member~~ lawyer has been appointed to act for the seller pursuant to Business and

Professions Code section 6180.5, ~~then~~ prior to the transfer, the purchaser:

(ai) ~~the purchaser~~ shall cause a written notice to be given to each of the client'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, ~~as required in the form or format held by rule 3-700~~ the lawyer as provided by Rule 1.16(D); and that, if no response is received to the ~~notification notice~~ notification within 90 days ~~of the sending of such notice, after it is sent~~ or in the event, 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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements;~~ and

(bii) ~~the purchaser~~ shall obtain the written consent of the client, provided that ~~such~~ the affected client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response ~~is received~~ to the paragraph (d)(1)(i) notification ~~specified in subparagraph (a)~~ within 90 days ~~of the date of the sending of such notification~~ 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 ~~such~~the 90-day period.

(2) ~~in~~In all other circumstances, not less than 90 days prior to the transfer;

(a) the seller, or the ~~member~~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 client'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, ~~as required in the form or format held by rule 3-700~~the lawyer as provided by Rule 1.16(D); and that, if no response is received to the ~~notification~~notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the sending of such notice~~purchaser to act during the 90 day period,~~ the purchaser may act on behalf of the client until otherwise notified by the client. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements;~~ and

(b) the seller, or the ~~member~~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 client's clients whose matters are included in the sale, prior to the transfer, provided that ~~such~~the client's consent shall be presumed ~~until otherwise notified by the~~

~~client~~ if ~~neither the seller nor the purchaser receives a response is received to the notification specified in subparagraph (a)(2)(i) notice~~ within 90 days of the date of the sending of such notification 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 ~~member~~lawyer shall be taken.

(d) ~~All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.~~

(g) ~~Confidential information~~A lawyer shall not ~~be disclosed~~disclose confidential client information to a ~~non-member~~nonlawyer in connection with a purchase or sale under this ~~rule~~Rule.

(h) ~~Admission~~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 ~~shall not be deemed a sale or purchase under this rule.~~

Discussion:COMMENT

~~Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.~~

[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] ~~"All~~Return to private practice, or ~~substantially all~~return to the practice in the substantive field or geographic area of the ~~law practice of a member"~~ means, for purposes of rule 2-300, that ~~was sold, for as a~~ result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a ~~member may retain one or two clients~~lawyer who ~~have such~~has sold a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. ~~Conversely, rule 2-300 is not intended~~practice to ~~authorize~~accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of ~~a law~~ practice if the lawyer later resumes private practice upon being defeated in a ~~piecemeal fashion except as may be required by subparagraph (B)(1)(a)~~contested or ~~paragraph (D)~~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

- [5] 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. 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 Business and Professions Code section 6068(e) and 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 protected by Business and Professions Code section 6068(e) and Rule 1.6 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]

~~Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.~~

[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 Business and Professions Code section 6068(e) and Rule 1.6) 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.

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 Business and Professions Code section 6068(e) and Rule 1.6, 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 Business and Professions Code section 6068(e) and 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 protected by Business and Professions Code section 6068(e) and Rule 1.6 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 Business and

Professions Code section 6068(e) and Rule 1.6) 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.

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Hazard, Geoffrey, Deborah Rhode and Richard Zitrin (for group of law professors)	M	Yes		1. Re: Geographical area: The Commission has conflated the reference to "geographic area of practice" in the ABA rule -allowing a selling lawyer to cease practice in a state or particular "geographic area" -into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise. Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing in a wide variety of circumstances. This rule was designed to allow lawyers or law firms that are retiring or moving or materially changing their practice to forward their practices to other qualified lawyers. The geographical area sale proposed by CRPC 1.17 is far too broad, allowing buying and selling of areas as if the practice of law were only a business and not also a	The Commission disagrees. Model Rule 1.17 expressly includes as one of its permissive clauses the sale of a practice in a geographic area. It is not confined to a sale of a practice in an entire state. See, e.g., S.C. Rule 1.17. If a lawyer wants to cut back the size of his or her practice in lieu of retiring entirely, he or she could stop accepting cases that would have to be filed in Southern California and confine his or her practice in the future to Northern California. The Commission interprets this as but one of the many possible applications of the Model Rule. While there is disagreement among the Commission members on this point, in the end the Commission has made a policy decision favoring a more expansive interpretation of the Rule, along the lines of the South Carolina rule, that permits the sale of all or substantially all of a practice in a geographic area. As to the concern expressed that this reading will result in clients being "shunted" between law firms, the Commission notes that the Rule does not make clients chattel. Instead, it permits the sale of all or part of the practice. Clients will continue to be free to reject the buyer as their new lawyer, and the selling firm will remain

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.17 Sale of a Law Practice [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.17(e)	profession, and clients were products to be bought and sold. This breadth should be narrowed substantially. 2. Re: No increase of fees: Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word "solely" should be stricken.	responsible for the client matter unless permitted or required to withdraw in accordance with Rule 1.16. The Commission disagrees. Paragraph (e) is taken from the current Rule 2-300. Model Rule 1.17(d) does not contemplate the realities of the transition when all or part of a practice is sold. For example, the buyer and a client who wants to be represented by the buyer will normally enter into a new engagement agreement. In doing so, the client may want to expand or contract the scope of the work to be performed by the new lawyer. The fees charged to the client may properly be increased or decreased accordingly. By providing that fees charged to clients may not be increased "<i>solely</i>" by reason of the sale, current Rule 2-300(A) and proposed Rule 1.17(e) provide the necessary flexibility to permit such arrangements.
2	Office of Chief Trial Counsel	M	Yes		OCTC's concern is that as to both deceased and living clients it provides that the notice to the client can state that if there is no response to the notice the buyer may act. It does not say the buyer is required to act. This could create a problem. There should be a provision that if the client does not specifically consent to the transfer of his or	The Commission disagrees. These provisions are in current Rule 2-300. The Commission is not aware of any problem with them. The rule should not require the buyer to act if the client does not respond. The buyer may not be permitted to act on behalf of the client. For example, the buyer may have an actual or potential conflict of interest, and the non-responsive client must be given an

Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]

TOTAL = 3 **Agree = 1**
Disagree = 0
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are also some Comments providing this, but OCTC believes that it should be in the rule itself.)	opportunity to give his or her informed, written consent to the representation before the buyer may act. Instead, the selling lawyer retains responsibility. If a given client has not responded to the notice, requiring the buyer to act might be inconsistent with Rule 1.16 and other rules. Conversely, if the lawyer whose practice is sold is deceased or incapacitated, the corpse or the incapacitated lawyer should not be required to retain the file and continue to represent the client.
					There are too many Comments and they seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees with the proposal to move compliance with Rule 1.16 into the black letter paragraphs of this rule. Doing so would permit double charging of disciplinary violations without cause. The Comments should direct the attention of selling lawyers to other rules with which they must comply.
				Comment [2]	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 Commission agrees in part. The Commission has reworded the last clause of Comment [2] to state: "... unless the seller withdraws from the representation in compliance with Rule 1.16." The Commission has stricken the sentence that used to say, "See Rule 1.16."

Rule 1.17 Sale of a Law Practice [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [1A], [12], [15A], [15B]	Comments [1A], [12], [15A], and [15B] should be in the rule, not the Comments.	The Commission disagrees. Relatively early in the drafting process, the Commission considered placing Comment [1A] in the black letter rule. However, doing so made the rule more awkward, so the Commission recommends that its contents be in the Comment. Not all definitions need to be in the black letter rule. The Commission disagrees with moving Comments 12, 15A and 15B into the black letter rule. That would invite double charging without cause. One of the functions of comments is to call lawyers' attention to other potentially applicable standards.
				Comments [7] & [11]	Comments [7] and [11] are too long, burying information and being hard to read and understand. Comment [11] involves two different concepts: conflict checks and confidentiality. They should be separated into two separate comments	The Commission disagrees. Comment [7] is adapted from Model Rule Comment [7]. The buyer should not normally obtain access to client-specific confidential information relating to the representation or to the file without client consent. The Comment gives guidance on compliance if the client does not respond to notice. The Commission disagrees with the remark concerning Comment [11].
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.

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).

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

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.

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).

Proposed Rule 1.18 [N/A]
“Duties to Prospective Client”
(ALT1, XDraft 3, 6/17/10 and ALT2, XDraft 7, 6/29/10)

Summary: Proposed Rule 1.18 closely tracks Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California Rule counterpart, but the duty to protect confidential information of a prospective client is found in Evid. Code § 951. Following the Supreme Court’s disposition of the petition for review and requests for depublishation in *Kirk v. First American Title*, and further public comment, the Commission requests that the Board of Governors reconsider its decision on Rule 1.18 (see version ALT1, attached) and adopt a provision permitting unconsented screening in limited circumstances described in paragraph (d)(2) of attached version ALT2. In the alternative, the Commission requests that the Board forward to the Supreme Court both versions of the Rule to permit the Court to make an informed decision on this issue. 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

Statute

Evid. Code § 951

Case law

People v. Gionis (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456];
Kirk v. First American Title Ins. Co. (2010) 183 Cal.App.4th
776, 108 Cal.Rptr.3d 620.

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Nevada Rule 1.18.

- ☐ 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 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 number of lawyers in California reject the concept of non-consensual screening, which is provided for in paragraph (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*

July 2010

(Draft rule following consideration of second round of public comment and the California Supreme Court's disposition of *Kirk v. First American Title*.)

INTRODUCTION & EXPLANATION OF REQUEST FOR RECONSIDERATION OF BOARD'S DECISION NOT TO INCLUDE A PROVISION PERMITTING UNCONSENTED ETHICAL SCREENING IN THE LIMITED SITUATION DESCRIBED IN PROPOSED RULE 1.18(d)(2):

Summary of the Commission's Request. The Commission believes that the Supreme Court's disposition of the *Kirk* case, *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, as well as comments received during both rounds of public comment, have created changed circumstances that warrant the Commission's return to the Board to seek reconsideration of the Board's previous vote on proposed Rule 1.18, and to request that the Board adopt that version of Rule 1.18, attached, that permits unconsented ethical screening in the limited situations described in paragraph (d)(2). This version of the Rule is denominated as "ALT2". The version of Rule 1.18 approved by the Board at its May 2010 meeting is also attached (denominated as "ALT1" in these materials).

Procedural History of the Board's Consideration of Rule 1.10 and Kirk. At its May, 2010 meeting, the Regulation and Admissions Committee of the Board of Governors voted to recommend the adoption of a version of proposed Rule 1.18 without paragraph (d)(2). Paragraph (d)(2) would permit screening under limited circumstances: only when the lawyer to be screened can show that the lawyer "took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." Although the rule adopted by the Board contained no express rule provision concerning ethical screening, it did contain two comments expressing the Board's position that the issue of ethical screening should be left to resolution by case law.

Contemporaneously with the Board's action, a petition for review of the Court of Appeals decision in *Kirk* was filed with the Supreme Court, together with several requests to depublish the decision. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be depublished.

* Proposed Rule 1.18, version ALT1, XDraft 3 (6/17/10) and version ALT2, XDraft 7 (6/29/10).

Significance of the Supreme Court's Actions in Kirk, a decision involving a consultation with a prospective client. The Commission believes that the Supreme Court's actions in the *Kirk* case warrant the Board reversing itself and adopting a version of Rule 1.18 that permits unconsented ethical screening in the limited circumstances as approved by the Court of Appeals. In *Kirk*, the Supreme Court denied both the petition for review and numerous requests that the Court of Appeal decision be depublished. The Supreme Court was squarely presented with addressing the issue of screening in the prospective client situation, the very subject matter of Rule 1.18. The Court of Appeals had concluded that screening in the private lawyer context in limited circumstances was warranted. In reaching that decision, the court found it "significant" that "a majority of the Commission for the Revision of the Rules of Professional Conduct believed that screening *should* be ethically permissible in limited circumstances." 183 Cal.App.4th at 805 (emphasis in original). The same court questioned the rationale that permitted screening of a lawyer who has moved into government service from a private firm, but not the same lawyer who had moved from one private firm to another. *Id.* at 806 n. 25 ("The law cannot possibly be that [a law firm] could effectively screen [the lawyer] if he was tainted from information obtained when he worked for the [government], but cannot effectively screen him if he was tainted from information obtained when he worked for [a private client]. The court also noted that the policy rationales traditionally used by courts to distinguish between screening in a government context and screening in the private context were not compelling and, for the most part, applied equally in the private firm context. *Id.* at 805 n. 24. Some have argued that much the Court of Appeal's opinion was dicta and should not be relied upon as sign post for the direction the Supreme Court would take as to screening in the private context. However, as to the prospective client situation, the court's opinion clearly was *not* dicta. Regardless, if the Supreme Court thought the Court of Appeal was in error in reaching its conclusions, then surely the the Court would have granted the petition for review to set the record straight or, failing that, would at least have depublished the opinion to remove the inference that judges and lawyers should look to it for guidance. The Supreme Court, however, did neither, suggesting it was satisfied not only with the Court of Appeal's conclusion on the specific issue before it (screening in the prospective client context), but also its arguably broader pronouncements on screening in the limited situations presented in the Commission's proposed Rule.

Commission Request. Accordingly, the Commission requests that the Board reconsider its decision not to address unconsented screening directly in Rule 1.18 and adopt the Commission's proposed Rule, ALT2, that permits such screening only in the limited circumstances set forth in paragraph (d)(2). The Commission understands the important role that confidentiality plays in encouraging client candor, typically a prerequisite to a lawyer's effective representation of a client. This Rule recognizes that role and balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation. Thus, the limited availability of screening under this Rule should not impair the flow of information between lawyer and client.

Further, the Commission urges the Board not to continue to pursue the piecemeal, case-by-case approach that is sanctioned in the rule draft it

approved at its May 2010 meeting. In this respect, the Commission agrees fully with the comment submitted by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") during the second public comment period:

"COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties." See June 14, 2010 Letter from COPRAC to Harry B. Sondheim, Commission Chair (in complete public comment, provided with this submission).

Alternatively, the Commission requests that the Board of Governors forward to the Supreme Court the attached ALT2 version of the Rule that the Commission has approved, in addition to the version of the Rule that the Board approved at its May 2010 meeting ("ALT1"). The Commission believes the Supreme Court should have the benefit of having an alternative in making its decision to approve a Rule counterpart to Model Rule 1.18 that permits screening.

Description of Proposed Rule 1.18, Version ALT2. Proposed Rule 1.18, version ALT2, is based on Model Rule 1.18 and clarifies 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 11/18/09).¹ Adopting Rule 1.18 will put the important duties that might arise during the pre-retention period front and center for the profession.

There is no California Rule counterpart, but 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 11/18/09].

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 11/18/09].

The proposed Rule closely tracks Model Rule 1.18, with a number of changes that are intended to: (i) conform the Rule to the language of the Evidence Code [see Explanation of Changes to paragraph (a)]; (ii) limit the scope of a prospective client's protected information by requiring it that be "confidential," while at the same time broadening the scope to include confidential information learned not only "in" the initial consultation but also learned "as a result of" that consultation [see Explanation of Changes to paragraph (b)]; (iii) substituting the well-settled "material to the matter" standard developed over many years in California case law for the ambiguous "significantly harmful to that in the matter" standard that is used in Model Rule 1.18 [see Explanation of Changes for paragraph (c)]; (iv) adding clarifying language and requiring a more rigorous ethical screen than is required by the Model Rule to protect the prospective client's confidential information [see Explanation of Changes for paragraph (d)].

The Comment to proposed Rule 1.18 largely tracks the comment to Model Rule 1.18. The changes made are intended primarily to conform the comment to the revisions to the black letter of the Rule.

Disagreement Over the inclusion of a provision permitting unconsented screening of the consulted lawyer when confidential information is learned during the pre-retention period. The Commission voted 5-5 to strike from proposed Rule 1.18 the concept of unconsented screening and so the concept, which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2).

Those who favor a unconsented screening provision note that it is available to a law firm only in limited situations – where the consulted lawyer "took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." Proponents of this view take the position that the proposed Rule appropriately balances the interests of the prospective client and the interests of the firm's affected client in retaining the lawyer of its choice. The lawyer who might have acquired the prospective client's information despite the lawyer's "reasonable measures" is screened to protect the information.

Those who oppose the inclusion of unconsented screening in this Rule take the position that "[t]his unilateral power would enable lawyers 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 matter in which representation was sought." A detailed statement of this position, with citation to authority, is provided in these materials after the Rule & Comment Comparison Chart, below. See Statement Opposing Unconsented Screening.

Minority. A minority of the Commission maintains that there is no reason for the Board to reconsider its decision. The Board repeatedly has decided on multiple occasions that screening is a matter with sufficient uncertainty that it should be left to the courts to resolve. *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, does not change that conclusion.

Kirk created a highly circumstantial standard that will require further applications in the courts before any general conclusions regarding the scope of the standard can be drawn. *Kirk* 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." (183 Cal.App.4th at 805) The highly circumstantial test which *Kirk* announced leaves the law unsettled and should be left to evolve in the courts. The Supreme Court's decision to not decertify the opinion and to decline review of the Court of Appeal decision does not mean the Court endorsed the decision. (See e.g. Cal Rule of Ct, Rule 8.1125(d).) Nor does it make the law any more settled in light of *Kirk*'s highly circumstantial test.

The screening rule the majority asks the Board to reconsider has nothing to do with the test in *Kirk*. The proposed screening rule would allow for screening without any of the balancing of interests the *Kirk* standard requires. Limiting screening to situations where a lawyer has taken reasonable measures to avoid exposure to more confidential information than was necessary to determine whether the represent the prospective client, offers minimal client protection. Once past the conflicts check stage, a lawyer's determination whether to represent a prospective client frequently involves a discussion in which prospective clients reveal confidential information. The California Supreme Court has recognized that "Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148.)

Furthermore, the proposed screening rule still suffers from the fundamental problem that a 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 proposed screening rule cannot overcome the fact that the affected client is prevented by law firm's duties of confidentiality and the lawyer-client privilege from knowing whether there is actual compliance. The legal profession cannot engender client trust by imposing screens on a wary public. The comments the Commission received do not address that screening comes at the expense of client trust and client protection, which are more important values than finding a way to impose a screen without client consent more predictably.

Variations in Other Jurisdictions. Every jurisdiction that has completed its Ethics 2000 review of its Rules of Professional Conduct has adopted some version of Model Rule 1.18. One of those jurisdictions (D.C.) does not permit unconsented screening. 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., North Carolina, Oregon). Nevada moves into the black letter of the Rule Comments [2] and [5] of the Model Rule.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~, <u>directly or through an authorized representative, consults</u> a lawyer <u>for the possibility</u>~~purpose~~ of ~~forming a client-retaining the lawyer relationship with respect to a matter~~<u>or securing legal service or advice from the lawyer in the lawyer’s professional capacity</u>, is a prospective client.	Paragraph (a) is based on Model Rule 1.18(a) but has been revised to track the language from the California Evidence Code concerning the lawyer-client privilege. The concept of “authorized representative” through whom a client may act is derived from Evid. Code §§ 951 (“Client”) and 954 (“Holder of the Privilege”). The clause, “securing legal service or advice from the lawyer in the lawyer’s professional capacity” is also taken from section 951. Utilizing the Evidence Code language conforms the Rule to the statutory language for the privilege, which applies even if the lawyer is not retained as counsel. See Evid. Code § 951 (“‘client’ means a person who ... <i>consults</i> a lawyer ...”). See also Cal. State Bar Formal Opn. 2003-161.
(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-client~~ relationship ensues, a lawyer who has ~~had discussions~~<u>communicated</u> with a prospective client shall not use or reveal <u>confidential</u> information learned ~~in~~<u>as a result of</u> the consultation, except as Rule 1.9 would permit with respect to information of a former client.	Paragraph (b) largely tracks Model Rule 1.18(b). The term “lawyer-client” has been substituted for the Model Rule’s “client-lawyer” to conform to the style of California rules and statutes. The phrase “has communicated with” has been substituted for “has had discussions with” because “discuss” is a subset of “communicate,” and the Commission determined that given the wide range of communication modes available to prospective clients, the broader term is more inclusive, and so more protective, of the prospective client’s communication. The phrase “as a result of” has been substituted for “in” because a lawyer often will have to investigate further to determine whether

* Proposed Rule 1.18, ALT1 [NO SCREEN], Draft 3 (6/17/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
		the lawyer is willing or able to accept the representation. That information should also be protected. See Comment [3]. However, the word “confidential” has been added to narrow the scope of protection afforded a prospective client. Although a current or former client should be entitled to protection by the lawyer of all information the lawyer learned as a result of a representation, only information which is learned “as a result” of the consultation <i>and</i> which is confidential should be protected in the prospective client situation.
(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 <u>confidential</u> information from the prospective client that ~~could be significantly harmful~~ <u>is material</u> to ~~that person in~~ the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~ <u>prohibited</u> 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).	Paragraph (c) is based on Model Rule 1.18(c). with several changes. As to the addition of “confidential” to modify “information,” see Explanation of Changes for paragraph (b). The phrase “is material to the matter” has been substituted for “could be significantly harmful to that person in the matter” to track California case law on successive representation conflicts of interest, which focuses on the materiality of the information learned in the prior representation or consultation. See, e.g., <i>Jessen v. Hartford General Casualty Co.</i>, 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877, 884-885 (2003). See also <i>Knight v. Ferguson</i>, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823 (2007); <i>Ochoa v. Fordel</i>, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); <i>Faughn v. Perez</i>, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006); <i>Farris v. Fireman’s Fund Ins. Co.</i>, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004). The word “prohibited” has been substituted for “disqualification”

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
		because the rule is intended as a disciplinary rule, not a civil disqualification standard.
(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 <u>that prohibits representation</u> as defined in paragraph (c), representation <u>of the affected client</u> is permissible if: <u>both the affected client and the prospective client have given informed written consent.</u>	The introductory clause to paragraph (d) is based on the corresponding clause in Model Rule 1.18(d), with several changes. The phrase, “that prohibits representation” is substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil disqualification standard. The phrase “of the affected client” has been added to clarify that the issue is whether the lawyer or the lawyer’s firm can represent a current client who might be affected by the consultation with the prospective client because the current client might be prohibited from retaining his or her preferred lawyer. Because the Commission recommends the deletion of subparagraph (d)(2), see Introduction and Explanation for subparagraph (d)(2), the language of Model Rule 1.18(d)(1), which permits representation provided client consent is obtained, has been moved into the introductory paragraph. The language is identical to that of Model Rule 1.18(d)(1), except that California’s heightened “informed written consent” standard has been substituted for the Model Rule’s “consent, confirmed in writing” standard.
(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:~~	As noted above, the language in Model Rule 1.18(d)(1) has been moved into paragraph (d).

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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. The Commission recommends that Rule 1.18 be adopted without the provisions in Model Rule 1.18(d)(2) that permit a law firm that has received a prospective client’s confidential information to implement an ethical screen unilaterally and without the prospective client’s consent. In part, the Commission believes that allowing screening without a prospective client’s consent undermines the extremely important role of confidentiality and trust in a prospective lawyer-client relationship.
(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 Explanation of Changes for subparagraph (d)(2).
(ii) written notice is promptly given to the prospective client.	~~(ii) written notice is promptly given to the prospective client.~~	See Explanation of Changes for subparagraph (d)(2).

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~to~~ and sometimes required to proceed no further. Hence, <u>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 protection afforded clients</u>consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.	Comment [1] is based on Model Rule 1.18, cmt. [1]. The Model Rule language, in the third sentence, stating that “prospective clients should receive some but not all of the protection afforded clients” has been replaced with: a statement that a prospective client’s information is protected “to the same extent as that of a client;” and a reference to the provision in paragraph (d) for seeking client consent to accept or continue a representation of a client who is adverse to a prospective client. This deviation from the Model Rule language, in part, reflects the Commission’s view that a lawyer’s duties to a prospective client should encourage trust and confidence in the context of a consultation. In addition, new language has been included that provides cross to Comments [3] and [4] for guidance and a new last sentence has been added to clarify that whether a prospective client consults directly with the lawyer or through an authorized representative, the effect is the same. See also Explanation of Changes for 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).	[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who <u>by any means</u> 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 <u>or to discuss the prospective client's matter in the lawyer's professional capacity</u>, is not a “prospective client” within the meaning of paragraph (a). <u>Similarly, a person who discloses information to</u>	Comment [2] is based on Model Rule 1.18, cmt. [2]. The phrase “by any means” has been added to emphasize that there are a plethora of modes by which prospective clients can communicate their interest in retaining a lawyer. See also Explanation of Changes to paragraph (b) (substitution of “communicate” for “discussion”). The addition of the clause, “or to discuss the prospective client’s matter in the lawyer’s professional capacity,” has been added to track the language in paragraph (a), which in turn is derived from

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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 <i>People v. Gionis</i> (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.</u>	Evid. Code § 951. The third sentence provides a citation to and brief summary of a seminal California Supreme Court case, <i>Gionis</i>, which provides important guidance to clients and lawyers alike that a lawyer can expressly disclaim that a lawyer-client communication will take place. The fourth sentence, which is taken nearly verbatim from a corresponding comment to Nevada Rule 1.18, was added pursuant to the recommendation in a public comment and clarifies that a person who communicates with a lawyer without intending to retain the lawyer but for some other reason, e.g., to cause the lawyer’s disqualification from representing the person’s opponent in the matter, is not a prospective client and therefore is not afforded the protections of the Rule.
	<u>[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.</u>	Comment [2A] has no counterpart in Model Rule 1.18. It has been added to provide helpful guidance to lawyers concerning the relevant factors to analyze to determine whether a lawyer has indicated by words or conduct an interest in consulting with a prospective client in the lawyer’s professional capacity. See Cal. State Bar Ethics Opn. 2003-161.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 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.	[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~~ <u>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,</u> 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.	Comment [3] is based on Model Rule 1.18, cmt. [3]. The new third sentence (“Sometimes the ...”) and the language added to the third Model Rule sentence “Regardless of ...”) have been added in recognition that information needed to determine whether a lawyer is willing or able to accept a representation might occur outside the initial client consultation, but nevertheless will be protected. See also Explanation of Changes for paragraph (b).
[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,	[4] In order to avoid acquiring ~~disqualifying~~ information from a prospective client <u>that would prohibit representation as provided in paragraph (c),</u> a lawyer considering whether or not to undertake a new matter ~~should~~<u>must</u> 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	Comment [4] is similar to Model Rule 1.18, cmt. [4]. The first sentence has been modified to substitute language describing a prohibited representation for the Model Rule term “disqualifying” to reflect that this Rule is primarily intended as a rule of discipline. A reference to Rule 1.9 (“Duties to Former Clients”) has been added to conform to the Model Rule comment’s reference to “former clients”.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	representation. If the prospective client wishes to retain the lawyer, and if consent is possible under ~~Rule~~<u>Rules 1.7 and 1.9</u>, 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 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 <u>not</u> prohibit the lawyer from representing a different client in the matter. See Rule ~~1.01.0.1~~<u>1.01.0.1</u>(e) for the definition of informed consent. ~~If However, the agreement expressly so provides, lawyer must take~~ <u>reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent</u> the prospective client ~~may also consent to the lawyer’s subsequent use of information received from the prospective client.~~	Comment [5] is based on Model Rule 1.18, cmt. [5]. The change to the first sentence is for clarity. No change in meaning is intended. The last sentence has been extensively modified to change the Model Rule’s emphasis from a lawyer’s <i>ability</i> to obtain a prospective client’s consent to use of the information to the lawyer’s <i>obligation</i> to limit his or her exposure to information that would serve to prohibit the lawyer’s representation of a current client. The latter approach is more in keeping with California’s strong policy obligating lawyers to protect confidential information.
[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 <u>with the prospective client</u>, under paragraph (c), the lawyer is not prohibited from ~~representing~~<u>either accepting or continuing the representation of</u> a client with interests <u>materially</u> 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~~ <u>is material to</u> the matter. <u>For a discussion of the meaning of</u>	Comment [6] is based on Model Rule 1.18, cmt. [6], with some revisions to clarify the intent of the Rule or to conform the Comment to revisions made to paragraph (c). First, the phrase “with the prospective client” has been added as a transition from the previous Comment. Second, the clause, “either continuing or accepting the representation” has been added to clarify that the concept of “representing” includes both ongoing representations and new matters. Third, as in paragraph (c), the phrase “is material to” has been substituted for “could be significantly harmful if used in” for the reasons stated in the Explanation of

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	“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].	Changes for paragraph (c). Finally, the last two sentences have been added to provide a cross-reference to several comments to Rule 1.9, which provide guidance to lawyers on the application of the “substantially related” and “material” standards in paragraph (c).
[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), the consequences of imputation may be avoided if the lawyer obtains the informed written 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.~~	Comment [7] is based on Model Rule 1.18, cmt. [7]. As the proposed rule does not provide for unconsented screening, the language related to the protocol has been deleted. See also Explanation of Changes for subparagraphs (d) and (d)(2).
[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 practicable after the need for screening becomes apparent.	~~[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 practicable after the need for screening becomes apparent.~~ Rule 1.18 leaves open the issue of	Comment [8] 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

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>[ALT1 – NO SCREEN] – Board’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). 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.</u>	screening. Model Rule 1.18, cmt. [8], which concerns the required notice in the event a screen is implemented, has been deleted because the proposed Rule does not expressly provide for screening.
[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.	Comment [9] is identical to Model Rule 1.18, cmt. [9].

Rule 1.18: Duties to Prospective Client

(Redline Comparison of the Proposed Rule ALT1 to the Public Comment Draft)

- (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~~[Comment](#) [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, ~~comments~~[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)(4), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

- [8] Rule 1.18 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 (c). 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.
- [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
(Commission's Proposed Rule ALT1 – Clean Version)

- (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), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

- [8] Rule 1.18 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 (c). 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.
- [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.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~, <u>directly or through an authorized representative, consults</u> a lawyer ~~for the possibility~~<u>purpose</u> of ~~forming a client-retaining the lawyer relationship with respect to a matter~~<u>or securing legal service or advice from the lawyer in the lawyer’s professional capacity</u>, is a prospective client.	Paragraph (a) is based on Model Rule 1.18(a) but has been revised to track the language from the California Evidence Code concerning the lawyer-client privilege. The concept of “authorized representative” through whom a client may act is derived from Evid. Code §§ 951 (“Client”) and 954 (“Holder of the Privilege”). The clause, “securing legal service or advice from the lawyer in the lawyer’s professional capacity” is also taken from section 951. Utilizing the Evidence Code language conforms the Rule to the statutory language for the privilege, which applies even if the lawyer is not retained as counsel. See Evid. Code § 951 (“‘client’ means a person who ... <i>consults</i> a lawyer ...”). See also Cal. State Bar Formal Opn. 2003-161.
(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-client~~ relationship ensues, a lawyer who has ~~had discussions~~<u>communicated</u> with a prospective client shall not use or reveal <u>confidential</u> information learned ~~in~~<u>as a result of</u> the consultation, except as Rule 1.9 would permit with respect to information of a former client.	Paragraph (b) largely tracks Model Rule 1.18(b). The term “lawyer-client” has been substituted for the Model Rule’s “client-lawyer” to conform to the style of California rules and statutes. The phrase “has communicated with” has been substituted for “has had discussions with” because “discuss” is a subset of “communicate,” and the Commission determined that given the wide range of communication modes available to prospective clients, the broader term is more inclusive, and so more protective, of the prospective client’s communication. The phrase “as a result of” has been substituted for “in” because a lawyer often will have to investigate further to determine whether

* Proposed Rule 1.18, XDraft 7 (6/29/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
		the lawyer is willing or able to accept the representation. That information should also be protected. See Comment [3]. However, the word “confidential” has been added to narrow the scope of protection afforded a prospective client. Although a current or former client should be entitled to protection by the lawyer of all information the lawyer learned as a result of a representation, only information which is learned “as a result” of the consultation <i>and</i> which is confidential should be protected in the prospective client situation.
(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 <u>confidential</u> information from the prospective client that ~~could be significantly harmful~~ <u>is material</u> to ~~that person in~~ the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~ <u>prohibited</u> 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).	Paragraph (c) is based on Model Rule 1.18(c). with several changes. As to the addition of “confidential” to modify “information,” see Explanation of Changes for paragraph (b). The phrase “is material to the matter” has been substituted for “could be significantly harmful to that person in the matter” to track California case law on successive representation conflicts of interest, which focuses on the materiality of the information learned in the prior representation or consultation. See, e.g., <i>Jessen v. Hartford General Casualty Co.</i>, 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877, 884-885 (2003). See also <i>Knight v. Ferguson</i>, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823 (2007); <i>Ochoa v. Fordel</i>, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); <i>Faughn v. Perez</i>, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006); <i>Farris v. Fireman’s Fund Ins. Co.</i>, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004).

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
		The word “prohibited” has been substituted for “disqualification” because the rule is intended as a disciplinary rule, not a civil disqualification standard.
(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 <u>that prohibits representation</u> as defined in paragraph (c), representation <u>of the affected client</u> is permissible if:	The introductory clause to paragraph (d) is based on the corresponding clause in Model Rule 1.18(d), with several changes. The phrase, “that prohibits representation” is substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil disqualification standard. The phrase “of the affected client” has been added to clarify that the issue is whether the lawyer or the lawyer’s firm can represent a current client who might be affected by the consultation with the prospective client because the current client might be prohibited from retaining his or her preferred lawyer.
(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 <u>written</u> consent, ~~confirmed in writing, or:~~	Subparagraph (d)(1) is based on Model Rule 1.18(d)(1), except that California’s stricter “informed written consent” standard has been substituted for the Model Rule’s “consent, confirmed in writing” standard.
(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 <u>that prohibits representation</u> than was reasonably necessary to determine whether to represent the prospective client; and	Subparagraph (d)(1) is based on Model Rule 1.18(d)(2), except that the phrase, “that prohibits representation” is substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil disqualification standard.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client	<u>ALT2 [SCREEN] – Commission’s Proposed Rule*</u> Rule 1.18 Duties to Prospective Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>prohibited</u> lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and	Subparagraph (d)(2)(i) is based on Model Rule 1.18(d)(2)(i), except that the word “prohibited” has been substituted for “disqualified” because the rule is intended as a disciplinary rule, not a civil standard. The phrase “and effectively” has been added to the paragraph to provide an added layer of protection to the client by requiring that an ethical screen not only be timely, but also effective. This language is taken from New York Rule 1.11.
(ii) written notice is promptly given to the prospective client.	(ii) written notice is promptly given to the prospective client <u>to enable the prospective client to ascertain compliance with the provisions of this Rule.</u>	Subparagraph (d)(2)(ii) is based on Model Rule 1.18(d)(2)(ii), except for the addition of the clause, “to enable the prospective client to ascertain compliance with the provisions of this Rule.” The addition of this clause, taken from New York Rule 1.11, apprises lawyers of what the notice is intended to accomplish.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ~~to~~ and sometimes required ~~to~~ to proceed no further. Hence, <u>although the range of a prospective clients should receive some but not all 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 protection afforded clients</u>consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.	Comment [1] is based on Model Rule 1.18, cmt. [1]. The Model Rule language, in the third sentence, stating that “prospective clients should receive some but not all of the protection afforded clients” has been replaced with: a statement that a prospective client’s information is protected “to the same extent as that of a client;” and a reference to the provision in paragraph (d) for seeking client consent to accept or continue a representation of a client who is adverse to a prospective client. This deviation from the Model Rule language, in part, reflects the Commission's view that a lawyer's duties to a prospective client should encourage trust and confidence in the context of a consultation. In addition, new language has been included that provides cross to Comments [3] and [4] for guidance and a new last sentence has been added to clarify that whether a prospective client consults directly with the lawyer or through an authorized representative, the effect is the same. See also Explanation of Changes for 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).	[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who <u>by any means</u> 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 <u>or to discuss the prospective client's matter in the lawyer's professional capacity</u>, is not a “prospective client” within the meaning of paragraph (a). <u>Similarly, a person who discloses information to</u>	Comment [2] is based on Model Rule 1.18, cmt. [2]. The phrase “by any means” has been added to emphasize that there are a plethora of modes by which prospective clients can communicate their interest in retaining a lawyer. See also Explanation of Changes to paragraph (b) (substitution of “communicate” for “discussion”). The addition of the clause, “or to discuss the prospective client's matter in the lawyer's professional capacity,” has been added to track the language in paragraph (a), which in turn is derived from

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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 <i>People v. Gionis</i> (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.</u>	Evid. Code § 951. The third sentence provides a citation to and brief summary of a seminal California Supreme Court case, <i>Gionis</i>, which provides important guidance to clients and lawyers alike that a lawyer can expressly disclaim that a lawyer-client communication will take place. The fourth sentence, which is taken nearly verbatim from a corresponding comment to Nevada Rule 1.18, was added pursuant to the recommendation in a public comment and clarifies that a person who communicates with a lawyer without intending to retain the lawyer but for some other reason, e.g., to cause the lawyer's disqualification from representing the person's opponent in the matter, is not a prospective client and therefore is not afforded the protections of the Rule.
	<u>[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.</u>	Comment [2A] has no counterpart in Model Rule 1.18. It has been added to provide helpful guidance to lawyers concerning the relevant factors to analyze to determine whether a lawyer has indicated by words or conduct an interest in consulting with a prospective client in the lawyer's professional capacity. See Cal. State Bar Ethics Opn. 2003-161.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 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.	[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~~ <u>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,</u> 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.	Comment [3] is based on Model Rule 1.18, cmt. [3]. The new third sentence (“Sometimes the ...”) and the language added to the third Model Rule sentence “Regardless of ...”) have been added in recognition that information needed to determine whether a lawyer is willing or able to accept a representation might occur outside the initial client consultation, but nevertheless will be protected. See also Explanation of Changes for paragraph (b).
[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,	[4] In order to avoid acquiring ~~disqualifying~~ information from a prospective client <u>that would prohibit representation as provided in paragraph (c),</u> a lawyer considering whether or not to undertake a new matter ~~should~~<u>must</u> 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	Comment [4] is similar to Model Rule 1.18, cmt. [4]. The first sentence has been modified to substitute language describing a prohibited representation for the Model Rule term “disqualifying” to reflect that this Rule is primarily intended as a rule of discipline. A reference to Rule 1.9 (“Duties to Former Clients”) has been added to conform to the Model Rule comment’s reference to “former clients”.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	representation. If the prospective client wishes to retain the lawyer, and if consent is possible under ~~Rule~~<u>Rules 1.7 and 1.9</u>, 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 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 <u>not</u> prohibit the lawyer from representing a different client in the matter. See Rule ~~1.0~~<u>1.0.1</u>(e) for the definition of informed consent. ~~If However, the agreement expressly so provides,~~<u>lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent</u> the prospective client~~may. See also consent to the lawyer’s subsequent use of information received from the prospective client~~<u>Comment [7].</u>	Comment [5] is based on Model Rule 1.18, cmt. [5]. The change to the first sentence is for clarity. No change in meaning is intended. The last sentence has been extensively modified to change the Model Rule’s emphasis from a lawyer’s <i>ability</i> to obtain a prospective client’s consent to use of the information to the lawyer’s <i>obligation</i> to limit his or her exposure to information that would serve to prohibit the lawyer’s representation of a current client. The latter approach is more in keeping with California’s strong policy obligating lawyers to protect confidential information.
[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 <u>with the prospective client</u>, under paragraph (c), the lawyer is not prohibited from ~~representing~~<u>either accepting or continuing the representation of</u> a client with interests <u>materially</u> 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~~<u>is material to</u> the	Comment [6] is based on Model Rule 1.18, cmt. [6], with some revisions to clarify the intent of the Rule or to conform the Comment to revisions made to paragraph (c). First, the phrase “with the prospective client” has been added as a transition from the previous Comment. Second, the clause, “either continuing or accepting the representation” has been added to clarify that the concept of “representing” includes both ongoing representations and new matters. Third, as in paragraph (c), the phrase “is material to” has been substituted for “could be significantly

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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].	harmful if used in” for the reasons stated in the Explanation of Changes for paragraph (c). Finally, the last two sentences have been added to provide a cross-reference to several comments to Rule 1.9, which provide guidance to lawyers on the application of the “substantially related” and “material” standards in paragraph (c).
[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), the consequences of imputation may be avoided if the lawyer obtains the informed written 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~~prohibited lawyers are timely screened and written notice is promptly given to the prospective client. See Rule ~~1.0~~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.	Comment [7] is based on Model Rule 1.18, cmt. [7]. California’s stricter “informed written consent” standard has been substituted for the Model Rule’s “consent, confirmed in writing” standard. The term “prohibited” has been substituted for “disqualified” to reflect that this Rule is primarily intended as a rule of discipline. In addition, new language was added at the suggestion of a public commenter to provide specific guidance to lawyers concerning additional precautions, such as specific disclosures, that might be appropriate in certain circumstances, for example, when the prospective client is a person who is not an experienced user of legal services. To foster confidence and candor in the consultation, the new language indicates that it may be appropriate in such situations for a lawyer to explain how a screen might be used in the event of subsequent conflict of interest.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>ALT2 [SCREEN] – Commission’s Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 practicable after the need for screening becomes apparent.	[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 <u>to the prospective client</u> as soon as practicable after the need for screening becomes apparent.	Comment [8] is based on Model Rule 1.18, cmt. [8]. The phrase “to the prospective client” has been added to clarify that the notice must be given so that the prospective client may monitor the effectiveness of the screen.
[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.	Comment [9] is identical to Model Rule 1.9, cmt. [9].

Rule 1.18: Duties to Prospective Client
(Redline Comparison of the Proposed Rule ALT2 to the Public Comment Draft ALT1)

- (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~~:

(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~~[Comment](#) [7]. For a discussion of the meaning of “substantially related” as used in paragraph (c), see Rule 1.9, ~~comments~~[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] ~~Rule 1.18 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 (c). 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.~~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.

Rule 1.18: Duties to Prospective Client
(Commission's Proposed Rule ALT2 – Clean Version)

- (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.

Proposed Rule 1.18: Duties to Prospective Client

Minority Dissent to Inclusion of Paragraph (d)(2)

A minority of the Commission members oppose the unconsented screening provisions in paragraph (d)(2). The screening rule the majority asks the Board to reconsider has nothing to do with the test recently announced in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776. The proposed screening rule would allow for screening without any of the balancing of interests the *Kirk* standard requires.

Paragraph (d)(2) would allow screening in situations where the law in California is still evolving. *Kirk* created a highly circumstantial standard that will require further applications in the courts before any general conclusions regarding the scope of the standard can be drawn. *Kirk* 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 highly circumstantial test which *Kirk* announced leaves the law unsettled and should be left to evolve in the courts. The Supreme Court's decision to not decertify the opinion and to decline review of the Court of Appeal decision does not mean the Court endorsed the decision. (See e.g. Cal Rule of Ct, Rule 8.1125(d).) Nor does it make the law any more settled in light of *Kirk's* highly circumstantial test.

Limiting screening to situations where a lawyer has taken reasonable measures to avoid exposure to more confidential information than was necessary to determine whether the represent the prospective client, offers minimal client protection. Once past the conflicts check stage, a lawyer's determination whether to represent a prospective frequently involves a discussion in which a prospective client reveal confidential information. The California Supreme Court has recognized that "Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148.)

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.

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."].)

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.

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.)

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.

The comments the Commission received do not address that screening comes at the expense of client trust and client protection, which are more important values than finding a way to impose a screen without client consent more predictably. While making screening more predictable protects lawyers, it does not protect prospective clients with confidential information at stake. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect prospective 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.

Kirk is but one decision, whose significance will be measured over time. It presents a highly controversial standard that for the first time allows other interests to outweigh the duty of confidentiality. Given the significance of the duty of confidentiality, it is left to be seen how courts will engage in that balancing and whether they will allow other interests to outweigh the protection of prospective client trust in the ability to communicate with a lawyer in confidence. The courts should be left to resolve the scope and application of the *Kirk*. Screening should not be imposed on a client by a Rule of Professional Conduct.

Rule 1.18 Duties to Prospective Client [Sorted by Commenter]						TOTAL = 4 Agree = 0 Disagree = 1 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which paragraph (d) permitted screening to rebut the presumption of shared confidences if "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." If the rule were to permit screening, it should not require that the screening have been, in hindsight, "effective," but rather should require that the lawyer or firm took reasonable measures to screen the prohibited lawyer. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession by leaving lawyers uncertain of the application of precedent to their particular situations. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.	1. As the commenter noted, the Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2). However, in light of the Supreme Court's decision to deny review in <i>Kirk v. First American Title Ins. Co.</i> (2010) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620, rev. denied (6/23/10), and also to deny a request for depublication of the Court of Appeal opinion, the Commission voted to request that the Board reconsider its rejection of proposed Rule 1.198 with a provision permitting screening in the limited circumstances provided in paragraph (d)(2).

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.18 Duties to Prospective Client [Sorted by Commenter]						TOTAL = 4 Agree = 0 Disagree = 1 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					In addition, even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline. If this change is not adopted, we are concerned that the language, as drafted may contain a contradiction, in that the rule says that you can undertake the representation if both lawyer and client give informed written consent, but the comment directs lawyers to abide by case law, which may allow screening. Is the Commission relying on the fact that the new provision in the rule does not use the word "only" before "if both the affected client and the prospective client have given informed written consent" to avoid internal inconsistency? If so, we are concerned that this may end up causing confusion. Finally, we note that Comment [7] incorrectly refers to paragraph (d)(1), when there is no longer a subparagraph (1). In the event the Commission does not follow our recommendation, this reference should be amended to refer to paragraph (d).	2. The Commission understands the commenter's concerns but has not made any suggested change. Pursuant to proposed Rule 1.0, the comments to the Rules "provide guidance for their interpretation and for acting in compliance with the Rules." When read in conjunction with Comment [8], the implementation of a screen by itself will not subject the lawyers involved to discipline. 3. The noted discrepancy has been corrected.

Rule 1.18 Duties to Prospective Client [Sorted by Commenter]							TOTAL = 4 Agree = 0 Disagree = 1 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
2	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.18(c),(d)	1. The Commission states that this is a new rule to California, although OCTC believes it is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts. 2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat of the conflict 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 conflict rules should be in a separate rule. 3. Many of the Comments are more appropriately placed in treatises, law review articles, and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.	1. The Commission is not aware of any Rule of Professional Conduct that addresses duties owed to prospective clients. Thus, this is a "new rule" for California, although some of its concepts can be found in the Evidence Code and ethics opinions. 2. The Commission disagrees with the commenter. As noted previously, a conflict that might arise from a consultation with a prospective client is distinguishable from a former client conflict, requiring that it be treated separately from other conflicts situations. Moreover, non-waivable conflicts typically arise in concurrent representation situations and thus are more appropriately treated under Rule 1.7. 3. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.	
3	Orange County Bar Association ("OCBA")	M	Yes		The OCBA supports the adoption of proposed Rule 1.18 with one substantive change. Specifically, the OCBA notes that paragraph (d) states that, "[w]hen the lawyer has received information that prohibits representation as defined in paragraph (c),	1. See Response to COPRAC, ¶.2, above.	

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL = 4 **Agree = 0**
Disagree = 1
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent." While this statement does not say "...permissible only if...", the language could be interpreted to imply that such a representation can only be undertaken with informed written consent. This interpretation is reinforced by the language of paragraph (c) insofar as it provides a direct prohibition with regard to "represent[ing] 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)." This single exception is repeated in the next sentence of paragraph (c) with regard to imputation. However, Comment [8] states that "Rule 1.18 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 (c). 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." This appears to contradict the language of the proposed Rule itself, in that paragraph (d) could be read to suggest that a non-	

Rule 1.18 Duties to Prospective Client [Sorted by Commenter]						TOTAL = 4 Agree = 0 Disagree = 1 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					consensual screen (even if supported by case law) would not be permitted because it does not involve informed written consent by both clients. To correct this inconsistency, the OCBA suggests revising the language of paragraph (d) to add either of the following at the end of the sentence: "...or if otherwise allowed pursuant to case law" or "...or if otherwise allowed by law." On a non-substantive note, the OCBA notes that Comment [7] still refers to paragraph (d)(1), even though subparagraph (1) was removed in the Commission's revisions to this proposed Rule. It appears that this reference was meant to be to paragraph (d) itself.	2. The noted discrepancy has been corrected.
4	San Diego County Bar Association Legal Ethics Committee	M	Yes		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 matter 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.	The Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2), thereby implementing the commenter's suggested change.

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

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.

Proposed Rule 2.1 [n/a]

“Advisor”

(XDFT5.2, 07/06/10)

Summary: Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer's role as a client's advisor. It provides that a lawyer must exercise independent professional judgment and render candid advice.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☒ Other Primary Factor(s)

This Model Rule has no counterpart in the current California rules but in stating the duty of independent professional judgment, the rule emphasizes an important principle that is fully consistent with California law.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 2
Abstain 2

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:

Comments received during the initial comment period asserted that the proposed Rule should not be adopted because it is not a disciplinary rule, it is not enforceable, is unnecessary and provides for advice that is beyond a lawyer's expertise. Comments received during the subsequent comment period objected to the Commission's omission of comments found in Model Rule 2.1.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.1* Advisor

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer's role as a client's advisor. There is no counterpart to this Rule in the California rules and the Commission is recommending adoption of the first sentence of the Model Rule without any change. The Commission is recommending that the second sentence of the Model Rule not be adopted, but that the sentence be incorporated into Comment [2] to the proposed Rule. Although it is anticipated that the Rule may not be frequently applied as a lawyer disciplinary standard, the Commission recognizes the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment.

Regarding the comments to the Rule, the Commission is recommending adoption of modified versions of two of the Model Rule Comments, and deletion of three Model Rule comments. For the most part, deletions have been made to focus the rule on key concepts of independent professional judgment and candor. The commentary concerning a lawyer's responsibility to render *advice* on factors beyond technical legal considerations, such as moral or social factors, was viewed as inconsistent with the terms of the Rule itself, which provides only that a lawyer duly consider these factors in rendering legal advice. A new Comment [1] has been added that clarifies the concept of independent professional judgment. The first two Comments of the Model Rule counterpart have been modified to remove references that suggest the frequency in which non-legal considerations might arise in the course of representing clients. The Commission determined that the Model Rule statements may not be the case and are unnecessary to make the point of the comment and to clarify that the standards in the Rule are permissive, rather than mandatory requirements in every representation.

* Proposed Rule 2.1, XDFT5.2 (07-06-10)

The Commission added a new Comment [1], which explains the independent judgment standard in the Rule. The Commission added the Comment because the concept of independent judgment in California is a fairly well defined concept. Courts in other jurisdictions have not been consistent in their application of the independent judgment standard. In some cases, courts in other jurisdictions have applied the independent judgment standard in a way that would be inconsistent with a lawyer's duty of loyalty to a client. Comment [1] was added to assure a clear and consistent application of the independent judgment standard."

<u>ABA Model Rule</u> Rule 2.1 Advisor	<u>Commission's Proposed Rule*</u> Rule 2.1 Advisor	<u>Explanation of Changes to the ABA Model Rule</u>
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.	In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.~~In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.~~	The proposed Rule is identical to the first sentence of the Model Rule. In response to public comment, the second sentence of the Model Rule was deleted and moved to Comment [2].

* Proposed Rule 2.1, XDraft 5.2(7/6/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 2.1 Advisor Comment	<u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[1] <u>Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship.</u>	The Commission added a new Comment [1] which clarifies the concept of "independent professional judgment." Although one public comment expressed concerns about any possible language relating the concept to the loyalty, the Commission's new Comment [1] does not equate independent professional judgment with the concept of loyalty.
Scope of Advice [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.	~~Scope of Advice~~ [~~1~~2] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice ~~often involves unpleasant~~<u>may involve</u> facts and alternatives that a client may <u>find unpleasant</u> and <u>may</u> be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.	Comment [2] is based on Model Rule 2.1, cmt.[1]. The heading "Scope of Advice" has been deleted as unnecessary and inaccurate given the Commission's narrower version of the rule. The first sentence of the comment has been revised to replace with word "often" with the word "may" because the Model Rule language makes a judgment about what often occurs in a lawyer client relationship that is not necessarily the case and is unnecessary to make the point of the Comment. The reference to "unpleasant facts and alternative" was changed to state "facts and alternatives that a client may find unpleasant" in response to public comment that it is the client's perception of the facts, rather than the facts themselves, that determine whether they are unpleasant.

<u>ABA Model Rule</u> Rule 2.1 Advisor Comment	<u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.	~~[23] Advice~~<u>In some cases, advice</u> couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. ~~Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.~~ Although a lawyer is not a moral advisor ~~as such, moral and ethical considerations impinge upon most legal questions and~~<u>in rendering advice, a lawyer</u> may ~~decisively influence how the~~<u>refer not only to law will, but to other considerations such as moral, economic, social and political factors that may be applied</u><u>relevant to the client's situation.</u>	Comment [3] is based on Model Rule 2.1, cmt. [2]. The first sentence was revised to clarify that it is not intended to state a proposition that applies in every representation. The second sentence has been deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. The third sentence was deleted and its substance incorporated into the last sentence. The last sentence was revised to incorporate language that was taken from the second sentence of the proposed Rule. The Model Rule Comment language in the last sentence was replaced with the second sentence from the proposed Rule, because the deleted language makes a judgment that moral and ethical considerations impinge on most legal questions, that may not be the case and is not necessary to make the point of the Comment.
[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.	~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~	Model Rule, cmt. [3], has been deleted because the proposition stated therein may be construed as creating a substantive legal standard that goes beyond the terms of the rule itself.

<u>ABA Model Rule</u> Rule 2.1 Advisor Comment	<u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.	~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts~~	Model Rule, cmt. [4], has been deleted as unnecessary practice pointers that distract and potentially undermine the primary message to lawyers and clients that there is a duty of independent professional judgment and candor.

<u>ABA Model Rule</u> Rule 2.1 Advisor Comment	<u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Offering Advice [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.	~~Offering Advice~~ ~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.~~	Model Rule, cmt. [5], has been deleted, in part, because the Commission has included comparable guidance in other proposed rules. For example, the proposed rule on client communication, Rule 1.4, includes Comment [1] that, in part, states: “Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute resolution processes.”

Rule 2.1 Advisor

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

Scope of Advice

[1] Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.1 Advisor

(Commission's Proposed Rule – Clean Version)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship.

[2] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[3] In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Robert K. Rogers	M	No		I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.	The Commission fully considered this comment, but concluded that no changes to the Rule are required.
2	COPRAC	A	Yes		Support as drafted.	No response required.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
4	Barbara Weber	M	No		These comments are regarding attorney discipline as it relates to construction defect claims and suits, and Proposed Rule 2.1. Prevent solicitation by Plaintiff counsel via mass mailings and door to door solicitation. Concerned with "ambulance chasers" and "witch hunts." Attached examples of "fraudulent solicitation letters to unsuspecting homeowners."	The Commission fully considered this comment, but concluded that no changes to the Rule are required. In part, the commenter expresses concerns about the enforcement of the rules, including the consequences rule violations, rather than the substantive content of the rules.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Plaintiff counsel, at time of filing, must record notice of claim/suit to the property. This will protect unsuspecting purchasers or subsequent owners by notifying them upon title search that named property is in litigation/claim status. Owners commonly will not disclose this type of info to subsequent owners which is in direct violation of Cal. Civ. Code section 1102.6. Claimants shall receive a one page summary that shall be signed and notarized by Claimant and submitted with filing of claim to courts. Example: Truth in Lending Act of 2009 for Credit Cards which was enacted has made the dissemination of legal jargon much more user friendly. Real Property filings; at any time during the process of a claim/suit, the ownership of the property changes from original named claimant, property shall automatically be dismissed. New owner of property would need to sign new claim document (see paragraph above) in order for property to remain in claim/suit. In order to fully comply with litigation, Claimant must be present in court in order to file. Again, this would help to prevent	

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					frivolous filings. If a Claimant knew that he/she had to attend a court filing, they would be fully and completely aware of what they have initiated. SB 800 claims and construction defects claims that are not properly filed as stated in Civil Code should immediately be dismissed from court and the filing attorney group FINED for monopolizing the court system. Due to the current recession, all sorts of lawsuits have put a strain on the court system, which currently is overburdened and understaffed due to state deficits at an all time high. The impact of unfounded lawsuits impacts the availability of the court system to handle legitimate claims and filings. If you hit them in their checkbooks, they will think twice before filing an illegitimate claim. Tougher disciplinary standards for violations of professional conduct should include fines at the least, up to and including, disbarment. It is mandatory that the State Bar protect the public from lawyers who take advantage of homeowners. These firms need not conjure up issues in a home that do not exist. Homeowners are already on edge with the economic conditions and these suits/claims only exacerbate the problems by further devaluing properties.	

Rule 2.1 Advisor. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Office of Chief Trial Counsel	A	Yes	Comments [1] & [2]	Comments [1] and [2] seem more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
6	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	M	Yes		Re: Strengthening the comments: The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include, ¶ 3 and the first two sentences of, ¶5 of the ABA rule. Also, the Commission eliminated the sentence in, ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore." Re: Independent professional judgment: We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we <i>strongly caution</i> the Board about	The Commission does not agree with the comment. The Commission rejected Comment [3] from the Model Rule because the proposition stated therein could be construed as creating a substantive legal standard that goes beyond the Rule itself. The Commission rejected Model Rule Comment [5] because it is covered in Rule 1.4. The second sentence of Comment [2] was deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. The commenters' proposed revision does not resolve the concern the Commission had with the Comment. The Commission has adopted a new Comment [1] which addresses the concept of "independent professional judgment." The new Comment does not equate independent professional judgment with the concept of loyalty.

Rule 2.1 Advisor. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any <i>effort</i> to equate "independent professional judgment" with "loyalty" - two vital and important concepts that are nevertheless not the same.	

Rule 2.1: Advisor

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 Rule 2.1.

Colorado adds the following sentence at the end of Rule 2.1: “In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”

Georgia moves the second sentence of the ABA rule to a Comment, and adds the following sentence to the text of the rule in its place: “A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

New York: In the rules effective April 1, 2009, Rule 2.1 adds the word “psychological” after “moral, economic, social” but is otherwise substantially the same as the Model Rule.

Texas: Rule 2.01 begins, “In advising or otherwise representing a client . . . ,” and Texas deletes the second sentence of ABA Model Rule 2.1.

Proposed Rule 2.4 [n/a]
“Lawyer as Third-Party Neutral”
(XDraft #7, 9/13/07)

Summary: Proposed Rule 2.4, which closely tracks Model Rule 2.4, applies to lawyers when they serve as third party neutrals.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☒ Other Primary Factor(s)

Judicial Council Standards for Mediators in Court Connected Mediation Programs; Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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/Not Voting 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

ADR Services, Inc., Alternative Resolution Centers, California Dispute Resolution Council, California Judges Association, JAMS, Judicate West, NASD, NYSE, State Bar Committee on Alternative Dispute Resolution, State Bar of California

☒ Very Controversial – Explanation:

Stakeholders maintain that the services they provide are not the practice of law and therefore, the State Bar should not regulate third party neutral lawyers. See Introduction, ¶¶. 2 & 3. See also Comment [4] to proposed Rule & Explanation of Changes to Comment [4].

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4* Lawyer as Third-Party Neutral

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 2.4 substantially follows ABA Model Rule 2.4, except that the Rule has been modified to emphasize that it applies to “neutral” arbitrators but not to “party” arbitrators, whose duties are different. See Explanation of Changes for paragraph (a). In addition, a few changes have been made to conform the Rule to current California law, and to reference the State Bar Act, where appropriate.

A minority of the Commission believes that Rule 2.4 should go further in providing a means by which the State Bar can discipline lawyers who engage in misconduct while acting as a third party neutral, whether through appointment by a court or by agreement of the parties. In light of the reality that many lawyers in California now provide services as third party neutrals, either in supplement to or in place of their traditional services, the public comment version of the Rule tracked Model Rule 2.4 but also incorporated by reference selected provisions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Thus, under the public comment version of the proposed rule, a lawyer serving as a third party neutral would have been subject to discipline for violating any of the selected standards incorporated in the rule. The Judicial Council standards selected by the Commission included provisions addressing conflicts of interest, confidentiality, ex parte communication and other standards that the Commission believed were relevant to the particular context of a lawyer, as opposed to a non-lawyer, serving as a third party neutral. The Commission’s regulatory strategy of setting a lawyer disciplinary standard by incorporating by reference provisions found outside of the Rules of Professional Conduct was based on current California rules 1-700 and 1-710, both of which both incorporate by reference selected provisions of the Code of Judicial Ethics.

* Proposed Rule, XDraft 7 (9/13/07)

INTRODUCTION (Continued):

Nearly all of the public comment received opposed the Commission's approach of incorporating Judicial Council standards as disciplinary rules. Following consideration of the public comment and presentations at Commission meetings made by several of the commentators, the Commission voted to delete those portions of the proposed rule that would incorporate the Judicial Council standards as disciplinary rules. In taking this action, the Commission considered alternate approaches of: (1) "codifying" in the rule itself, the language of the selected standards; and (2) restructuring the rule, along the lines of California's current trust accounting rule 4-100, to include an enabling provision authorizing the Board to adopt standards for regulating lawyer conduct when acting as a third-party neutral. Neither option garnered the support of a majority of the Commission members. In addition, concerns about the practical obstacle of statutory mediation confidentiality would have persisted even under these alternatives to formulating a broader rule.

Minority. A minority of the Commission believes that incorporating by reference the Judicial Council standards, as was done in earlier drafts of proposed Rule 2.4, is the appropriate approach to regulating conduct of lawyers serving as neutrals, and that it would provide better public protection. The minority also points out that virtually all of the public comment that opposed the original version of the rule came from individuals or entities offering commercial ADR services, or from professional organizations which represent the interests of such individuals or entities.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 2.4 Lawyer as Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.	(a) A lawyer serves as a third-party neutral when the lawyer ~~assists~~<u>is engaged to assist impartially</u> two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as ~~a~~<u>a neutral</u> arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.	This section is nearly identical to the corresponding Model Rule 2.4(a). Changes have been made to clarify that this Rule is applicable only when the lawyer is acting as a <i>neutral</i> arbitrator. Party arbitrators owe different duties to the parties that have retained them and should not necessarily be subject to the same standards as neutral arbitrators.
(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.	(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.	This section is identical to ABA Model Rule 2.4(b).

* Proposed Rule 4.2, Draft 7 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.	[1] Alternative dispute resolution has become a substantial part of the civil justice system. <u>Aside</u> from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. <u>A</u> third-party neutral is a person, such as a mediator, <u>neutral</u> arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. <u>Whether</u> a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.	Comment [1] is nearly identical to comment [1] to Model Rule 2.4. The word "neutral" has been added to emphasize that the Rule applies when a lawyer is acting as an <i>impartial</i> neutral. See Explanation of Changes for paragraph (a).
[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.	[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. <u>In</u> performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the ~~Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.~~ <u>Judicial Council</u>	Comment [2] is identical to Model Rule 2.4, cmt. [2], except that the standards applicable to lawyers acting as third party neutrals in California have been substituted in place of the corresponding ABA standards.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.	
[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.	[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.	Comment [3] is identical to Model Rule 2.4, cmt. [3].

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. <i>In re Scott</i> (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.	Comment [4] has no counterpart in Model Rule 2.4. It has been added to emphasize the California Supreme Court's authority to regulate lawyers when acting as third party neutrals, regardless of whether such conduct constitutes the practice of law.
[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.	~~[4]~~[5] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. ~~Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. <i>Cho v. Superior Court</i> (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)~~	~~The second sentence of Model Rule 2.4, cmt. [4], has been deleted and replaced with a reference to California case law relating to when a former third party neutral is precluded from accepting a later representation of one of the parties because of a conflict of interest. Comment [5] is identical to Model Rule 2.4, cmt. [4].~~

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.	~~[5]~~[6] Lawyers who represent clients in alternative dispute-resolution processes are governed by ~~the~~these Rules ~~of Professional Conduct and the State Bar Act. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~	Comment [6] is identical to Model Rule 2.4, cmt. [5], except that it references the Rules of Professional Conduct and the State Bar Act generally, rather than Model Rules 1.0(m) and 3.3.
	[7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.	Comment [7] has no counterpart in Model Rule 2.4. This Comment has been added in recognition that the conduct of lawyers who serve as third party neutrals may also be subject to other regulation.
	[8] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.	Comment [8] has no counterpart in Model Rule 2.4. The comment has been included to reference proposed Rule 2.4.1 and clarify that when lawyers act as temporary judges, referees, or court-appointed arbitrators, Rule 2.4.1, and not this Rule, applies.

Rule 2.4 Lawyer as Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

- [1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.
- [2] The role of a third-party neutral is not unique to lawyers, although, in some court connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the

lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

- [3] Unlike non lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.
- [4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is

not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is **intended** to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.

- [5] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.
- [6] Lawyers who represent clients in alternative dispute resolution processes are governed by these Rules and the State Bar Act.
- [7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [8] This Rule is not **intended** to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4 Lawyers as Third-Party Neutral. [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	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes	Comments [1], [3] & [4]	Comments [1], [3] and [4] seem more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 2.4: Lawyer Serving as Third-Party Neutral

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.)

Illinois: In the rules effective January 1, 2010, Illinois Rule 2.4(b) requires third-party neutrals to explain to unrepresented parties “the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client” regardless of whether the lawyer believes the unrepresented parties misunderstand the lawyer’s role.

New York: In the rules effective April 1, 2009, Rule 2.4 is substantially the same as Model Rule 2.4.

South Carolina: Rule 2.4 adds a new subparagraph (c) that permits a lawyer to serve as a neutral only if the lawyer or law firm does not represent (and has not previously represented) any party in the matter.

Tennessee: Rule 2.4 defines the circumstances under which a lawyer may act as a “dispute resolution neutral,” the limitations on a lawyer who assumes that position, the circumstances under which the lawyer must withdraw from the position, and the lawyer’s responsibilities following withdrawal. The rule and its comment are much more extensive than Model Rule 2.4.

Virginia: Long before the ABA adopted Model Rule 2.4 in 2002, Virginia adopted its own Rule 2.10 (Third Party Neutral) and Rule 2.11 (Mediator), which provide as follows:

Virginia Rule 2.10 Third Party Neutral

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer’s role as third party neutral and the lawyer’s role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

(4) may not compel or coerce the parties to make an agreement.

(c) A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding. . . .

(g) A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the resolution proceeding.

(h) This Rule does not apply to joint representation, which is covered by Rule 1.7.

Virginia Rule 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (see Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer- mediator should reasonably determine that:

(1) mediation is an appropriate process for the parties;

(2) each party is able to participate effectively within the context of the mediation process; and

(3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties. . . .

Proposed Rule 2.4.1 [RPC 1-710]
**“Lawyer as Temporary Judge, Referee,
or Court-Appointed Arbitrator”**
(XDraft #5, 6/23/07)

Summary: Proposed Rule 2.4.1 carries forward current California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics, when they act as temporary judges, etc.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☒ No ABA Model Rule counterpart	☒ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-710.

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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/Not Voting 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4.1* Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 2.4.1 has no ABA Model Rule counterpart. This Rule currently exists as California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when they act as temporary judges, referees, or court-appointed neutrals. The Rule also requires compliance with Canon 6D, and provides a disciplinary path for lawyers who violate the Canon.

Current Rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court's consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the CA Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court's request, Rule 1-710 was developed and adopted by the Board of Governors and subsequently approved by the Supreme Court.

* Proposed Rule 2.4.1, XDraft 5 (6/23/07).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-710)	<u>Commission's Proposed Rule*</u> Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.	A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.	There is no ABA Model Rule counterpart to proposed Rule 2.4.1. This Rule currently appears as California Rule 1-710, and the Commission recommends that it be carried over into the new rules. The Commission recommends only a few changes be made to current rule 1-710 to conform to California rule drafting style.

* Redline/strikeout showing changes to the ABA Model Rule

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-710)	<u>Commission's Proposed Rule*</u> Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator Comment	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.	[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.	Comment [1] is based on paragraph 1 of the Discussion to current rule 1-710. The only substantive change recommended is the expansion of the comment to make clear the rule covers lawyers acting in "quasi-judicial" capacities as well as acting as temporary judges.
Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)	[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.	Comment [2] is based on paragraph 2 of the Discussion to current rule 1-710. The Commission recommends that it be carried over into the new rule. No substantive changes are recommended to comment [2].
	[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.	Comment [3] is a new comment, and has been included to cross-reference new Rule 2.4 relating to lawyers who are acting as third party neutrals.

* Redline/strikeout showing changes to the ABA Model Rule

Rule ~~1-710~~ Member 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
(Comparison of the Current Proposed Rule to Current California Rule)

A ~~member~~lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject ~~under to Canon 6D of~~ the Code of Judicial Ethics ~~to Canon 6D~~, shall comply with the terms of that canon.

~~Discussion:~~COMMENT

- [1] This ~~rule~~Rule is intended to permit the State Bar to discipline ~~members~~lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.
- [2] Nothing in ~~rule 1-710~~this Rule shall be deemed to limit the applicability of any other rule or law.
~~(Added by order of the Supreme Court, operative March 18, 1999.)~~
- [3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator (Commission's Proposed Rule – Clean Version)

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

COMMENT

- [1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.
- [2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

Rule 2.4.1 Lawyers as Temporary Judge, Referee, or Court-Appointed Arbitrator.
[Sorted by Commenter]

TOTAL = 2 Agree = 2
Disagree = 0
Modify = 0
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		Support as drafted.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Proposed Rule 3.1 [3-200]

“Meritorious Claims and Contentions”

(XDraft #5, 10/3/09)

Summary: Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule, and for clarity.

Comparison with ABA Counterpart	
Rule	Comments
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-200.

Statute

Case law

Zamos v. Stroud, (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54].

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 2
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.1* Meritorious Claims and Contentions

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.1 Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule and for clarity. See Explanation of Changes for the Rule.

Variation in Other Jurisdictions. See Explanation of Changes for the Rule.

* Proposed Rule, XDraft 5 (10/3/09).

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.	(a) A lawyer shall not bring, <u>continue</u> or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. (b) A lawyer for the defendant in a criminal proceeding, or <u>for</u> the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.	Proposed Rule 3.1 is based on Model Rule 3.1, with only minor changes to broaden the rule's scope and to provide clarity. The addition of the word "continue" in paragraph (a) is intended to ensure broad coverage in the public interest. See also <i>Zamos v. Stroud</i> (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54]. The division of the Rule into two paragraphs and the addition of the word "for" in paragraph (b) is for clarity. <u>Variation in other Jurisdictions:</u> Most states follow the Model Rule verbatim. A number of other jurisdictions have divided the Model Rule into two paragraphs as the Commission recommends. E.g., Montana, Wisconsin, and Wyoming. One state has taken the opposite tack and reduced the two sentences of the Model Rule to a single sentence. See Oregon Rule 3.1. Wyoming adds a third paragraph that parallels the substance of FRCP 11(b), concerning the legal effect of a lawyer's signing a pleading, motion or other court document. The Commission is not aware of any other jurisdiction that has added "continue" to its rule. New Jersey has not adopted the second sentence of MR 3.1. Several states elaborate on the word "incarceration," adding or substituting such phrases as "or commitment" (North Dakota), "involuntary institutionalization" (D.C.), or "deprivation of liberty" (Wisconsin).

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.	[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.	Comment [1] is identical to Model Rule 3.1, cmt. [1].
[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith	[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith	Comment [2] is based on Model Rule 3.1, cmt. [3]. The added language clarifies that the Proposed Rule is consistent with the provisions of the State Bar Act and other law.

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Explanation of Changes to the ABA Model Rule</u>
argument for an extension, modification or reversal of existing law.	argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Code of Civil Procedure section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.	
[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.	[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.	Comment [3] is identical to Model Rule 3.1, cmt. [1].
	[4] This Rule is intended to apply to proceedings of all kinds, including appellate and writ proceedings.	Comment [4] has no counterpart in the Model Rule. It reinforces the intended broad scope of this Rule.

Rule ~~3-200 Prohibited Objectives of Employment~~ 3.1 Meritorious Claims and Contentions

(Comparison of the Current Proposed Rule to Current California Rule)

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

~~(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or~~

~~(a) (B) To present a claim~~ A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in litigation law and fact for doing so that is not warranted under existing law ~~frivolous, unless it can be supported by which includes~~ a good faith argument for an extension, modification, or reversal of ~~such~~ existing law.

~~(b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.~~

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3.1 Meritorious Claims and Contentions
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- (b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
- [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to

support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

- [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.
- [4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

**Rule 3.1 Meritorious Claims and Contentions.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No		The Proposed Rule should be clarified as to the meaning of the term "proceeding." Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with Proposed Rule 3.9 and Rule 4.1.	The Commission disagrees that a definition of "proceeding" is necessary in rule 3.1 or in the terminology rule. The term "proceeding" is a term of common usage and is used in other rules (e.g, Rule 3.3(d), Rule 3.5(b) Rule 3.6(a). Defining "proceeding" would be like defining "litigation," "trial" or "matter" in the rules. Lawyers are expected to understand the meaning of terms common to the practice of law such as "proceeding" in complying with the rules. (see Black's Law Dictionary). In addition, the Commission is not recommending adoption of Rule 4.1.
2	COPRAC	A	Yes		Support as drafted.	No response required.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC is concerned that Proposed Rule 3.1 has narrowed what is currently contained in rule 3-200(A). It removes the prohibition on bringing an action whose purpose is to harass or maliciously injure any person. We believe that still belongs in the rules. The Comments are too long and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	The Commission disagrees and has made no change to this rule. Rule 3.1 tracks the Model Rule and in many ways is broader than current rule 3-200(A). Other rules, including Rule 3.4(e) and 8.4(c) and (d) would also protect against actions brought for the purpose of harassing or maliciously injuring any person. The Commission disagrees and believes the four comments are appropriate and useful in understanding and complying with the rule.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.1 Meritorious Claims and Contentions.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	While Comment [2] references Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, it, especially the first sentence, could be interpreted to be contrary to Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, which require an attorney to make an inquiry reasonable under the circumstances. The duty to make a reasonable inquiry should be stated in a clearer language. It should also be made clearer that attorneys may have a duty to even investigate their client's statements. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])	The Commission does not believe that Comment [2] can be reasonably read to be contrary to CCP § 128.7 or FRCP 11. The statement that the rule requires that lawyers inform themselves about the facts of their client's case and the applicable law and determine that they can make good faith arguments in support of their clients' positions is consistent with the duty to make a reasonable inquiry. This statement which comes from Model Rule Comment [2] coupled with citations to both statutes is adequate to eliminate a reasonable interpretation to the contrary.

Rule 3.1: Meritorious Claims and Contentions

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 generally tracks ABA Model Rule 3.1, but the “unless” clause in the first sentence applies if there is a “good faith” basis in law and fact, which “may include” a good faith “and nonfrivolous” argument for an extension, modification, or reversal of existing law.

California: Rule 3-200 provides:

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Also, California Business & Professions Code §6068(c) states that an attorney has a duty to “counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.” In addition, California Civil Code §§128.5, 128.6, and 128.7 provide sanctions for bad faith lawsuits and for frivolous litigation tactics.

Colorado: Rule 1.2(c) permits a lawyer to “provide limited representation to pro se parties . . . ,” but Rule 11(b) of the Colorado Rules of Civil Procedure provides as follows:

Limited Representation

. . . Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney’s name, address, telephone number and registration number. . . . The attorney in providing such drafting assistance may rely on the pro se party’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. . . .

Merely “helping to draft the pleading or paper filed by the pro se party” constitutes a certification by the attorney that the pro se client’s document is “(1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney . . . and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

District of Columbia: The second sentence of Rule 3.1 provides that a lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in “involuntary institutionalization, shall, if the client elects to go to trial or to a contested factfinding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.”

Georgia rejects ABA Model Rule 3.1 and instead retains the language of DR 7-102(A)(1) and (A)(2) from the ABA Model Code of Professional Responsibility.

New Jersey adds the phrase “the lawyer knows or reasonably believes” after “unless” in the first sentence and adds “or the establishment of new law” at the end of the first sentence.

New Mexico creates a Rule 3.0 (Rule 16-300), which specifies as follows:

In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age or sexual orientation

against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding.

New York: In the rules effective April 1, 2009, New York adds Rule 3.1(b), which has no Model Rule equivalent. It defines conduct as “frivolous” if “(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or (3) the lawyer knowingly asserts material factual statements that are false.”

Proposed Rule 3.3 [5-200]

“Candor Toward the Tribunal”

(XDraft #12.1, 6/30/10)

Summary: Proposed Rule 3.3, which is based on Model Rule 3.3, sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The Rule replaces current Rule 5-200 (Trial Conduct), which is narrower in scope than Model Rule 3.3. The Rule imposes on lawyers the same duties as the Model Rule to avoid conduct that undermines the integrity of the adjudicative process, with several significant differences. See Introduction & Explanation of Changes.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 5-200

Statute

Case law

Batt v. City and County of San Francisco (2007) 155 Cal.App.4th 65, 82 n.9.

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9

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 on Model Rule Comparison Chart: ☒ Yes ☐ No
(See the introduction in the Model Rule comparison chart.)

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The Rule imports into the disciplinary rules several duties that are not expressed in current rule 5-200, but which are established in case law. In its public comment, OCTC objected to perceived changes in the standard set by current rule 5-200. Also, a comment from ethics law professors objected to the deviation from the Model Rule in paragraph (c).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3* Candor to the Tribunal

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.3 sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The proposed Rule, which is based on Model Rule 3.3, replaces current Rule 5-200 (Trial Conduct), which is less precise and narrower in scope than Model Rule 3.3. The proposed Rule sets forth substantially the same special duties of lawyers, as officers of the court and legal system, to avoid conduct that undermines the integrity of the adjudicative process, as the Model Rule with several significant differences. Those differences between proposed Rule 3.3 and the Model Rule relate primarily to California's policy of strictly limiting disclosures of confidential client information. See, e.g., Explanation of Changes for paragraphs (a)(3), (b) and (c). Other significant departures from the Model Rule include a change to paragraph (c), which sets forth the duration of the lawyer's duties under this Rule. The Model Rule extends the lawyer's duties through the conclusion of the proceeding. The Commission instead recommends that the duties "continue to the conclusion of the proceeding or the representation, whichever comes first." Other changes in the comments include a more detailed discussion of a lawyer's obligations to cite legal authority in the controlling jurisdiction, (Comment [4]), a discussion of California authority governing a lawyer's conduct when representing a criminal defendant who chooses to testify (Comment [7]), and consideration of the more limited remedial measures available in light of California's confidentiality duty (Comments [9]-[11].)

* Proposed Rule 3.3, XDraft 12.1 (6/30/10).

Minority. A minority of the Commission believes that, aside from the changes made to the Model Rule to conform the proposed Rule to California's policy of strictly limiting disclosures of confidential information and certain other clarifying changes, most of the revisions to the Model Rule that the Commission is recommending are unwarranted. In particular, the minority takes the position that the change the Commission has implemented to paragraph (c) concerning the duration of the duties under this Rule runs counter to prevailing authority in every other jurisdiction and threatens to undermine the integrity of the judicial process. See Minority Statement in Explanation of Changes for paragraph (c). See also Explanation of Changes for Comment [6].

A separate minority takes issue with subparagraph (a)(2). See Explanation of Changes for subparagraph (a)(2).

Variations in Other Jurisdictions. Every jurisdiction has adopted a version of Model Rule 3.3. See Selected State Variations excerpt, below.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	Subparagraph (a)(1) is identical to Model Rule (a)(1).
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or	(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or	Subparagraph (a)(2) is identical to Model Rule (a)(2). The Commission determined that the Model Rule comports with California law. See, e.g., <i>Batt v. City and County of San Francisco</i>, 155 Cal.App.4th 65, 82n. 9 (2007). However, see Comment [4], which notes that this requirement might implicate constitutional concerns when a lawyer is engaged in the defense of a criminal defendant. <u>Minority.</u> A minority view is that the requirement to disclose adverse authority that is not disclosed by opposing counsel where opposing counsel is present is contrary to California law, citing, <i>Schaefer v. State Bar</i>, 26 Cal.2d 739, 747-748 (1945).
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary,	(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the	Subparagraph (a)(3) is similar to Model Rule 3.3(a)(3) except that it does not require disclosure of the false evidence to the tribunal if the disclosure is prohibited by Business and Professions Code § 6068(e). The paragraph reflects the rule in California that a lawyer's duty of candor to a tribunal is circumscribed by the lawyer's duty under section 6068(e) to preserve client confidential information.

* Proposed Rule 3.3, XDraft 12.1 (6/30/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	tribunal, <u>unless disclosure is prohibited by Business and Professions Code section 6068(e)</u>. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.	(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, ~~including, if necessary, disclosure to the tribunal~~<u>extent permitted by Business and Professions Code section 6068(e)</u>.	Paragraph (b) imposes a special obligation on lawyers to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. See Comment [12]. Paragraph (b) follows Model Rule 3.3(b), except it substitutes the clause, "to the extent permitted by Business and Professions Code section 6068(e)" for the phrase "if necessary, disclosure to the Tribunal" at the end of the paragraph. See the Explanation of Changes to paragraph (a)(3).
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.	(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding <u>or the representation, whichever comes first</u> ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~	Paragraph (c) is a significant departure from Model Rule 3.3(c) in two respects. First, unlike the Model Rule that imposes an obligation through the conclusion <u>of the proceeding</u>, paragraph (c) provides that the obligations set forth in paragraphs (a) and (b) should end either with the termination of the representation or the conclusion of the proceeding. The Commission determined that the lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
		Second, paragraph (c) deletes the clause “and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” See the Explanation of Changes to paragraph (a)(3). <i>Minority.</i> A minority of the Commission opposes the first departure from the Model Rule for a number of reasons: (1) a lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); (2) the lawyer would not interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken (see Comment [10]); (3) the lawyer may only take remedial measures under paragraph (a)(3) and (b) to the extent permitted under Business and Professions Code §6068(e); (4) the proposal would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and (5) no known state variation limits paragraph 3.3(c) as proposed.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.	(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.	Following consideration of public comment, the Commission revised paragraph (d) to be identical to the ABA counterpart, in part, because using the Model Rule language will foster consistency in regulating lawyer conduct. As distributed for public, the prior language, among other changes, diverged from the Model Rule language by deleting the term “material.”

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~1-01.0.1~~ 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	Comment [1] is identical to the Model Rule counterpart, except that the reference for the definition of tribunal is to Rule 1.0.1, which is the number assigned to the Terminology section in the Proposed Rules.
[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.	[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently~~ <u>However</u>, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not ~~allow the tribunal to be misled by~~ <u>make</u> false statements of law or fact or <u>present</u> evidence that the lawyer knows to be false. <u>For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material</u>	The first two sentences in Comment [2] are identical to the Model Rule counterpart. The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal. The next-to-last sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled. The last sentence has no counterpart in the Model Rule and is a revision of current California rule 5-200(D), which

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.</u>	prohibits the citation to invalid authority. The Commission determined that adding the substance of current rule 5-200(D), which is more specific than proposed paragraph (a)(1), would provide guidance on the kinds of conduct that paragraph (a)(1) covers. As provided in paragraph (a)(1), the sentence also clarifies that a lawyer is also required to correct an invalid citation previously made to the tribunal.
Representations by a Lawyer [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	Representations by a Lawyer [3] ~~An advocate~~<u>A lawyer</u> is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of ~~matters~~<u>the facts</u> asserted therein, ~~for~~<u>because</u> litigation documents ordinarily present assertions <u>of fact</u> by the client, or ~~by someone on the client's behalf~~<u>a witness</u>, and not ~~assertions~~ by the lawyer. Compare Rule 3.1. However, an assertion <u>of fact</u> purporting to be <u>based</u> on the lawyer's own knowledge, as in <u>a declaration or</u> an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. <u>Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].</u> There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. <u>Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].</u> The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud	The first sentence in Comment [3] is similar to the ABA counterpart, except that "lawyer" is substituted for "advocate," since "advocate" is not the defined term in the rules. The sentence includes several grammatical changes to make the sentence more clear without changing its substance. The second, third, fourth and fifth sentences are similar to Model Rule Comment [3], except for several grammatical changes and the inclusion of a lawyer's declaration in addition to an affidavit. Citations to two applicable cases have been added.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	
Legal Argument [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.	Legal Argument [4] ~~Legal argument based on~~Although a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authoritiesargument based on a knowing false representation of law constitutes dishonesty toward the tribunal. Furthermore, as stated in paragraph A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2), an advocate has requires a dutylawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine Legal authority in the controlling jurisdiction may include legal premises properly applicableauthority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on	The first sentence of Comment [4] is derived from the first sentence in Comment [4] of the comments to the New York Rules of Professional Conduct. The sentence, in effect, reverses the first and second sentences in the Model Rule comment without changing the meaning. The second sentence is new and helps explain the reason for the obligation to disclose applicable law. The third sentence largely tracks its Model Rule counterpart, except that it substitutes “lawyer” for “advocate,” and adds the requirement that the legal authority be known to the lawyer. The fourth and fifth sentences provide guidance on what constitutes “legal authority in the controlling jurisdiction.” The sixth sentence is new and was added in response to public comments that raised concerns that imposing on a criminal defense lawyer the obligations of subparagraph (a)(2) might implicate constitutional principles of due process and effective assistance of counsel. The final sentence is new and provides guidance concerning the lawyer’s obligations under paragraph (a)(4) of the Rule, a provision that has no counterpart in the Model Rule.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the case tribunal.</u>	
Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. ~~This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.~~ A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	The first sentence in Comment [5] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been deleted. The final sentence in Comment [5] is identical to the Model Rule counterpart.
[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer	[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer	The first and second sentences in Comment [6] are identical to the Model Rule counterpart. The third sentence has been added to point the reader to Comment [7], which provides relates to a lawyer's duties concerning testimony by a criminal defendant.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.	the false evidence. <u>With respect to criminal defendants, see Comment [7].</u> If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit ~~or otherwise permit the witness to present~~ the testimony that the lawyer knows is false <u>or base arguments to the trier of fact on evidence known to be false.</u>	The fourth sentence diverges from its Model Rule counterpart in two respects. First, it provides additional guidance that a lawyer may not base arguments to the trier of fact on the evidence known to be false. Second, the clause, "or otherwise permit the witness to present testimony that the lawyer knows to be false," has been stricken. The Commission believes that clause lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. Because the lawyer was not offering the evidence for the purpose of establishing its falsity, see Comment [5], or was in a position to "prevent" or not "otherwise permit" the evidence because of its unexpectedness, the lawyer could be subject to discipline merely by having called the witness. <u>Minority.</u> A minority of the Commission disagrees. The minority takes the position that reading the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) assuages the concerns of the Commission and public commenters.
[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See	[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. ~~In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if~~ <u>criminal defendant insists on testifying, and the accused so desires, even if counsel</u> ~~lawyer~~ knows that the testimony ~~or statement~~ will be false, <u>the lawyer may offer the testimony in a narrative form if the lawyer</u>	The first sentence in Comment [7] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been replaced because California and Ninth Circuit law permits defense counsel to ask a criminal defendant client to testify in the "narrative" fashion as explained in the second sentence and in the cases cited in the proposed comment.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
also Comment [9].	<u>made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. Business and Professions Code section 6068(d); <i>People v. Guzman</i> (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in <i>Price v. Superior Court</i> (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; <i>People v. Johnson</i> (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; <i>People v. Jennings</i> (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; <i>People v. Brown</i> (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].</u> The ~~obligation~~<u>obligations</u> of ~~the advocate~~<u>a lawyer</u> under ~~the~~<u>these</u> Rules ~~of Professional Conduct is~~<u>and the</u> State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~<u>applicable constitutional provisions.</u>	The third sentence adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the Commission recommends deletion of Model Rule 3.3, cmt. [9].
[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. <u>See, e.g., <i>People v. Bolton</i> (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671].</u> A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule ~~1.0~~<u>1.0.1</u>(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	Comment [8] is identical to the Model Rule counterpart, except that a citation to an important California case on the concept discussed has been added and the cross-reference changed to "1.0(f)" changed to "1.0.1(f)," Proposed Rule 1.0.1 ("Terminology" is the counterpart to Model Rule 1.0.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].	~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~	Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.
Remedial Measures [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the	Remedial Measures ~~[10]~~ Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. ~~In such situations, the advocate's~~ <u>The lawyer's</u> proper course is to	The first sentence in Comment [9] is identical to the first sentence in Model Rule Comment [10]. The second sentence is identical to its Model Rule counterpart. The third sentence is identical to the third sentence in Model Rule Comment [10]. The fourth sentence is derived from the fourth sentence in Model Rule Comment [10]. The proposed Comment replaces "advocate's" with "lawyer's", since advocate is not a defined

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.	remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the ~~advocate~~lawyer must take further remedial ~~action. If withdrawal from measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the~~ representation is not permitted or will not undo the effectmateriality of the false evidence, ~~the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.~~	term in the rules and expands on the remedial measures to be taken to include advising the client of the consequences of providing perjured testimony. The fifth sentence combines the fourth and fifth sentences in Model Rule Comment [10]. It changes “advocate” to “lawyer” and clarifies that remedial measures may require seeking permission to withdraw depending on the materiality of the false evidence. The sentence departs from the ABA counterpart which obligates a lawyer to reveal information that would otherwise be protected by the lawyer's duty of confidentiality. Thus, the fifth and sixth sentences of the Model Rule Comment have been substantially revised.
[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false	~~[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false~~	Model Rule Comment [11] is not included because the State Bar Act and California case law obligate a lawyer to protect the client's confidential information, which duty is not superseded by the lawyer's obligation of candor toward a tribunal. See Business and Professions Code § 6068(e).

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.	~~evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~	
	[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).	Comment [10] has no Model Rule counterpart and is intended to provide guidance on what constitutes "reasonable remedial measures" under paragraphs (a)(3) and (b).
	[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not	Comment [11] has no Model Rule counterpart and is intended to clarify that the obligation to take "reasonable remedial measures" under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question and that the duty to take remedial measures under paragraph (b)

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.	does not apply to another lawyer who is retained to investigate or represent a person concerning that person's conduct in the prior proceeding.
Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, ~~including disclosure if necessary,~~ whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Comment [12] is identical to its Model Rule counterpart, except that it clarifies that "other evidence" referred to in the comment is evidence relating to the proceeding. It adds a cross-reference to Rule 3.4. The Comment deletes the phrase "including disclosure if necessary" for the reasons explained in the changes to paragraphs (a)(3) and (b).
Duration of Obligation [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the	Duration of Obligation [13] A Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact ~~has to be established. The~~ Either the conclusion of the proceeding is or of the representation provides a reasonably definite point for	The first sentence in Comment [13] derives from the Model Rule counterpart and no material change is intended. The second sentence conforms the Model Rule comment to the changes recommended for paragraph (c). It also departs

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.	the termination of the ~~obligation~~mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.	from the Model Rule by referring to “mandatory” obligations under the rule. The third sentence is identical to the Model Rule. A fourth sentence has been added to clarify that there may be obligations that go beyond the rule, citing, for example, Rule 3.8 on duties of prosecutors.
Ex Parte Proceedings [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.	Ex Parte Proceedings ~~[14] — Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~	Model Rule 3.3, Comment [14] is not included in the comments to proposed Rule 3.3.

Withdrawal [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.	Withdrawal [15] ~~Normally, a~~ lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's ~~disclosure~~<u>taking reasonable remedial measures</u>. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in ~~such an extreme~~<u>a</u> deterioration of the ~~client-lawyer-client~~ relationship <u>such</u> that the lawyer can no longer competently <u>and diligently</u> represent the client, <u>or where continued employment will result in a violation of these Rules</u>. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. ~~In connection~~ <u>This Rule does not modify the lawyer's obligations under Rule 1.6 or Business and Professions Code section 6068(e) or the California Rules of Court with</u> ~~a~~<u>respect to any</u> request ~~for permission~~ to withdraw that is premised on a client's misconduct, ~~a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~	The first sentence in comment [14] is similar to the first sentence in Model Rule Comment [15], except "disclosure" is replaced with "taking reasonable remedial measures" to make the comment consistent with the wording of the proposed Rule. The second sentence is also similar to the Model Rule counterpart except that it provides clearer guidance on when the deterioration of the lawyer-client relationship may require the lawyer to seek the tribunal's permission to withdraw. The third sentence duplicates the third sentence in the Model Rule Comment. The fourth sentence does not have a counterpart in Model Rule Comment [15] and has been added to clarify that the lawyer's obligations under this Rule are not superseded by the lawyer's obligations under the State Bar Act or the California Rules of Court in requesting permission to withdraw. The Comment departs from Model Rule [15] in that it does not permit the lawyer to reveal confidential client information to the extent reasonably necessary to comply with this rule or with Model Rule 1.6.

Rule 3.3 Candor Toward the Tribunal
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all ~~facts known to the lawyer that the lawyer knows or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.~~ material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has

been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may

include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. ~~Business and Professions Code~~ section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762]. ~~The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.~~

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

[9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by

the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).

[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to

represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

- [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

- [13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

- [14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's

taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule ~~5-200 Trial Conduct~~ 3.3 Candor Toward the Tribunal

(Comparison of the Current Proposed Rule to Current California Rule)

~~In presenting a matter to a tribunal, a member:~~

~~(a) A lawyer shall not knowingly:~~

~~(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;~~

~~(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;~~

~~(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;~~

~~(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;~~

~~(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or~~

~~(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and~~

~~(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is~~

prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

~~(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness~~

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3)

requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is *not* required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing *as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional*, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27

Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.
- [10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the

tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).

- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

- [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

- [13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

- [14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule 3.3 Candor Toward the Tribunal
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a

lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made

reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client

of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

- [10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).
- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

[14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where

continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	M	Yes	(c)	In sharp contrast to the Model Rule, which requires candor until the matter is resolved, paragraph (c) requires that the duty of candor continues until the conclusion of the proceeding or representation, whichever occurs first. The effect of this provision permits lawyers to absolve themselves of their duty on candor while the adjudicative proceeding is pending. Also, because a lawyer need not have made an appearance in the matter to implicate the duty of candor, the proposed rule may also allow a lawyer to "withdraw" and thus from the duty without any imprimatur from the tribunal.	The Commission fully considered the commenter's view, which is aligned with the Commission minority position on paragraph (c), but the majority position was reaffirmed. The Commission continues to believe that a lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged because such involvement could abrogate the lawyer's loyalty to a former client.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as "actual knowledge." However, this is contrary to established California law. An attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (In the <i>Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.)	The Commission disagrees. Both <i>Harney</i> and <i>Chesnut</i> were decided under Bus. & Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of "know" in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts.

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 0**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847, 857 and 859; <i>In the Matter of Harney</i> (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; <i>In the Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; <i>In the Matter of Dale</i> (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; <i>In the Matter of Loftus</i> (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; <i>In the Matter of Casey</i> (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See <i>In the Matter of Broderick</i> (Review Dept. 1994) 3 Cal.	

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					State Bar Ct. Rpt. 138, 148; <i>Zitny v. State Bar, supra</i>, 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.	The Commission disagrees that removing "artifice" from the Rule will narrow OCTC's ability to charge lawyers. The word is found in Bus. & Prof. Code § 6068(d), so OCTC will not lose the ability to make such a charge. Moreover, the term "artifice" is from an statute enacted in 1872 and is not a term that is in common usage in modern lawyer regulation or is one that has received sufficient application or interpretation to provide lawyers with adequate advance guidance. The Commission believes that closely tracking the wording of the Model Rule will enhance compliance with the duty of candor and provide better public protection.

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: 1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and 2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1) and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2). OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney "[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny	The Commission disagrees that the proposed rule signals a change in the law regarding the proper citing of legal authority and believes that Comments [2] and [4] make it sufficiently clear that the prohibitions under current 5-200(c) come with the provisions of paragraph (a) and that no further comment is necessary. No change is necessary. The provision from current rule 5-200(E) is properly in proposed Rule 3.4(g) on advocacy and not in this rule.

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 0**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					them a fair trial. (See e.g. <i>In the Matter of Philip E. Kay</i>, Case No. 01-0-193. The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court, Supreme Court Case No. S 180405.) OCTC suggests that this language be included in the rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see <i>Hawk v. Superior Court</i> (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see <i>Hawk v. Superior Court, supra</i>, 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See Butler v. State Bar (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])	lawyers on how to be in compliance with their professional obligations. The Commission disagrees. As to length, see previous paragraph. As to the stated concerns re CCP 128.7, an inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a "lawyer cannot ignore an obvious falsehood."
3	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes	Paragraph (d) Comment [9]	Agree with a Commission minority that there is "insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter." The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept	The Commission agrees with SDCBA. Paragraph (d) has been changed to track Model Rule paragraph (d) for better clarity and consistency in regulating lawyer conduct. No change is necessary. Comment [9] provides that the duty to take corrective measures applies when the lawyer learns of false testimony occurring on cross examination.

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	of “Candor Toward the Tribunal,” and should remain intact. It should be noted that the “Explanation of Changes to ABA Model Rule” for Comment [6] notes that a Minority of the Commission believed the clause “or otherwise permit the witness to present testimony that the lawyer knows to be false,” in the last sentence of Comment [6], “lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . .” The Majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) “assuages the Minority’s concerns.” SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.	The Commission fully considered the commenter’s view of the minority position but the majority position was reaffirmed with the one substantive change being the adoption of the Model Rule counterpart language for paragraph (d).

Rule 3.3: Candor Toward the Tribunal

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: Rule 5-200 provides as follows:

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

In addition, California Business & Professions Code §6068(d) provides that it is the duty of an attorney to employ “those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” And §6128(a) makes an attorney guilty of a misdemeanor if the attorney engages in “any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.”

District of Columbia: Rule 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, “unless correction would require disclosure of information that is prohibited by Rule 1.6.” Rule 3.3(a)(2) is nearly identical to ABA Model Rule 1.2(d). D.C.’s equivalent to ABA Model Rule 3.3(a)(2) applies to undisclosed, directly adverse legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to be “dispositive of a question at issue.”

D.C. Rule 3.3(a)(4) provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false, “except as provided in paragraph (b).” D.C. Rule 3.3(b)

adopts the so-called “narrative method” for presenting false testimony by providing as follows:

When the witness who intends to give evidence that the lawyer knows to be false is the lawyer’s client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client’s testimony in closing argument.

Rule 3.3(c) provides simply: “The duties stated in paragraph (a) continue to the conclusion of the proceeding.” D.C. omits both the second sentence of ABA Model Rule 3.3(a)(3) (“If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity . . .”), and all of ABA Model Rule 3.3(b) (“A lawyer . . . who knows that a person . . . has engaged in criminal or fraudulent conduct relating to the proceeding . . .”) but covers both situations by adding Rule 3.3(d), which provides as follows: “(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).” (The relevant

part of D.C. Rule 1.6(d)(2) provides that when a client has used or is using a lawyer’s services to further a crime or fraud, the lawyer may reveal client confidences and secrets to the extent reasonably necessary to “prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of the crime or fraud.”) Finally, D.C. omits ABA Model Rule 3.3(d) (regarding ex parte proceedings).

Florida: Rule 3.3 provides that a lawyer shall not

(a)(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Florida Rule 3.3(b) provides that “the duties stated in Rule 3.3(a) continue beyond the conclusion of the proceeding.” Florida has not adopted any equivalent to ABA Model Rule 3.3(b). Florida Rule 3.3(c) provides only that a lawyer “may refuse to offer evidence that the lawyer reasonably believes is false.”

Maryland adds the following Rule 3.3(e): “[A] lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.”

Massachusetts: Rule 3.3(b) states that the conclusion of the proceedings includes “all appeals.” Rule 3.3(e) permits a lawyer representing a criminal defendant to elicit false testimony in narrative fashion if withdrawal is not otherwise possible without prejudicing the defendant. However, “the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.” A lawyer who is unable to withdraw when he or she knows that a criminal defendant will testify falsely “may not prevent the client from testifying” but must not “examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false.”

New Jersey adheres closely to the pre-2002 version of ABA Model Rule 3.3 but adds, in a new Rule 3.3(a)(5), that a lawyer shall not fail to disclose to the tribunal a material fact “knowing that the omission is reasonably certain to mislead the tribunal.” Also, New Jersey Rule 1.6(b)(2) requires a lawyer to reveal confidences to prevent a client from committing “a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.”

New Mexico specifies in Rule 16-303(E) that a lawyer must disclose to a tribunal whether the lawyer is representing the client in a “limited manner.”

New York: In the rules effective April 1, 2009, Rule 3.3(c) omits the phrase “continue to the conclusion of the proceeding” (and thus has no express time limit). New York also adds Rule 3.3(e), which is substantially similar to 7-106(B)(2) of the old Model Code. Rule 3.3(f), which also has no Model Rule equivalent, is substantially similar to 7-106(C)(5)-(7) of the old Model Code, but it also prohibits

“conduct intended to disrupt the tribunal.” New York adds Comment 6A, which addresses the rule’s application to prosecutors, and omits Comment 13 concerning the duration of the Rule 3.3 obligation.

North Dakota: Rule 3.3(a)(3) provides that if a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, then:

the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in testimony of the lawyer’s client. If the evidence was contained in testimony of the lawyer’s client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client’s false testimony.

Ohio: Rule 3.3(c) provides that the duties stated in Rules 3.3(a) and (b) continue “until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination. . . .”

Oregon provides that the duties in Rule 3.3(a) and (b) are suspended if “compliance requires disclosure of information otherwise protected by Rule 1.6.”

Pennsylvania adds that it applies if a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence "before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition. . . ."

Texas: Rule 3.03(b) and (c) provides:

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Virginia: Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Virginia Rule 3.3(a)(3) requires disclosure only of "controlling" legal authority and omits the word "directly" before "adverse." (The Comment explains that "directly" was deleted because "the limiting effect of that term could seriously dilute the paragraph's meaning.") Virginia Rule 3.3(a)(4) and Rule 3.3(b) are identical to the pre-2002 version of ABA Model Rule 3.3(a)(4) and Rule 3.3(c). Virginia omits ABA Model Rules 3.3(b) and (c) and adds a new paragraph taken verbatim from DR 7-102(B)(2) of the ABA Model Code of

Professional Responsibility that provides: "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

Proposed Rule 3.4 [5-200(E)][5-220][5-310(A)] “Fairness to Opposing Party and Counsel” (XDraft #6, 09/19/09)

Summary: Proposed Rule 3.4 describes litigation abuses that threaten the goal of the fair administration of justice that is intended to provide a level playing field. The proposed Rule generally tracks Model Rule 3.4, supplemented by provisions from current California rules 5-200, 5-220, and 5-310.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

Rules 5-220, 5-310

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 2
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.4* Fairness To Opposing Party And Counsel

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.4 describes litigation abuses that threaten the goals of the fair administration of justice that is intended to provide a level playing field. The proposed rule generally tracks ABA Model Rule 3.4, supplemented by provisions in current California rules 5-200, 5-220, and 5-310.

Proposed Rule 3.4 omits all or part of Model Rule 3.4(d), (e) and (f), as well as the comment paragraphs associated with those provisions. The Commission believes that adoption of those provisions would chill legitimate advocacy and be inconsistent with legislative policy regarding discovery.

Variations in Other Jurisdictions. Twelve states have revised the substance of ABA Model Rule 3.4. (See State Variation Chart.)

* Proposed Rule 3.4, XDraft 6 (9/19/09).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;	A lawyer shall not: (a) unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;	Paragraph (a) is identical to Model Rule 3.4(a).
	(b) <u>suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;</u>	Paragraph (b) carries forward current rule 5-220; it does not have a counterpart in the Model Rule. Retaining the concept of rule 5-220 adds a layer of public protection by prohibiting suppression of evidence. Paragraph (b) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraph (d), below.¹
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;	(b) falsify evidence, <u>or</u> counsel or assist a witness to testify falsely, ~~or offer an inducement to a witness that is prohibited by law;~~	Paragraph (c) tracks Model Rule 3.4(b), except the concept of offering an unlawful inducement to a witness has been moved to another paragraph dealing with conduct toward witnesses. (See paragraph (e) below.)

* Proposed Rule 3.4, XDraft 6 (9/19/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;</u>	Paragraph (d) carries forward current rule 5-310(A); it does not have a Model Rule counterpart. Retaining the concept of rule 5-310(A) adds a layer of public protection by prohibiting a lawyer from advising or causing a person to be unavailable, which is a subset of evidence obstruction and suppression. Paragraph (d) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraphs (a) and (b), above.²
	(e) <u>offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:</u>	Paragraph (e) melds ABA Model Rule 3.4(b)'s concept of "offer[ing] an inducement to a witness that is prohibited by law. . ." with current rule 5-310(B)'s prohibitions concerning witness compensation that are not found in the Model Rule.
	(1) <u>expenses reasonably incurred by a witness in attending or testifying;</u>	Subparagraph (e)(1) carries forward current rule 5-310(B)(1), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating for reasonable expenses.

² RM: SHOULD SAY A MORE "SPECIFIC" LAYER BECAUSE (d) IS REALLY A SUBSET OF (a)—OBSTRUCTING ACCESS TO EVIDENCE

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
	(2) reasonable compensation to a witness for loss of time in attending or testifying; or	Subparagraph (e)(2) carries forward current rule 5-310(B)(2), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating witnesses who provide testimony for earnings lost by reason of their appearance in litigation proceedings.
	(3) a reasonable fee for the professional services of an expert witness.	Subparagraph (e)(3) carries forward current rule 5-310(B)(3), which the Commission believes essential to the ability of litigants to prove cases where expert witnesses are necessary or desirable.
(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;	(ef) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists; or	Paragraph (f) is identical to Model Rule 3.4(c).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;	~~(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;~~	Model Rule 3.4(d) has been rejected because it conflicts with California legislative policy, which provides for: (1) a comprehensive system of discovery remedies (e.g., C.C.P., § 2019 – 2036.050); (2) Court supervision of discovery misconduct and abuse through a variety of means, including sanctions and contempt(e.g., C.C.P., § 1992, 2019.030, 2020.240, 2023.010, 2023.020); and (3) no reporting of attorney sanctions for discovery matters (Bus. & Prof. C.,§6068(o)(3)) The Commission believes that this public policy is sound because: (1) the tribunal before which a matter is pending is better equipped to control discovery delay or frivolous requests; (2) discovery misconduct is not necessarily indicative of unfitness to practice law; and (3) more serious discovery abuses can subject a lawyer to discipline through other standards (e.g., Bus. & Prof. C., §6103 – failure to comply with court order; §6068(b) --failure to maintain respect for the courts; or other parts of this Rule).
	<u>(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.</u>	Paragraph (g) is based in part on Model Rule 3.4(e), and in part on current rule 5-200(E).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or	~~(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or~~	Except for what has been proposed as paragraph (g), the Commission recommends rejecting Model Rule 3.4(e) because it is overbroad, ambiguous and is likely to chill legitimate advocacy. Abuses can best be controlled by the trial judge through proper objections by the opponent.
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.	~~(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:~~ ~~(1) the person is a relative or an employee or other agent of a client; and~~ ~~(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.~~	Commenters objected to Model Rule 3.4(f) arguing that it is ambiguous, overly broad and duplicative, and in conflict with paragraph (a). On reconsideration, the Commission agreed.

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.	[1] The procedures^s of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.	Comment [1] adopts Model Rule 3.4, comment [1], only making "procedure" plural.
[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting	[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. ~~Applicable law in many jurisdictions makes it an~~ <u>It is a criminal</u> offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. <u>(See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.)</u> Falsifying evidence is also generally a criminal offense. <u>(See, e.g., Penal Code section 132; 18 United States Code section 1519.)</u> Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or	Comment [2] largely tracks Model Rule 3.4, deleting only the reference to law in other jurisdictions and adding California citations to support the principles stated in the Comment.

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
authority, depending on the circumstances.	destroy material characteristics of the evidence. ~~In such a case, applicable~~ <u>Applicable</u> law may require ~~the a~~ lawyer to turn ~~the~~ evidence over to the police or other prosecuting ~~authority~~<u>authorities</u>, depending on the circumstances. <u>(See <i>People v. Lee</i> (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; <i>People v. Meredith</i> (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)</u>	
[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.	~~[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.~~	The Commission recommends that Comment [3] to Model Rule 3.4 be rejected because (1) the first sentence is too general to provide definition of the rule or guidance; and (2) the second sentence is unnecessary because it refers to common law in other jurisdictions, which is irrelevant to the common law of California and therefore can provide little guidance. Moreover, the topic is more comprehensively addressed in proposed paragraph (e).
	<u>[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.</u>	Proposed comment [3] has no counterpart in the Model Rule; it clarifies the scope of the Rule. In that regard, the Comment is intended to prevent abuse of the Rule by parties who might attempt to claim that a discovery violation under the rules regulating discovery is equivalent to a breach of professional obligations under this Rule.
[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.	~~[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.~~	The Commission recommends that Comment [4] to Model Rule 3.4, which clarifies Model Rule 3.4(f) be rejected because the Commission's has proposed deleting of paragraph (f).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.	Comment [4] has no counterpart in the Model Rule. It attempts to provide guidance regarding application of this Rule. (See e.g., California State Bar Formal Opn. No. 1997-149.)

Rule ~~5-220~~ ~~Suppression of Evidence~~ 3.4 Fairness to Opposing Party and Counsel

(Comparison of the Current Proposed Rule to Current California Rule)

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) ~~A member shall not~~ suppress any evidence that the ~~member~~ lawyer or the ~~member's~~ lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence or counsel or assist a witness to testify falsely;

~~Rule 5-310 Prohibited Contact With Witnesses~~

~~A member shall not:~~

- (d) ~~(A) Advise~~ advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (e) ~~(B) Directly~~ offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~ lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) ~~Expenses~~ expenses reasonably incurred by a witness in attending or testifying;
- (2) ~~Reasonable~~ reasonable compensation to a witness for loss of time in attending or testifying; or
- (3) ~~A~~ a reasonable fee for the professional services of an expert witness.
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

~~Rule 5-200(E) Trial Conduct~~

- (g) ~~(E) Shall not~~ in trial, assert personal knowledge of ~~the~~ facts ~~at~~ in issue, except when testifying as a witness.

Comment

- [1] The procedures of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

- [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. (See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)
- [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.
- [4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last

earned if currently unemployed, or what others earn for comparable activity.

Rule 3.4 Fairness to Opposing Party and Counsel

(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence or counsel or assist a witness to testify falsely;
- (d) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (e) offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness.
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.

Comment

- [1] The procedures of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose

commencement can be foreseen. See, e.g., Penal Code section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

- [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.
- [4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.

**Rule 3.4 Fairness to Opposing Party and Counsel.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	M	Yes	3.4(f)	While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule is vague and potentially overbroad. It is unclear whether “an obligation under the rules of a tribunal” includes, for example, local court rules or a judge’s individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation. OCTC requests clarification from the Commission whether the Proposed Rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.	The Commission disagrees. The Commission does not believe that such clarification is needed or possible in this rule.
				Comment [2]	Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment [2] has too many ideas for one Comment.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 3.4 Fairness to Opposing Party and Counsel.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Diego County Bar Association	M	Yes		Paragraph (e)(3) is overbroad and unnecessary to accomplish the policy objective of preventing improper influence of witness testimony. It should be limited to prevent undue influence of fact witnesses and an attorney should not be penalized if an expert is paid an amount that another person believes is too high to be objectively or subjectively reasonable. Paragraph (h) is overbroad because it is not limited to the discovery or litigation context and is unnecessary and duplicative in light of section (a).	Commission did not make the requested revision, in part, because, expert witness fees are addressed in the existing rule and the Commission was not aware of any manifest problems. Commission deleted paragraph (h).

Rule 3.4: Fairness to Opposing Party and Counsel

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 adds two exceptions that allow a lawyer to ask a non-client not to give information to another party if: “(2) the person may be required by law to refrain from disclosing the information; or (3) the information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.”

California: Compare Rule 5-200 (reprinted in the Selected State Variations following ABA Model Rule 3.3 above) and Rule 5-220, which provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.” Also, Rule 5-310 provides that a member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where

prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

In addition, California Penal Code §135, which was enacted in 1872, provides as follows:

Destroying evidence. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

District of Columbia: Rule 3.4 provides that a lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6; . . .

(g) Peremptorily strike jurors for any reason prohibited by law.

Florida: Rule 3.4(a) replaces the ABA phrase “having potential evidentiary value” with the phrase “that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding. . . .” Rule 3.4(b) provides that a lawyer shall not “fabricate” evidence, and provides that a lawyer shall not

offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

Florida Rule 3.4(d) deletes the phrase “to make a reasonably diligent effort,” instead providing that a lawyer shall not “intentionally” fail to comply with a legally proper discovery request by an opposing party. Florida Rules 3.4(g) and (h) expand upon DR 7-105 of the ABA Model Code of Professional Responsibility by providing that a lawyer must not present, participate in presenting, or threaten to present either criminal charges or “disciplinary charges under these rules” solely to obtain an advantage in a civil matter.

Georgia: Rule 3.4(b) borrows language from DR 7-109(C) of the ABA Model Code of Professional Responsibility. Georgia omits ABA Model Rules 3.4 (c), (d), and (e) entirely. Georgia Rule 3.4(f) adds that a lawyer may request a person not to volunteer information to another party “if the information is subject to the assertion of a privilege by the client.”

Georgia also adds a new Rule 3.4(g), based on ABA Model Rule 4.4, which provides that a lawyer shall not “use methods of obtaining evidence that violate the legal rights of the opposing party or counsel,” and a new Rule 3.4(h), taken verbatim from DR 7-105 of the ABA Model Code, which provides that a lawyer shall not “present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Illinois: In the rules effective January 1, 2010, Illinois expands on ABA Model Rule 3.4(b)'s command not to “offer an inducement to a witness that is prohibited by law.” Comment 3 elaborates on this restriction in even more detail.

Massachusetts: Rule 3.4(g) tracks DR 7-109(C) of the ABA Model Code of Professional Responsibility. Rule 3.4(h) retains the language of DR 7-105. Rule 3.4(i) says that a lawyer shall not, “in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person,” but the paragraph expressly does not preclude “legitimate advocacy” when the same factors or similar ones are “an issue in the proceeding.”

New Jersey adds Rule 3.4(g), which provides, based on DR 7-105 of the ABA Model Code of Professional Responsibility, that a lawyer shall not “present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.”

New York: In the rules effective April 1, 2009, Rule 3.4 draws almost exclusively on the old Model Code. Rule 3.4(a)(1)-(2) is substantially the same as DR 7-109(A)-(B). Rule 3.4(a)(3)-(6) is substantially the same as DR 7-102(A)(3), (4), (6), and (8). Rule 3.4(b) is substantially similar to DR 7-109(C). Rule 3.4(c) is substantially the same as DR 7-106(A), and Rule 3.4(d) is substantially the same as DR 7-106(C)(1)-(4). New York adds several comments, including Comment 5, which describes the use of threats:

The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer’s threat to report the crime does not constitute extortion when

honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

North Carolina: Rule 3.4(b) adds that a lawyer shall not “counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness.” Rule 3.4(c) provides that a lawyer shall not “advise a client to disobey” an obligation under the rules of a tribunal, except that “a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation.” Rule 3.4(f)(1) limits the “employee” exception to a “managerial employee.”

Ohio: The exception clause in Ohio Rule 3.4(c) applies to an open refusal based on a “good faith” assertion that no valid obligation exists. Rule 3.4(d) provides that a lawyer engaged in pretrial procedure shall not “intentionally or habitually” make a frivolous “motion or” discovery request. Ohio omits Rule 3.4(f) because it is inconsistent with a lawyer’s obligations under Ohio law, and Ohio adds a new Rule 3.4(g) that provides that a lawyer shall not “advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.”

Oklahoma omits the clause “other than the testimony of a defendant in a criminal matter” in the last sentence of Rule 3.4(a)(3). In addition, Oklahoma adds a new Rule 3.4(a)(4), which provides that a lawyer “shall not knowingly .

. . fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”

Oregon: Rules 3.4(b) and (g) provide that a lawyer shall not:

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or (3) a reasonable fee for the professional services of an expert witness. . . .

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Pennsylvania: Rule 3.4(b) deletes the ABA phrase “or offer an inducement to a witness that is prohibited by law” and substitutes language nearly identical to DR 7-109(C) of the ABA Model Code of Professional Responsibility. Pennsylvania deletes ABA Model Rule 3.4(c) and substitutes the language of DR 7-106(C)(4). Pennsylvania deletes

subparagraphs (d) and (e) of ABA Model Rule 3.4, and adds “and such conduct is not prohibited by Rule 4.2” at the end of Pennsylvania Rule 3.4(d), which is equivalent to ABA Model Rule 3.4(f).

Texas: Rule 3.04(a)'s prohibition on unlawfully altering, destroying, or concealing evidence applies “in anticipation of a dispute.” (Regarding “unlawfully,” Texas Penal Law §37.09 makes it a felony if a person “knowing that an investigation or official proceeding is pending or in progress . . . alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence,” but §37.09 does not apply to items that are “privileged” or “work product.”) Texas Rule 3.04(b) retains the substance of DR 7-109(C) of the ABA Model Code of Professional Responsibility. Rule 3.04(c) retains language from DR 7-106(C), and Rule 3.04(c)(5) provides that a lawyer shall not “engage in conduct intended to disrupt the proceedings.” Rule 3.04(d) provides that a lawyer shall not knowingly disobey “or advise the client to disobey” an obligation under the tribunal's “standing rules” or under a “ruling” by the tribunal, except for an open refusal based *either* on an assertion that no valid obligation exists “or on the client's willingness to accept any sanctions arising from such disobedience.”

Virginia eliminates the word “unlawfully” from Rule 3.4(a), and provides that a lawyer shall not alter, destroy or conceal material having potential evidentiary value “for the purpose of obstructing a party's access to evidence.” Rule 3.4 (b) and (c) incorporates language from DR 7-109(B) and (C) of the ABA Model Code of Professional Responsibility. Rule 3.4(i), which expands on DR 7-105 of the Model Code,

provides that a lawyer shall not present or threaten to present criminal “or disciplinary” charges solely to obtain an advantage in a civil matter, and Rule 3.4(j) is taken verbatim from DR 7-102(A)(1) of the Model Code but adds “or initiate criminal charges” to the list of forbidden conduct.

Proposed Rule 3.5 [5-300][5-320]

“Impartiality and Decorum of the Tribunal”

(XDraft # 5, 10/7/09)

Summary: Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. By including specific guidance in the proposed Rule on conduct is prohibited in interacting with the tribunal and jurors, proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 5-300, 5-320.

Statute

Cal. Code Civ. Proc. § 206 (Communications with Jurors).

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 1

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.5*: Impartiality and Decorum of the Tribunal

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. Rule 3.5(a)-(c) continue policies of prohibiting (1) the giving or loaning anything of value to a judge, judicial officer, or judicial employee and (2) *ex parte* communications concerning the merits of a matter pending before a tribunal with judges, judicial officers and other judicial personnel, with noted exceptions. Proposed Rule 3.5(d)–(l) continue policies of prohibiting certain communications with jurors, members of jury venires and their families, as well as regulating communications with discharged jurors. The Commission decided not to recommend adoption of Model Rule 3.5 due to its overbreadth and lack of specificity. The Commission believes that proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.

The policies underlying proposed Rule 3.5 and Model Rule 3.5 are substantially similar.

- a. Model Rule 3.5(a) prohibits lawyers from seeking to influence judges, officials and jurors by means prohibited by law. Proposed Rule 3.5(a) prohibits lawyers from giving or lending anything of value to a judge, judicial officer, or employee. By prohibiting acts that historically have resulted in influence peddling, the proposed Rule (1) clarifies, by creating a “bright line” stating precisely what “seeking to influence” means; and (2) clearly defines what is not prohibited. Proposed Rule 5.3(d) – (l) prevents lawyers from unduly influencing jurors by prohibiting outright certain communications and contacts, while regulating others.

* Proposed Rule 3.5, XDraft 5 (10/7/09).

INTRODUCTION (Continued):

- b. Model Rule 3.5(b) prohibits all *ex parte* contact with judges, officials and jurors during a proceeding unless authorized to do so by law or court order. Proposed Rule 3.5 specifies the circumstances when *ex parte* communications with judges, judicial officers and personnel, and jurors are prohibited; when any communications with jurors are prohibited; and when certain communications are permitted in order to create a brighter line for compliance with the law and for establishing proof in disciplinary and regulatory proceedings.

Defining what conduct is acceptable and what is not better aids judicial personnel, lawyers and jurors from engaging in conduct that may be well meaning, but which reflects adversely upon the fairness of the judicial process, thereby ultimately providing better public protection.

State Variations: Many jurisdictions have revised ABA Model Rule 3.5 to add specificity; some, like California, have opted to retain more specific language similar to current rules 5-300 and 5-320. (See State Variations Chart.)

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;	~~A lawyer shall not:~~ ~~(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;~~	See Explanation of Changes for proposed paragraph (a), below.
	<u>(a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.</u>	See Introduction. Paragraph (a) carries forward nearly verbatim the provisions of current rule 5-300(A) ("lawyer" has been substituted for "member"). The Commission determined that carrying forward the specificity of the provision in current California rules 5-300 and 5-320 would avoid challenges of overbreadth and vagueness and better serve these Rules' purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;	~~(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;~~	See Explanation of Changes for paragraph (a).

* Proposed Rule 3.5, XDraft 5 (10/7/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:</u> <u>(1) in open court;</u> <u>(2) with the consent of all other counsel in the matter;</u> <u>(3) in the presence of all other counsel in the matter;</u> <u>(4) in writing with a copy thereof furnished promptly to all other counsel; or</u> <u>(5) in ex parte matters as permitted by law.</u>	See Explanation of Changes for paragraph (a). Paragraph (b) carries forward the substance of current rule 5-300(B). The clause, "Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order," has been added to track the "unless authorized by to do so by law or court order" in Model Rule 3.5(b).

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(c) As used in this Rule, “judge” and “judicial officer” shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.</u>	See Explanation of Changes for paragraph (a). Paragraph (c) carries forward the substance of current rule 5-300(C). Paragraph (c) clarifies that the prohibitions in paragraphs (a) and (b) extend to any court personnel who participate in decisionmaking and might affect the outcome. The phrase, “and neutral arbitrators” has been added so the Rule will also apply in an arbitration setting. This added phrase recognizes that much of the work of the judicial system now takes place before court-appointed and other third-party neutrals.
	<u>(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.</u>	See Explanation of Changes for paragraph (a). Paragraph (d) carries forward the substance of current rule 5-320(A) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (e) carries forward the substance of current rule 5-320(B) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.</u>	See Explanation of Changes for paragraph (a). Paragraph (f) carries forward the substance of current rule 5-320(C) nearly verbatim, with only “lawyer” substituted for “member.”

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or	(eg) <u>A lawyer shall not</u> communicate <u>directly or indirectly</u> with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate;~~or~~ (3) the communication involves misrepresentation, coercion, duress or harassment; or (4) the communication is intended to influence the juror's actions in future jury service.	Paragraph (g) is nearly identical to Model Rule 3.5(c), except communicate is modified by the phrase "directly or indirectly" to conform with the prohibitions in paragraphs (d), (e) and (f). The addition of that language is intended to prevent lawyers from communicating through a third party to avoid the prohibitions of the Rule.
(d) engage in conduct intended to disrupt a tribunal.	~~(d) engage in conduct intended to disrupt a tribunal.~~	The Commission recommends that Model Rule 3.5(d) not be adopted because it is vague and subject to overbreadth challenges. See Introduction.
	(h) <u>A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.</u>	See Explanation of Changes for paragraph (a). Paragraph (h) carries forward the substance of current rule 5-320(E) nearly verbatim, with only "lawyer" substituted for "member." Paragraph (h) supplements proposed paragraph (g)(4).

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (i) carries forward the substance of current rule 5-320(F) nearly verbatim, with only “lawyer” substituted for “member.” The addition of that language is intended to prevent lawyers from influencing jurors through communications with, or investigations of, family members of jurors or potential jurors.
	<u>(j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.</u>	See Explanation of Changes for paragraph (a). Paragraph (j) carries forward the substance of current rule 5-320(G) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.</u>	See Explanation of Changes for paragraph (a). Paragraph (k) carries forward the substance of current rule 5-320(H) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(l) For the purposes of this Rule, “juror” means any empaneled, discharged, removed, or excused juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (l) carries forward the substance of current rule 5-320(I) nearly verbatim. In addition to substituting “lawyer” for “member,” proposed paragraph (l) includes “removed” juror within the definition of “juror.”

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.	[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ~~ABA Model Code of Judicial Conduct~~ Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.	Comment [1] is identical to Model Rule 3.5, cmt. [1], except that it references the California Code of Judicial Ethics, the governing judicial code in California, and to Code Civ. P. section 170.9. Section 170.9 is a public official gift statute that overlaps with Canon 4D(5) of the Code of Judicial Ethics in restricting judges' acceptance of gifts.
[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.	[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, <u>but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. "Promptly" as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.</u>	Comment [2] is based on Model Rule 3.5, cmt. [2]. The last clause of the Comment has been added to provide guidance to lawyers acting as temporary judges pursuant to proposed Rule 2.4.1 (which in is based on current rule 1-710), a rule that has no counterpart in the Model Rules. The last sentence of this Comment has been added to address concerns over possible gamesmanship in which a lawyer uses a slow method to deliver to opposing counsel a communication the lawyer has delivered quickly to a court, thus potentially interfering with opposing counsel's ability to participate.
	[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.	Comment [3] provides a cross-reference to California statutory law for specific guidance on permissible communications with jurors or prospective jurors.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.	~~[34]~~-A <u>It is improper for a</u> lawyer ~~may on occasion want to communicate with a juror who has been removed, discharged, or prospective juror after excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged. The lawyer may do so from further service or~~ unless the communication is ~~prohibited by law or a court order but must respect the desire~~part of the ~~juror not to talk with official proceedings of the lawyer. The lawyer may not engage in improper conduct during the communication~~case.	The subject matter of proposed Comment [4] is the same as that of Model Rule 3.5, cmt. [3]: communication with jurors or prospective jurors. However, the tenor of the Model Rule Comment has been recast to stress what is prohibited under the Rule rather than what is permitted. The former approach better reflects the primary function of these Rules as disciplinary rules.
[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.	~~[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.~~	The Commission recommends that Model Rule 3.5, cmt. [4], which relates to Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).	~~[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).~~	The Commission recommends that Model Rule 3.5, cmt. [5], which relates to Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.

Rule ~~5-300~~ ~~Contact With Officials~~ 3.5 Impartiality and Decorum of the Tribunal

(Comparison of the Current Proposed Rule to Current California Rule)

~~(a)(A)~~ ~~A member~~ Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the ~~member~~ lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. ~~Nothing contained in this rule~~ This Rule shall not prohibit a ~~member~~ lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

~~(b)(B)~~ ~~A member~~ Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before ~~such~~ the judge or judicial officer, except:

- (1) ~~In~~ in open court; ~~or~~
- (2) ~~With~~ with the consent of all other counsel in ~~such~~ the matter; ~~or~~
- (3) ~~In~~ in the presence of all other counsel in ~~such~~ the matter; ~~or~~
- (4) ~~In~~ in writing with a copy thereof furnished promptly to ~~such~~ all other counsel; or
- (5) ~~In~~ in ex parte matters as permitted by law.

~~(c)(C)~~ As used in this ~~rule~~ Rule, "judge" and "judicial officer" shall include law clerks, research attorneys, ~~or~~ other court personnel who

participate in the ~~decision-making~~ decisionmaking process and neutral arbitrators.

Rule ~~5-320~~ ~~Contact With Jurors~~

~~(d)(A)~~ A ~~member~~ lawyer connected with a case shall not communicate directly or indirectly with anyone the ~~member~~ lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.

~~(e)(B)~~ During a trial a ~~member~~ lawyer connected with the case shall not communicate directly or indirectly with any juror.

~~(f)(A)~~ During a trial a ~~member~~ lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the ~~member~~ lawyer knows is a juror in the case.

~~(B) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.~~

~~(g)~~ A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:

- (1) the communication is prohibited by law or court order;
- (2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to influence the juror's actions in future jury service.

(h)(C) A ~~member~~lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of ~~the~~a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(i)(D) All restrictions imposed by this ~~rule~~Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of ~~the~~a venire or a juror.

(j)(E) A ~~member~~lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the ~~member~~lawyer has knowledge.

(k)(F) This ~~rule~~Rule does not prohibit a ~~member~~lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(l)(G) For the purposes of this ~~rule~~Rule, "juror" means any ~~empanelled~~empaneled, discharged, removed, or excused juror.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. "Promptly" as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.

[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.

[4] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.5 Impartiality and Decorum of the Tribunal **(Commission's Proposed Rule – Clean Version)**

- (a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court;
 - (2) with the consent of all other counsel in the matter;
 - (3) in the presence of all other counsel in the matter;
 - (4) in writing with a copy thereof furnished promptly to all other counsel; or
 - (5) in ex parte matters as permitted by law.
- (c) As used in this Rule, “judge” and “judicial officer” shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.
- (g) A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror's actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (l) For the purposes of this Rule, “juror” means any empaneled, discharged, removed, or excused juror.

COMMENT

- [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. “Promptly” as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be

sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.

- [3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.
- [4] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

**Rule 3.5 Impartiality and Decorum of the Tribunal.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC recommends that subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent the juror from communicating with the other party or the court. (<i>Lind v. Medevac</i> (1990) 219 Cal.app.3d 516.) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition. Comment [4] seems more appropriate for a treatise, law review article, or ethics opinion.	The Commission disagrees that a specific prohibition is necessary or desired, given that paragraph (g)(4) has already been found to apply in the described circumstances. The Commission disagrees with the commenter's assessment and has concluded that Comment [4] provides clarification of the black letter and guidance to lawyers on the duration of the described duty.
2	San Diego County Bar Association	M	Yes		Delete requirement that lawyers be familiar with the Code of Judicial Ethics.	Commission did not make the requested revision. The clause comes from MR 3.5, cmt. [1]. The clause is aspirational ("should") rather than mandatory ("must"), so it would not have disciplinary consequences. Moreover, it is in the comment to the Rule, not the Rule itself. It does not "impose" a requirement on lawyers. Finally, an advocate who regularly appears before tribunals should be familiar with the Code of Judicial Ethics.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.5 Impartiality and Decorum of the Tribunal. [Sorted by Commenter]						TOTAL = 3 Agree = 1 Disagree = 0 Modify = 2 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	State Bar Committee on Professional Responsibility and Conduct (COPRAC)	A	Y		Supports rule as drafted.	No response required.

Rule 3.5: Impartiality and Decorum of the Tribunal

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 clarifies that Rule 3.5(a) applies only to an official “of a tribunal,” and substitutes “likely” for “intended” in Rule 3.5(d).

California: Rule 5-300 provides as follows:

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

(1) In open court; or

(2) With the consent of all other counsel in such matter; or

(3) In the presence of all other counsel in such matter; or

(4) In writing with a copy thereof furnished to such other counsel; or

(5) In ex parte matters.

(C) As used in this rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

Florida: Rule 3.5(a) provides that a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker “except as permitted by law or the rules of court.” Rule 3.5(d), governing communications with jurors, former jurors, and prospective jurors, generally tracks DR 7-108 of the ABA Model Code of Professional Responsibility, but adds that a lawyer shall not:

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. . . .

Georgia: Rule 3.5 adopts most of the pre-2002 version of ABA Model Rule 3.5 verbatim, but alters the introductory phrase to make clear that the prohibitions apply “without regard to whether the lawyer represents a client in the matter.”

Maryland: Rule 3.5 includes several sui generis provisions, including a prohibition against discussing employment of a judge before whom the lawyer’s firm has a matter, a limitation on contacts with discharged jurors, and a requirement to report knowledge of improper contacts with jurors or prospective jurors.

Massachusetts: Rule 3.5(d) restricts the ability of lawyers connected to a case to initiate a communication with a member of the jury after discharge without leave of the court.

Michigan: Rule 3.5(c) retains the language of DR 7-106(C)(6) of the ABA Model Code of Professional Responsibility.

Nevada adds Rule 3.5(e):

(e) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided that a lawyer or the lawyer’s employees or independent contractors may not, at any time before the commencement of the trial, conduct or authorize any investigation of the prospective jurors, through any means which are calculated or likely to lead to communication with prospective jurors of any allegations or factual circumstances relating to the case at issue. Conduct prohibited by this Rule includes, but is not limited to, any direct or indirect communication with a prospective juror, a member of the juror’s family, any employer, or any other person that may lead to direct or indirect communication with a prospective juror.

New Jersey: Rule 3.5(b) provides only that a lawyer shall not communicate ex parte with anyone specified in subparagraph (a) “except as permitted by law,” and New Jersey Rule 3.5(c) says only that a lawyer shall not “engage in conduct intended to disrupt a tribunal.” New Jersey deletes ABA Model Rules 3.5(c)(1)-(3) and Rule 3.5(d).

New York: In the rules effective April 1, 2009, Rule 3.5 draws heavily on the old Model Code. Rule 3.5(a)(1)-(2) is similar to 7-110(A) and (B), respectively. Rule 3.5(a)(4) is

similar to DR 7-108(A) and (B)(1), and Rule 3.5(a)(6) is similar to DR 7-108(E). Rule 3.5(b)-(d) is nearly identical to DR 7-108(B)(2), 7-108(F), and 7-108(G), respectively.

North Carolina: Rule 3.5 adds language from DR 7-106(C)(5)-(7), DR 7-108(D),(F), and (G), and DR 7-110(B) of the ABA Model Code of Professional Responsibility.

Ohio replaces the term “judge” with the term “judicial officer” throughout Rule 3.5. Ohio adds Rule 3.5(a)(2), which provides that a lawyer shall not “lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a tribunal.” Ohio Rule 3.5(a)(3) provides that a lawyer shall not communicate ex parte with “(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order” or “(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.” Ohio also adds a new Rule 3.5(b), which provides that a lawyer “shall reveal promptly to the tribunal improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has knowledge.”

Texas: Rule 3.05 is substantially the same as DR 7-110(B) of the ABA Model Code of Professional Responsibility. Rule 3.06 borrows heavily from DR 7-108, but rearranges the order somewhat, adds references to an “alternate juror,” and provides in Rule 3.06(A)(2) that a lawyer shall not “seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.”

Virginia: Rule 3.5(a)(2) generally tracks DR 7-108(D) of the ABA Model Code of Professional Responsibility but adds that a lawyer shall not “after discharge of the jury from further consideration of a case: (i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service.” A new Rule 3.5(e) adds exceptions to the rule against ex parte communications with a judge.

Proposed Rule 3.6 [5-120] “Trial Publicity”

(XDraft #5, 12/12/09)

Summary: Proposed Rule 3.6 largely tracks Model Rule 3.6, which regulates lawyer conduct concerning pre-trial publicity. Proposed Rule 3.6 adopts the revised Model Rule with changes intended to facilitate construction of the Rule and to protect client confidentiality. See Introduction. The proposed Rule also retains some of the Discussion to rule 5-120, the current California counterpart to Model Rule 3.6, and most of the Model Rule comment. See Explanation of Changes.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 5-120

Statute

Bus. & Prof. Code §6103.7.

Case law

Gentile v. State Bar of Nevada, (1991) 501 U.S. 1030, 111 S.Ct. 2720, 115 L. Ed.2d 888

- ☒ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

D.C. Rule 3.6.

- ☒ Other Primary Factor(s)

The history of adoption of the current Rule 5-120.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 2

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

Two commenters, including the Santa Clara County Bar Association, believe the Rule should not be adopted.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.6* Trial Publicity

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Current Rule 5-120 is the California counterpart to Model Rule 3.6. When adopted in 1995, Rule 5-120 adopted the language in Model Rule 3.6 verbatim; however, the Discussion to the rule differed from the Model Rule. The ABA modified Model Rule 3.6 in 2000.

Proposed Rule 3.6 adopts the revised Model Rule with minor changes to assist in the construction of the Rule and to assure that the Rule does not supersede a lawyer's duty to maintain a client's confidential information. The proposed Rule retains some of the Discussion to current rule 5-120 and retains most of the Model Rule Comments. However, the proposed Rule contains a revised Comment [1], which incorporates concepts in Comments [1] and [3] to the Model Rule and in Comment [1] to the version of the Model Rule adopted by Washington D.C.

Follow public comment, the Commission made three changes to the Rule. See Explanation of Changes for paragraph (b)(6) and Comment [4].

* Proposed Rule 3.6, XDraft 5 (12/12/09).

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity	<u>Commission's Proposed Rule*</u> Rule 3.6 Trial Publicity	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.	(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will <u>(i)</u> be disseminated by means of public communication and ~~will~~ <u>(ii)</u> have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.	In the course of the Commission's deliberations, there was some confusion over whether the "knows or reasonably should know" standard applied to both the means of dissemination and the likelihood of material prejudice or only to the means of dissemination. Comment [3] to the Model Rule states that the knowledge standard applies to both, but the language in the paragraph is not as clear as the Comment. To assure that the Rule would not be misread and clarify that the knowledge standard applies to both, the Commission voted to add the roman numerals.
(b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary	(b) Notwithstanding paragraph (a), <u>and to the extent permitted by [Rule 1.6],</u> a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining	A number of states have adopted revisions to Model Rule 3.6. The Commission reviewed all of the variations. One such variation is in the Ohio version of the rule, which added the words in the beginning of paragraph (b) "and if permitted by Rule 1.6..." The Commission adopted a variation of the Ohio language in order to assure that paragraph (b) would not be considered an exception to a lawyer's overriding duty to maintain a client's confidential information. The Commission felt that adding this language was particularly necessary because some of the subparagraphs of paragraph (b) refer to categories of information that could constitute client confidential information.

* Redline/strikeout showing changes to the ABA Model Rule

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<p>thereto;</p> <p>(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and</p> <p>(7) in a criminal case, in addition to subparagraphs (1) through (6):</p> <p class="list-item-l1">(i) the identity, residence, occupation and family status of the accused;</p> <p class="list-item-l1">(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;</p> <p class="list-item-l1">(iii) the fact, time and place of arrest; and</p> <p class="list-item-l1">(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.</p>	<p>evidence and information necessary thereto;</p> <p>(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public ~~interest~~ <u>but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public</u>; and</p> <p>(7) in a criminal case, in addition to subparagraphs (1) through (6):</p> <p class="list-item-l1">(i) the identity, residence, occupation and family status of the accused;</p> <p class="list-item-l1">(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;</p> <p class="list-item-l1">(iii) the fact, time and place of arrest; and</p> <p class="list-item-l1">(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.</p>	Paragraph (b)(6) was revised to make clear that the exception applies only to the extent the dissemination is reasonably necessary to protect an individual or the public. In addition, the reference to “public interest” was changed to “public” to more clearly focus the exception on protecting health and safety.

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(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.	(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.	
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).	(d) No lawyer associated in a <u>law</u> firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).	The Commission changed the reference from "firm" to "law firm" to conform the terminology the Commission has proposed for use throughout the Rules. The purpose of the change here is to distinguish between lawyers engaged in the practice of law in a law firm from lawyers engaged in business associations that do not entail the practice of law, where application of the Rule would be inappropriate.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.	[1] ~~This Rule prohibits a lawyer who is difficult participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. Preserving~~ On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated ~~about a party~~ prior to trial, particularly where trial by jury is involved. ~~If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right~~Rule applies only to know about threats to its	Rule 3.6 reflects a balancing of concerns that the practitioner needs to understand in order to apply the Rule. That balancing of policies needs to be addressed succinctly in the introduction to the Comment. The Commission concluded that Comment [1] to the Model Rule is too theoretical and does not spell out the balance clearly. The Commission found that the D.C. Comment did a much better job of framing the considerations that underlie the Rule; however, the Commission felt that the D.C. Comment did not pick up concepts in Comment [3] to the Model Rule that also are pertinent. The proposed Comment is intended to put all of the governing concepts together in one place. It does this by combining the elements of Comment [1] as adopted by the Washington D.C. Bar and Comments [1] and [3] to the Model Rule. The first sentence is derived from the first sentence of Comment [3] to the Model Rule. The second sentence is based on Comment [1] to the Model Rule and Comment [1] to the Washington D.C. rule. The third sentence is a modified version from the Washington D.C. rule. The only difference is that the D.C. comment states that publicity should not be allowed to “influence the fair administration of justice.” The proposed Comment changes that reference to “adversely affect the fair administration of justice,” which the Commission concluded more closely tracks the intent of the Rule. The fourth sentence is taken from the D.C. Comment. The fifth sentence is based on the D.C. Comment. The sixth and seventh sentences are taken from Comment [3] to the Model Rule.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	~~safety and measures aimed at assuring its security. It also has a legitimate interest~~<u>lawyers who are, or who have been involved</u> in the ~~conduct~~<u>investigation or litigation</u> of ~~judicial proceedings~~<u>a case</u>, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and ~~deliberation over questions of public policy~~<u>their associates</u>.	
[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.	~~[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.~~	Comment [2] to the Model Rule was moved to Comment [8]. The Commission concluded that the Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.
[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.	~~[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.~~	Model Rule Comment [3] is incorporated into Comment [1]

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	Comment [2] adopts Model Rule Comment [4].
	[3] <u>Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or Rule 3.3; and (3) the timing of the statement.</u>	Comment [3] is a modified version of the second paragraph of the Discussion to current Rule 5-120. It is proposed in place of Comment [5] to the Model Rule. The Discussion to the current rule includes a fourth factor which states, "whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings)." The Commission deleted this factor, because the subject matter is now covered by proposed Rule 3.4. The Commission also revised the first factor to insert the phrase "for the purpose of influencing a trier of fact about" in place of the phrase "for the purpose of proving or disproving a material fact in issue." The change was made to clarify that the focus of the Rule is on improper attempts to influence the trier of fact. In response to public comment, the Commission moved the reference from the end of the clause to clarify that the attempt to influence the trier of fact relates to the purpose of the statement.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:	~~[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:~~	Model Rule Comment [5] was not included in current California rule 5-120, when it was originally proposed to the Supreme Court. The Commission unanimously decided not to include the Comment in proposed Rule 3.6. Comment [5] is problematic in that it refers to subjects that “are more likely to have a material prejudicial effect on a proceeding;” however, the statements would be permissible under the proposed Rule in some circumstances. The Comment does not address when the subjects would not prejudice a proceeding. It does not give the practitioner any guidance regarding when it would be permissible to discuss the subjects. As a result, the Comment tends to chill speech in situations where the Model Rule would not prohibit it. The Commission believes that proposed Comment [3] better addresses the issues by providing simple criteria for determining when the proposed Rule applies, while, at the same time, recognizing that there may be other factors.
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;	~~(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~ ~~(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~	

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(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.	~~(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~ ~~(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~ ~~(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or~~ ~~(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~	
[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule	~~[6]~~ Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule	Comment [4] adopts Model Rule Comment [6].

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will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	
[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.	~~[7] Finally~~<u>Under paragraph (c)</u>, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may ~~have the salutary effect of lessening~~<u>lessen</u> any resulting adverse impact on the adjudicative proceeding. Such responsive statements ~~should~~<u>must</u> be limited to ~~contain only such~~ information ~~as is~~ necessary to mitigate undue prejudice created by ~~the~~ statements ~~made by~~<u>of</u> others.	These changes were made to conform the Comment to the proposed Rule. The reference to paragraph (c) is intended to orient the reader to the portion of the proposed Rule to which it pertains. It conforms to the form the Commission has adopted for other Rules. The Commission deleted the words "have the salutary effect of lessening" and replace them with the word "lessen." The Commission concluded that the deleted language could be read as promoting responsive statements and that a less supportive tone was more appropriate. The word "must" was substituted for the word "should" to conform to the text of paragraph (c) of the proposed Rule. The Model Rule Comment is inconsistent with paragraph (c). Since the text of the Rule governs over the Comment, the Commission concluded that the Comment language should be revised in order to avoid misleading lawyers who rely on the Comment, without realizing that it is inconsistent with the proposed Rule.
[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	~~[8]~~<u>6</u> See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	Comment [6] adopts Model Rule Comment [8].
	<u>[7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.</u>	This Comment <u>[7]</u> is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

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	[8] <u>Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.</u>	This Comment is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

Rule ~~5-120~~3.6 Trial Publicity
(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A)~~ A ~~member~~lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~the lawyer knows or reasonably should know will (i) be disseminated by means of public communication ~~if the member knows or reasonably should know that it will~~and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) ~~(B)~~Notwithstanding paragraph ~~(Aa)~~, and to the extent permitted by Rule 1.6, a ~~member~~lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) ~~the~~information contained in a public record;
 - (3) that an investigation of ~~the~~a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
- ~~(a)~~(i) the identity, residence, occupation, and family status of the accused;
 - ~~(b)~~(ii) if the accused has not been apprehended, ~~the~~ information necessary to aid in apprehension of that person;
 - ~~(c)~~(iii) the fact, time, and place of arrest; and
 - ~~(d)~~(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) ~~(C)~~Notwithstanding paragraph ~~(Aa)~~, a ~~member~~lawyer may make a statement that a reasonable ~~member~~lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the ~~member~~lawyer or the ~~member's~~lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Discussion:

~~Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.~~

COMMENT

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.
- [2] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects

upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

- [3] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter ~~for the purpose of proving or disproving a material fact in issue~~; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); ~~(3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings)~~Rule 3.3; and ~~(4)~~ (3) the timing of the statement.

~~Paragraph (A) is intended to apply to statements made by or on behalf of the member.~~

~~Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)~~

- [4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The

Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

- [5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.
- [6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.
- [7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.
- [8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.6: Trial Publicity
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (b) Notwithstanding paragraph (a), and to the extent permitted by Rule 1.6, a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
 - (d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is

intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

- [2] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).
- [3] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or Rule 3.3; and (3) the timing of the statement.

- [4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.
- [5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.
- [6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.
- [7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 1
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	M	Yes		There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
				Comment [8]	Comment [8] is identical to Comment [7] and should, therefore, be stricken.	Comment [8] was deleted.
3	Public Defender of Los Angeles County	M	Yes	Comments [7] & [8]	Comments [7] and [8] seem duplicative.	Comment [8] was deleted.
4	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
5	Santa Clara County Bar Association	D	Yes		This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1 st Amendment. Much of the conduct/speech which this rule attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1 st Amendment, such as, an attorney	The Commission disagrees and believes that the rule affords important public protection, including but not limited to, promoting respect and confidence in the legal profession. The Commission is not aware of any successful constitutional challenges to the existing California rule which is substantially similar to the proposed rule.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.6 Trial Publicity. [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 1 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					misrepresenting the facts of case; or engaging in conduct that undermines the ability of a litigant to receive a fair trial such as deceit, deception or fraud.	

Rule 3.6: Trial Publicity

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: In the rules effective June 2008, Rule 3.8(a) provides as follows:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Alabama Rule 3.8(b) provides that a statement referred to in Rule 3.8(a) ordinarily is likely to have a materially prejudicial effect if it refers to “a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration” and the statement relates to one of the subjects listed in Comment 5 to ABA Model Rule 3.6 (which Alabama moves to the text of the rule). Alabama omits Rule 3.6(d).

California: Rule 5-120 tracks the pre-2002 version of ABA Model Rule 3.6 nearly verbatim, except that California omits subparagraph (d).

District of Columbia: Rule 3.6 consists of only one sentence: “A lawyer engaged in a case being tried to a judge

or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.”

Florida: Rule 3.6(a) omits the ABA phrase “who is participating or has participated in the investigation or litigation of a matter” and provides that a lawyer shall not make an extrajudicial statement that a “reasonable person” would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding “due to its creation of an imminent and substantial detrimental effect on that proceeding.” Florida deletes ABA Model Rule 3.6(b), (c), and (d), and substitutes the following Rule 3.6(b):

Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from

making extrajudicial statements that are prohibited under this rule.

Georgia: Rule 3.6(a), (c), and (d) tracks the pre-2002 version of ABA Model Rule 3.6 verbatim, but Georgia has relegated Rule 3.6(b) to a new paragraph 5B of the Comment, which notes that there are “certain subjects which are more likely than not to have no material prejudicial effect on a proceeding.” The Comment then lists all of the items in ABA Model Rule 3.6(b) as examples of things that a lawyer may “usually” state.

Illinois: In the rules effective January 1, 2010, Rule 3.6(a) prohibits an extrajudicial statement if the lawyer “knows or reasonably should know” that the statement would “pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.”

Iowa: In Rule 3.6, Iowa adds a paragraph (e) that provides: “Any communication made under paragraph (b) that includes information that a defendant will be or has been charged with a crime must also include a statement explaining that a criminal charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.”

Michigan places the text of Rule 3.6(b) in the Comment and omits the balance of the rule.

New Jersey deletes ABA Model Rule 3.6(d).

New York: In the rules effective April 1, 2009, New York moves Rule 3.6(b)-(d) to Rule 3.6(c)-(e) and uses 3.6(b) for a list of subjects that are likely to have a material

prejudicial effect. The list is drawn nearly verbatim from Comment 5 of the Model Rules.

North Carolina adds a new Rule 3.6(e), which provides that Rule 3.6 does not “preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.”

Ohio: Rule 3.6(b) makes clear that a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6.

Texas: Rule 3.07(a) begins “[i]n the course of representing a client” in place of the ABA phrase “[a] lawyer who is participating or has participated in the investigation or litigation of a matter,” then tracks ABA Model Rule 3.6(a) verbatim, but Texas, at the end of Rule 3.07(a), adds that a lawyer “shall not counsel or assist another person to make such a statement.”

Texas Rule 3.07(b) provides that a lawyer “ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent,” by making an extrajudicial statement described in Rule 3.07(a) if the statement refers to five specified categories of information, which track verbatim the items listed in Comment 5 to ABA Model Rule 3.6 — except that Texas omits from this list “(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.”

Texas Rule 3.07(c) generally tracks ABA Model Rule 3.6(b), with slight variations. Texas omits ABA Model Rule 3.6(c) and (d).

Virginia: Rule 3.6 provides as follows:

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

Proposed Rule 3.7 [5-210]

“Lawyer as Witness”

(XDraft #8.1, 6/30/10)

Summary: The Commission has recommended much of the substance and language of ABA Model Rule 3.7(a). However, with the substitution of the more client-protective provision in current California rule 5-210(C) for Model Rule 3.7(a)(3), the Commission is recommending continued adherence to the more limited scope of the California rule.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☒ ABA Model Rule substantially rejected	☒ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 5-210

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 4
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

Public comments from COPRAC and ethics law professors take the position that the scope of the rule should not be limited to a lawyer's appearance in a jury trial. This rule would retain a longstanding policy difference between the ABA and California approach.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.7* Lawyer as a Witness

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

1. The Commission is recommending that much of the substance and language of ABA Model Rule 3.7(a) not be adopted. Instead, the Commission recommends continued adherence to the more limited scope of the California rule.
2. First, the Commission recommends carrying forward current rule 5-210's limitation of the Rule to jury trials. The Commission has concluded that any threat to of the trier of fact being confused by a lawyer's dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer's dual role.
3. Second, the Commission recommends that Model Rule 3.7(a)(3) be deleted because it refers to principles of disqualification for substantial hardship to the client. Because authority over disqualification does not reside with the State Bar but rather with the courts, a disciplinary rule should not limit the right of judiciary to protect the fair administration of justice nor improperly intrude on the judicial function. Instead, the Commission recommends carrying forward current rule 5-210(C), which protects the client's autonomy by ensuring the client is fully informed to decide whether to consent to the lawyer's dual role. See Explanation of Changes for paragraph (a)(3).
4. Third, the Commission for the most part recommends rejecting the ABA Model Rule comments, which reflect the broader scope of the ABA Rule and thus are not pertinent to the proposed Rule, or which relate to disqualification issues. See Explanation of Changes for Model Rule 3.7, cmts. [1] – [6], below.
5. *Minority.* A minority of the Commission disagrees with the recommendation to carry forward current rule 5-210's limitation of the proposed Rule to jury trials and with the recommendation to carry forward Rule 5-210(C). The minority prefers Model Rule approach, which emphasizes protecting and ensuring the integrity of the judicial process. See Explanation of Changes for paragraphs (a)(1) and (a)(3), and Explanation of Changes for rejected Model Rule Comments [1] – [3], below. See also, a separately provided minority statement.

* Proposed Rule 3.7, XDraft 8.1 (6/30/10).

Proposed Rule 3.7 Lawyer as a Witness

Rules Revision Commission – Minority Dissent

The majority eliminates important public protection from the advocate-witness rule. Model Rule 3.7 is the prevailing standard in the U.S. and is consistent with case law in California. No other jurisdiction limits the rule to jury trials, and for good reason, since the objectives of the rule also apply to bench trials. Annot. Model Rules at pages 359-360. The well recognized purpose of the rule includes protecting the fairness of the judicial process which includes the tribunal and the interests of other parties to the proceeding as well as addressing conflicts of interest. Hazard & Hodes, *The Law Governing Lawyers* § 33.6; Restatement Third, *Law Governing Lawyers* §108, Cmt. b and reporter's notes. Protecting the fairness of the judicial process is one of the stated purposes of the California rules. Proposed Rule 1.0(a); There are no comments explaining the limited purpose of paragraph (a) in contrast to the Model Rule comments (1) – (3). The advocate-witness rule has important applications in criminal cases. See, e.g., *People v. Donaldson*, 93 Cal. App. 4th 916 (2001)(citing Model Rule 3.7(a)); *U.S. v. Edwards*, 154 F.3d

915 (9th Cir. 1998) Consent of the client will not suffice in these situations. Conflicts under this rule are not limited to advocates testifying in jury trials. California's current rule 5-210 was adopted 30 years ago to overturn *Comden v. Superior Court* (1979) 20 Cal. 3d 907 and is outdated. The concern raised by that decision is adequately addressed in paragraph (b) of the proposed rule.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:	(a) A lawyer shall not act as <u>an</u> advocate ~~at~~<u>in</u> a <u>jury</u> trial in which the lawyer is likely to be a necessary witness unless:	The Commission recommends retaining the approach in current California rule 5-210, whose application is limited to jury trials. The Commission notes that any threat of the trier of fact being confused by a lawyer's dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer's dual role. <i>Minority.</i> A minority of the Commission believes that the Rule should also apply to bench trials, as in every other jurisdiction in the country. See complete Dissent, below.
(1) the testimony relates to an uncontested issue;	(1) the testimony relates to an uncontested issue <u>or matter</u>;	Adopted the ABA Model Rule with addition: Added "matter" in addition to "issue" for public protection. Issue is too narrow if standing alone and might not include a lawyers' uncontested testimony about a different or related legal case or transaction.
(2) the testimony relates to the nature and value of legal services rendered in the case; or	(2) the testimony relates to the nature and value of legal services rendered in the case; or	Adopted the ABA Model Rule.

* Proposed Rule, XDraft 8.1 (6/30/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
(3) disqualification of the lawyer would work substantial hardship on the client.	~~(3) disqualification of the lawyer would work substantial hardship on the client.~~ <u>(3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.</u>	Rejected the ABA Model Rule to increase public protection and retained the provision in current California rule 5-210(C): Disqualification is not relevant to discipline. California courts have the inherent authority to disqualify an advocate/witness irrespective of compliance with the rule. See <i>Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 581, 70 Cal.Rptr.2d 507. In place of Model Rule 3.7(a)(3), the Commission has substituted current California rule 5-210(C). If the role of advocate/witness creates conflicts of interest, for public protection reasons, the client should be fully informed in writing of those conflicts, the facts and circumstances necessary to make an informed and intelligent decision and consent in writing, as is required in the first sentence of the Commission's proposed paragraph (a)(3). A substantial hardship alone should not be the determinative issue without client consent. The second sentence of proposed paragraph (a)(3) identifies the required source of consent in a governmental entity context. Minority. A second minority group of Commission members takes the position that the one of the purposes of the Rules in general and this Rule in particular is to protect the judicial process and the administration of justice. Permitting a lawyer to be both advocate and witness based only on the consent of a client who could likely be benefited by any confusion caused by the lawyer's dual role, poses a threat to the fair administration of justice. This minority believes that Model Rule 3.7(a)(3) provides the appropriate balancing of interests by permitting a lawyer to engage in such

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
		dual roles when the court has determined the client would otherwise suffer a hardship if the lawyer were disqualified.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.	(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by [Rule 1.7] or [Rule 1.9].	Adopted the ABA Model Rule. Brackets have been placed around "Rule 1.7" and "Rule 1.9" pending the Commission's final recommendation concerning these rules.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.	~~[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.~~	Rejected ABA Model Rule 3.7. Comment [1], because the comment's overbreadth is not a meaningful explanation of the Rule. As noted in the Rule Explanation, California's rule is more limited in scope than the Model Rule. There have been no published California cases criticizing the rule as being prejudicial. There have not been significant disciplinary complaints or legal malpractice cases concerning the current California rule. The California policy has worked well and should be continued. Minority. The same minority group of Commission members that opposes the substitution of current California rule 5-210(C) for Model Rule 3.7(a)(3) because of its potentially deleterious effect on the fair administration of justice, see Explanation of Changes for paragraph (a)(3), objects to the deletion of MR 3.7, cmts. [1]-[3]. The minority notes that these comments contain important statements of the policies that underlie the Rule, regardless of whether Model Rule 3.7(a)(3) is rejected.
Advocate-Witness Rule [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness	~~Advocate-Witness Rule~~ ~~[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness~~	Rejected ABA Model Rule 3.7, Comment [2] because the issues addressed do not relate to enforcing a disciplinary rule but rather to a judge's consideration of principles in furtherance of the fair administration of justice, including disqualification, limitation of witness testimony, and the use of judicial instruction. In California, the principles for the guidance of judges are set forth in more detail in case law. (See e.g., See, e.g. for civil cases: <i>Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 579-582, 70 Cal.Rptr.2d 507 and for criminal cases: <i>People v. Dunkle</i> (2005), 36 Cal.4th 861,32 Cal.Rptr.3d 23, rehearing denied, certiorari denied 126 S.Ct. 1884, 547 U.S. 1100, 164 L.Ed.2d 571; <i>People v. Donaldson</i>

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
should be taken as proof or as an analysis of the proof	~~should be taken as proof or as an analysis of the proof~~	(App. 5 Dist. 2001) 113 Cal.Rptr.2d 548, 93 Cal.App.4th 916. Minority. See Explanation of Changes, Comment [1].
[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.	~~[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.~~	The Commission recommends omitting ABA Model Rule 3.7, Comment [3]. It is inconsistent with the Rule the Commission recommends and would usurp the judiciary's own authority and role to control the proceedings before it in its duty to the fair administration of justice. These aspects, as set forth above, are the subject of case law unrelated to disciplinary proceedings and are therefore inappropriate for a disciplinary rule. Minority. See Explanation of Changes, Comment [1].
[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the	~~[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the~~	Rejected ABA Model Rule comment [4], which is an explanation for ABA Model Rule 3.7(a)(3), which in turn was rejected because it addresses disqualification. As already noted in the Rule Explanation for paragraph (a)(3), disqualification is an inappropriate subject for disciplinary purposes, because it concerns the reasons and factors relating to a court's inherent power to disqualify a lawyer.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.	~~lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.~~	
[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.	~~[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.~~	Rejected ABA Model Rule 3.7, Comment [5] because the comment merely suggests the reason for paragraph (b), rather than provide guidance in its application.
Conflict of Interest [6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even	~~Conflict of Interest~~ ~~[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even~~	Rejected ABA Model Rule comment [6] because the concepts discussed are already addressed in the Commission's proposed paragraph (a)(3). The concept of compliance with conflict of interest rules has been adopted as part of the informed written consent of the client contained in paragraph (a)(3). Moreover, because the Commission's proposed Rule 1.7 does not include "material limitations" conflicts, the reference to it would be inappropriate because the scope is limited to conflicts among concurrent clients.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."	~~though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."~~	
[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.	~~[7]~~ Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7~~(b)~~.	Adopted ABA Model Rule, Comment [7], with Rules 1.7, 1.9, and 1.10 bracketed, pending the Commission's final recommendation concerning.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).	Proposed Comment [2] has been added to address circumstances where client consent is documented as a part of a transcribed proceeding. The comment clarifies that this transcription satisfies the requirement for written disclosure and consent.

Rule 3.7: Lawyer as Witness

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not act as an advocate ~~before in~~ a jury ~~trial~~ in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue or matter;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by ~~{Rule 1.7}~~ or ~~{Rule 1.9}~~.

~~[2] — This Rule is not applicable in proceedings before legislative, administrative or other entities when not acting as a tribunal. See Rule 3.9. For example, the Rule would not apply where a lawyer testifies on behalf of the client in a hearing before a legislative body concerning the adoption of legislation; but would apply to a lawyer's testimony in impeachment hearings before Congress.~~

~~[32]~~ A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in ~~{Rule 1.0.1(n)}~~.

COMMENT

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by ~~{Rule 1.7}~~ or ~~{Rule 1.9}~~ from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by ~~{Rule 1.10}~~ unless the client gives informed consent under the conditions stated in ~~{Rule 1.7(b)}~~.

Rule 5-210 Member As 3.7 Lawyer as Witness
(Comparison of the Current Proposed Rule to Current California Rule)

- (a) A ~~member~~lawyer shall not act as an advocate ~~before in~~ a jury trial which ~~will hear testimony from the member~~lawyer is likely to be a necessary witness unless:
- (1) ~~(A) The~~the testimony relates to an uncontested issue or matter; ~~or~~
- (2) ~~(B) The~~the testimony relates to the nature and value of legal services rendered in the case; or
- (3) ~~(C) The member~~the lawyer has obtained the informed, written consent of the client. If the ~~member~~lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the ~~member~~lawyer is employed ~~and shall be consistent with principles of recusal.~~
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Discussion:-

~~Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies~~

~~on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended by order of Supreme Court, operative September 14, 1992.)~~

COMMENT

- [1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.
- [2] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

Rule 3.7: Lawyer as Witness
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not act as an advocate in a jury trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue or matter;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[2] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

COMMENT

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7(b).

Rule 3.7 Lawyer as Witness. [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		The Proposed Rule has been revised from the prior Rule, which applied to all trials, not just jury trials. COPRAC continues to support a version of Rule 3.7 that would apply to both bench and jury trials. COPRAC does not agree that bench officers would not be confused by a lawyer's dual role since practice background when taking the bench and length of time on the bench vary greatly, and both may impact how any given judge perceives an attorney who also acts as a witness.	The Commission disagrees with this policy for the reasons set forth in the Introduction.
2	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	M	Yes		"We agree with California construction(of proposed rule)...the client <u>should</u> be able to get the full assistance of counsel, including testimony, <u>so long as</u> informed consent is given. Nevertheless, conflicts of interest can and may occur...The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word 'jury' and add the word 'tribunal.'" We note that the definition of "tribunal" as proposed is seriously flawed in its narrow construction.(see infra.)	The Commission disagrees with this policy for disciplinary purposes for the reasons set forth in the Introduction.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.7 Lawyer as Witness. [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Office of Chief Trial Counsel	A	Yes		While this is the current law, OCTC does not understand why the client's informed written consent only applies to jury trials. It seems that clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent. Comment [2] seems more appropriate for a treatise, law review article, or ethics opinion.	The Commission disagrees with this policy for disciplinary purposes for the reasons set forth in the Introduction. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
4	Rothschild, Toby	A	No	Comment [2]	Comment [2] addresses the lawyer as witness in non-tribunal proceedings. This comment was necessary when the draft rule covered all proceedings. When it was limited to testimony before a jury, Comment [2] became unnecessary.	The Commission agreed and deleted Comment [2]. In addition, see the response to SDCBA.
5	San Diego County Bar Association Legal Ethics Committee	M	Yes	3.7(a)	Propose adding the word "jury" before the word "trial" in the first line of part (a) of the new rule. Add a Comment illustrating that the rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.	The Commission revised paragraph (a) to refer to a "jury trial." Because the Commission has revised the rule to apply only to jury trials, the Commission deleted, as unnecessary, Comment [2] which addressed other proceedings such as appearances before a legislative body.

Rule 3.7: Lawyer as Witness

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: Rule 5-210 provides as follows:

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

District of Columbia: Rule 3.7(b) provides that a lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness "if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9." D.C. also adds

that the provisions of Rule 3.7(b) "do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency."

Florida: Rule 3.7(a) applies when a lawyer is likely to be a necessary witness "on behalf of the client," and creates an exception when "the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." Florida adopts ABA Model Rule 3.7(b) verbatim.

New York: In the rules effective April 1, 2009, Rule 3.7(a) applies only when a lawyer is likely to be a necessary witness "on a significant issue of fact." Rule 3.7(a) also adds two additional exceptions: "(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal."

Ohio adds a new Rule 3.7(c), which provides as follows: "A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law."

Texas: Rule 3.08(a) disqualifies a lawyer if the lawyer knows or believes that the lawyer is or may be a witness “necessary to establish an essential fact on behalf of the lawyer’s client,” unless specified exceptions apply. The exceptions are substantially identical to DR 5-101(B)(1)-(3) of the ABA Model Code of Professional Responsibility, but Texas adds an exception if “(4) the lawyer is a party to the action and is appearing pro se,” and Texas applies the “substantial hardship” exception only if “the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter. . . .” Texas Rules 3.08(b) and (c) provide as follows:

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer’s client, unless the client consents after full disclosure.

(c) Without the client’s informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer’s firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Virginia: In Rule 3.7(a), Virginia substitutes “adversarial proceeding” for “trial.” In Rule 3.7(b), Virginia incorporates language from DR 5-102(B) of the ABA Model Code of Professional Responsibility to deal with situations in

which a lawyer learns that he or she may be called as a witness “other than on behalf of the client” after accepting the representation.

Proposed Rule 3.8 [RPC 5-110]

“Special Responsibilities of a Prosecutor”

(XDraft # 10, 6/28/10)

Summary: This amended rule states the responsibilities of a prosecutor to assure that charges are supported by probable cause and addresses when and how a prosecutor must respond to new exculpatory information, including evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor’s jurisdiction.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 5-110

Statute

Case law

- ☒ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New York

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

(See the introduction and explanation of paragraph (g) in the Model Rule comparison chart.)

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Prosecutors have appeared at Commission meetings to address the proposed requirements for responding to new exculpatory information.

☒ Very Controversial – Explanation:

See the Introduction and Explanation of Changes for Commission minority positions on paragraph (c) (re seeking waiver of pretrial rights from unrepresented accused) and paragraph (g) (re a prosecutor's response to new exculpatory evidence). In addition, see the public commenter chart for objections received from prosecutors and other commenters concerning these same paragraphs and also concerning paragraph (b) (re reasonable efforts to assure that the accused has been advised of the right to counsel) and paragraph (f) (re reasonable supervision of extra-judicial statements by persons under the supervision or direction of a prosecutor).

☐ Moderately Controversial – Explanation:

☐ Not Controversial – Explanation

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.8* Special Responsibilities of a Prosecutor

June 2010

(Draft rule revised following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.8 adopts in substance ABA Model Rule 3.8, as amended in February 2008, which imposes special obligations on prosecutors in criminal cases.

However, Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor's duties under the Model Rule to provide greater certainty to prosecutors and greater procedural protection to the criminal defendant, specifically by (1) providing that the prohibition on prosecution of a charge not supported by probable cause applies at all stages of prosecution; (2) clarifying the prosecutor's duties to disclose exculpatory information during a proceeding; (3) adding a new comment explaining the "reasonable efforts" standard used in paragraph (b); and (4) adding a new comment clarifying that paragraph (c) does not prohibit prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing.

In addition, the Commission is recommending the adoption of provisions recently added by the ABA (paragraphs (g) and (h)) to expand the scope of a prosecutor's duty of prompt disclosure of evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor's jurisdiction. This Model Rule provision is under consideration in a number of jurisdictions (e.g., Delaware and Michigan) but, to date, only Wisconsin has adopted it.

Minority. A minority of the Commission objects to the inclusion of Rule 3.8(c) which is based upon ABA Model Rule 3.8(c) because it conflicts with California law. Although this portion of the Model Rule may be appropriate for other jurisdictions, it conflicts with Penal Code section 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in the Jones case held that an accused can only waive a preliminary hearing if represented by counsel. Yet paragraph (c) allows a prosecutor to obtain a waiver of a preliminary hearing if the accused has been

* Proposed Rule 3.8, XDraft 10 (6/28/10).

permitted to appear *in propria persona*. Comment [2] correctly states "prosecutors should not seek to obtain waivers of preliminary hearings...from unrepresented accused persons" since California law would not permit them to do this, while the text of 3.8(c) would allow this if the court permits the defendant to appear *in propria persona*. A minority of the Commission also objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." See Explanation of Changes for paragraph (g), below.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;	~~The~~<u>A</u> prosecutor in a criminal case shall: (a) refrain from <u>commencing or</u> prosecuting a charge that the prosecutor knows is not supported by probable cause;	The proposed language of paragraph (a) adopts the language of the ABA Model Rule and adds language to increase client protection. The additional language clarifies that the scope of prohibited conduct includes both prosecuting and the act of <i>commencing</i> a prosecution that a prosecutor knows is not supported by probable cause.
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;	(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;	The proposed language of paragraph (b) is identical to that of the ABA Model Rule.
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;	(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, <u>unless the tribunal has approved the appearance of the accused <i>in propria persona</i></u>;	The proposed language of paragraph (c) adopts the language of the ABA Model Rule but carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding <i>in propria persona</i> with leave of the tribunal. <u>Minority.</u> A minority of the Commission objects to the inclusion of Rule 3.8(c) due to concerns about a conflict with existing California law. (See Introduction.)

* Proposed Rule 3.8, XDraft 10 (6/28/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;	(d) ~~make~~<u>comply with all constitutional obligations, as defined by relevant case law, regarding the</u> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;	The proposed language of paragraph (d) generally follows the ABA Model Rule but further clarifies that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law.
(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:	(e) not subpoena a lawyer in a grand jury ~~or other proceeding,~~ criminal proceeding, <u>or civil proceeding related to a criminal matter</u> to present evidence about a past or present client unless the prosecutor reasonably believes:	Paragraph (e) largely recommends the Model Rule language. Based on public comments received, the Commission also recommends the addition of a reference to civil proceedings related to a criminal matter. Explanations for any variations are provided next to the subparagraphs.
(1) the information sought is not protected from disclosure by any applicable privilege;	(1) the information sought is not protected from disclosure by any applicable privilege <u>or the work product doctrine</u>;	The proposed language of paragraph (e)(1) is taken from the ABA Model Rule, but the Commission has included an additional reference to the work product doctrine because, under California law, work product protection does not constitute a privilege.
(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and	(2) the evidence sought is ~~essential~~<u>reasonably necessary</u> to the successful completion of an ongoing investigation or prosecution; and	The proposed language of paragraph (e)(2) is taken from the ABA Model Rule, except that the standard for evidence to be disclosed has been changed from "essential to the successful completion etc." to "reasonably necessary to the successful completion etc."

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
		in order to provide greater guidance to the prosecutor. It is a difficult, if not impossible, task to decide <i>ex ante</i> what evidence will be “essential” to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of “evidence reasonably necessary to the successful prosecution” is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.
(3) there is no other feasible alternative to obtain the information;	(3) there is no other ~~feasible~~<u>reasonable</u> alternative to obtain the information;	The proposed language of paragraph (e)(3) is taken from the ABA Model Rule, except that the availability of an alternative that will preclude subpoena to a lawyer had been changed from “feasible” to “reasonable” in order to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If “feasible” means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If “feasible” means that the alternative is reasonable, the more familiar term “reasonable” should be used.
(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial	(f) ~~except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and~~ exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> investigators, law enforcement personnel, employees or other persons	The proposed language of paragraph (f) is taken from the ABA Model Rule, except that the reference to the prosecutor's ability to make statements that serve a legitimate law enforcement purpose, etc. subject to the duty to refrain from making extrajudicial comments with a substantial likelihood of heightening public condemnation of the accused has been deleted as an unnecessary and imprecise re-formulation of the more detailed Model Rule paragraphs 3.6(a) and (b).

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.	assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 ~~or this Rule.~~	
(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.	(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.	Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. See also Explanation of Changes for Comments [6A] through [9]. <u>Minority.</u> A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." The minority argues that the way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was "new, credible and material information creating a reasonable doubt," the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority any information he or she receives. The majority, however, takes the position that rather than create a trap for unwary prosecutors, the "new, credible and material" modifier was specifically added to the proposed New York rule on

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
		which paragraph (g) is based to create a higher standard for triggering the prosecutor's duty of disclosure. The language used encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.
(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.	(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.	See Explanation of Changes for paragraph (g).

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.	[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. ~~The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense.~~ Competent representation of the ~~sovereignty~~<ins>sovereign</ins> may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor ~~and knowing~~<ins>Knowing</ins> disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.	The deleted language is unnecessary. The final two sentences of proposed Comment [1] to the ABA Model Rule are a sufficient caution that there may be law or standards governing these obligations or imposing additional obligations upon a prosecutor, violation of which could also constitute a violation of Rule 8.4.
	<u>[1A] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.</u>	This definition is intended to clarify, but not to expand, the scope of persons covered by the Rule.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.</u>	Proposed Comment [1B] is intended to clarify paragraph 3.8(b), which is adopted from the ABA Model Rule. In response to concerns raised by public commenters, a new second sentence was added to make clear that if there is no applicable legal right to counsel, then paragraph (b) imposes no duty on prosecutors.
[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.	[2] ~~In some jurisdictions, a~~ defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) ~~does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it~~not forbid the lawful questioning of an uncharged suspect who has knowingly waived the ~~rights~~right to counsel and ~~silence~~the right to remain silent. <u>Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.</u>	Proposed Comment [2] is adopted from Comment [2] to the ABA Model Rule, except that the exception governing an accused who is appearing <i>in propria persona</i> with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c).
	<u>[2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure</u>	The first sentence of proposed Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.</u>	the law at the time the case was pending, but the law was subsequently changed and applied retroactively. Although the new law and court decision will apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively. The second sentence in proposed Comment [3] was added at the request of OCTC to clarify that a prosecutor is subject to discipline for failure to fulfill paragraph (d)'s disclosure obligations even if the non-disclosure does not result in actual prejudice to the defendant.
[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.	[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.	Proposed Comment [3] is adopted verbatim from Comment [3] of the ABA Model Rule.
[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.	[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the ~~client-lawyer~~<u>client or other privileged</u> relationship.	Proposed Comment [4] is adopted from Comment [4] of the ABA Model Rule, but the requirement of "genuine need" has been expanded to include situations in which there would be an intrusion into privileged relationships other than the lawyer-client relationship.
[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's	[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. ~~In the context of a criminal prosecution, a prosecutor's~~	Proposed Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2)

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).	~~extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this~~ <u>Comment This comment</u> ~~is not~~ intended to restrict the statements which a prosecutor may make ~~which~~<u>that</u> comply with Rule 3.6(b) or 3.6(c).	does not provide adequate guidance to a prosecutor who could be disciplined under paragraph 3.8[f] for extrajudicial statements that "have a substantial likelihood of increasing public opprobrium of the accused." Instead, the Proposed Comment, like the Model Rule, confirms that paragraph 3.8[f] is not intended to prohibit statements by a prosecutor in compliance with paragraphs (b) or (c) of Rule 3.6, the rule governing trial publicity.
[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.	~~[6] Like other lawyers, prosecutors~~ <u>Prosecutors</u> are subject to Rules 5.1 and 5.3. ~~Ordinarily, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with~~ <u>standard will be satisfied if</u> the prosecutor ~~from making improper extrajudicial statements, even when such persons are not under~~ <u>issues the direct supervision of the prosecutor</u> <u>appropriate cautions to law-enforcement personnel and other relevant individuals.</u> Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.	The public comment version of Comment [6] was adopted verbatim from Comment [6] of the ABA Model Rule. A public commenter, however, correctly noted that the ABA language of Comment [6] stated that the duty applies "even when such persons are not under the direct supervision of the prosecutor." This is inconsistent with the language used in paragraph (f) of the rule and, for that reason, the Commission has now deleted much of the ABA language in Comment [6]. The comment now states: "Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals."

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].	Proposed Comment [6A] has been added to clarify that prosecutors are also subject to Rule 3.3, which imposes an obligation upon a lawyer who has offered material evidence that the lawyer later comes to know is false.
[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.	[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person ~~outside the prosecutor's jurisdiction~~ was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of the inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives	Proposed Comment [7] is adopted from Comment [7] of the ABA Model Rule, except for three amendments or additions. First, the first sentence has been revised to clarify that a prosecutor has duties even when the wrongly-convicted person was convicted outside the prosecutor's jurisdiction. Second, a third sentence has been added and the fourth sentence of the Model Rule comment has been revised to provide guidance to prosecutors about the scope of the inquiry they are required to make. Third, the last sentence of the Comment has been added to clarify that the duties imposed on the prosecutor are not dependent upon whether the lawyer of the wrongly-convicted defendant could have discovered the evidence.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. <u>The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.</u>	
[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.	[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.	Proposed Comment [8] is adopted verbatim from Comment [8] to ABA Model Rule.
[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.	[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), ~~though subsequently determined to have been erroneous,~~ does not constitute a violation of this Rule <u>even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is</u>	Proposed Comment [9] largely tracks Comment [9] to the ABA Model Rule. Additional explanatory language has been added in response to public comments expressing concerns that the Model Rule language on the "good faith" standard is inadequate.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.</u>	
	<u>[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]</u>	For guidance, proposed Comment [10] refers to a specific California statutory prohibition applicable to both current and former prosecutors. Comment [10] also includes a cross reference to the Comment [16] of Rule 1.7 that addresses the concept that there may be conflicts of interest to which a client cannot consent because the representation is prohibited by applicable law.

Rule 3.8 Special Responsibilities of a Prosecutor
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law, regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor’s office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. [Paragraph \(b\) does not apply where there is no right to counsel.](#) “Reasonable efforts” include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.
- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused’s voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor’s failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] ~~Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable~~

~~care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.~~ Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].
- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant

must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

- [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
- [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.
- [10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

Rule 5-110 Performing the Duty**3.8 Special Responsibilities of Member in Government Service a Prosecutor**

(Comparison of the Current Proposed Rule to Current California Rule)

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law, regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
- (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
- (3) there is no other reasonable alternative to obtain the information;

(f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,

- (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where

there is no right to counsel. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.

- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which

there is a genuine need to intrude into the lawyer-client or other privileged relationship.

- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.
- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].
- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph

(g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

- [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
- [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a

reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule – Clean Version)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law, regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
 - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.
- [1A] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor’s office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. Paragraph (b) does not apply where there is no right to counsel. “Reasonable efforts” include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.
- [2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused’s voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor’s failure to disclose the evidence or information to the defense.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [6] Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.
- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct

material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

- [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.
- [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
- [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.
- [10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	County of Ventura, Office of the District Attorney	D	No	3.8(b)	This rule is unnecessary. The court has the duty to advise the defendant of the right to counsel. There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty. Comment [1B] states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e. to make efforts to assure that the accused is advised of the right to, and procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. 3.8(b) should be deleted.	Proposed Rule 3.8(b), which is identical to the ABA Model Rule, only requires the prosecutor to make reasonable efforts to assure that the accused has been advised of the right to counsel etc.; it does not require the prosecutor himself or herself to advise the defendant of those rights, nor support discipline of the attorney if the court has failed to comply with its statutory duty. In addition, the Commission has added a clarifying statement in Comment [1B] indicating that paragraph (b) does not apply in circumstances where there is no right to counsel.
				3.8(c)	This rule prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused <i>in propria persona</i> . California law already prohibits an unrepresented	The commenter's discussion of various forms of, and requirements for, waiver by an unrepresented defendant do not persuade the Commission that the prohibition against certain affirmative conduct by the prosecutor is inappropriate. In addition, while a defendant's right to self-representation is both a constitutional right and a matter of choice by the

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					defendant from waiving preliminary hearing. (Pen. Code section 860; <i>In re Van Brunt</i> (1966) 24 Cal.App.2d 96, 104, overruled on other grounds in <i>In re Smiley</i> (1967).) If a case is going to be resolved by way of guilty plea rather than by trial, the defendant must waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. (<i>Boykin v. Alabama</i> (1969) 395 U.S. 238; <i>In re Tahl</i> (1969) 1 Cal.3d 122.) The standard guilty plea forms include these waivers, and the court must satisfy itself that the waivers are free and voluntary before they are accepted. A defendant has the constitutional right to self-representation. This is a choice by the defendant, not by the prosecution, and not by the court. The court does not really “approve” a defendant’s exercise of this right. The application of the Proposed Rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The Proposed Rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling “approving” self-representation. We appreciate the	defendant, it remains subject to a judicial finding that, e.g., the defendant is capable of properly exercising that right. The Commission observes that the limited context of this rule is the role of a “prosecutor in a criminal matter” which is substantially similar to the Model Rule counterpart that refers to a “prosecutor in a criminal case.” The Commission is not aware of any experience in Model Rule jurisdictions with regard to this rule and infractions.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	concern in protecting the rights of unrepresented defendants, however, the Proposed Rule is overbroad and unnecessary. This rule should not be adopted because it could be read as requiring the prosecutor, in every case, to issue directives to police, victims, witnesses, and other persons over which prosecutors have no supervisory authority. This would include statements by independent elected officials such as police chiefs. Comment [6] explains that this duty applies “even when such persons are not under the direct supervision of the prosecutor.” Proposed Rule 5.1 and 5.3, which are cited in Comment [6], make attorneys responsible only for persons over whom they have managerial authority or direct supervisory authority. The State Bar should not mandate prosecutors to issue directives to persons in other agencies over whom they have no supervisory or managerial authority.	The language of Proposed Rule 3.8(f) makes clear that the prosecutor’s responsibility to exercise reasonable care to prevent others from making prohibited extrajudicial statements extends only to “persons under the supervision or direction of the prosecutor.” The commenter correctly notes that public comment version of Comment [6], which followed the ABA Model Rule, stated that the duty applies “even when such persons are not under the direct supervision of the prosecutor.” This is inconsistent with the revised language of Proposed Rule 3.8(f) and, for that reason, Comment [6] has been revised to read: “Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.”

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Public Defender of Los Angeles County	M	Yes	3.8(e) and Comment [4]	Rule 3.8(e) concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the Proposed Rule, saying it is intended to limit the issuances of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship. There is no "genuine need" exception written into the Proposed Rule and it should not swallow up the Proposed Rule's protections.	The "genuine need" language in Comment [4] is not intended to identify an additional exception to the prohibition against issuing a subpoena etc. that is contained in the body of Proposed Rule 3.8(e). Rather, Comment [4] is intended to explain the rationale for permitting an exception to the prohibition where the listed conditions (1), (2) and (3) are present.
4	Office of Chief Trial Counsel	M	Yes	3.8(a) 3.8(b)	OCTC thanks the Commission for its changes in subparagraph (a), which is preferable to the original proposal, and its inclusion of a reference to section 6131 in Comment [10]. OCTC is, however, concerned about subparagraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel. This section fails to address that in most situations the	No response required. Proposed Rule 3.8(b), which is identical to the ABA Model Rule, only requires the prosecutor to make reasonable efforts to assure that the accused has been advised of the right to counsel etc.; it does not require the prosecutor himself or herself to advise the defendant of those rights, nor support discipline of the attorney if the police have failed to comply with their duty to advise etc.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 7 **Agree = 1**
Disagree = 1
Modify = 4
NI = 1

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	police, not the prosecutor, control this. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. <i>People v. Jacinto</i> (2010) __ Cal.App.4th __, WL 2105069 [finding that the Sheriff's deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.	As the manner of approval by the tribunal is not mandated by the rule, there is room to accommodate existing procedures. Paragraph (c) should be construed as a rule of reason rather than rigidly applied. As a less restrictive deviation from the Model Rule counterpart language, the Commission's approach is intended to recognize that waivers can be properly obtained from an unrepresented accused.
				3.8(f)	Likewise, OCTC is concerned with subparagraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under Proposed Rule 3.6. While in principle	The language of Proposed Rule 3.8(f) makes clear that the prosecutor's responsibility to exercise reasonable care to prevent others from making prohibited extrajudicial statements extends only to "persons under the supervision or direction of the prosecutor."

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]						TOTAL = <u>7</u> Agree = <u>1</u> Disagree = <u>1</u> Modify = <u>4</u> NI = <u>1</u>
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(e)	laudable, this requirement seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.	The Commission's addition of "the work product doctrine" language recognizes, in part, that other jurisdictions may encompass work product protection under the concept of a "privilege."
				3.8(g)	OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	No response required.
				Comment [1A]	Comment [1A] defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should be in the Proposed Rule itself, not a Comment.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. As a general rule, definitions of terms contained in the Proposed Rules are contained either in Proposed Rule 1.0.1 or in a Comment to a particular Proposed Rule.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	San Diego County Bar Association Legal Ethics Committee		Yes		The Proposed Rule is acceptable except (1) the omission of the ABA language on pretrial publicity (review SDCBA's letter for an example) and (2) objection was voiced with respect to subparagraphs (d) and (f).	The Commission's approach to pretrial publicity is taken from the ABA Model Rule counterpart, except that the reference to the prosecutor's ability to make statements that serve a legitimate law enforcement purpose, etc. subject to the duty to refrain from making extrajudicial comments with a substantial likelihood of heightening public condemnation of the accused has been deleted as an unnecessary and imprecise re-formulation of the more detailed Model Rule paragraphs 3.6(a) and (b).
				3.8(d)	Proposed subsection (d) adds the requirement that a prosecutor "comply with all constitutional obligations as defined by relevant case law regarding the" timely disclosure of [discovery]. I believe that a requirement that a prosecutor have knowledge of "all relevant case law" regarding discovery would be unduly burdensome; I am not sure any lawyer could ever find enough hours in the day to comply with that additional requirement, particularly given on how quickly the law changes in this area.	Proposed subsection (d) requires compliance with "all constitutional obligations, as defined by relevant case law, regarding the timely disclosure etc." Thus, the reference to relevant case law is not to all case law regarding discovery, but specifically to case law that clarifies and defines the prosecutor's constitutional obligations.
				3.8(f)	Subsection (f) is another section that could be hard to enforce. While working with law enforcement agencies often involved	Unlike the ABA Model Rule, proposed subsection (f) requires the prosecutor to exercise reasoning care to prevent improper extrajudicial statements only by

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7_ Agree = 1_
Disagree = 1_
Modify = 4_
NI = 1_**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					cooperation, different agencies handle cases very differently. Prosecutors do not have supervisory responsibilities over the employees of other agencies, and it may be unfair to require prosecutors to exercise control they don't have. While prosecutors can provide training regarding the law, ultimately the employees of other agencies will answer to their own chain of command.	"persons under the supervision or direction of the prosecutor." The rule does not make the prosecutor responsible for statements made by employees of other agencies whom the prosecutor does not supervise or direct.
7	Santa Clara County Bar Association	M	Yes		We fully support a rule that addresses the special responsibilities of a prosecutor. The currently proposed version addresses several of the concerns previously articulated by the SCCBA. However, it still sets out too broad a framework for the responsibilities of a prosecutor. In particular, the SCCBA suggests that in subsection (f), the words "or direction" be deleted so that prosecutors are only held accountable for persons under their direct control as employees as opposed to those who may undertake action at their direction but who are not required to do so. Finally, the SCCBA would commend the RRC to once again seriously consider the input provided by the California District Attorneys Association in a letter to the RRC dated November 13, 2009.	Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. In addition, to respond to concerns about the ABA language concerning supervision, the Commission has revised Comment [6] to read: "Prosecutors are subject to Rules 5.1 and 5.3. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals."

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	US Attorney 's Office for Central, Southern, Northern, and Eastern District of California	M		3.8(g) & (h)	Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h). Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases. There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger. There is no reason why the Rules of Professional Conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently addresses	The Commission discussed at length, and considered the views of numerous stakeholders in connection with, the adoption of Proposed Rules 3.8(g) and 3.8(h). A majority of the Commission believes that a "special rule" governing prosecutors is appropriate in light of the unique role and authority of the prosecutor in the criminal justice system. The restriction of the disclosure obligation to exculpatory evidence that is "new, credible and material" creates a higher standard for triggering a prosecutor's duty, and the lesser disclosure obligation in cases where the conviction was obtained outside the prosecutor's jurisdiction minimizes the burden of the duty triggered.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = _7_ Agree = _1_
Disagree = _1_
Modify = _4_
NI = _1_**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					this issue. We respectfully disagree. If a prosecutor in Jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in Jurisdiction B, in which the prosecutor in Jurisdiction A has never served, then the prosecutor in Jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in Jurisdiction A will not know what evidence was presented at the trial in Jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in Jurisdiction B. The prosecutor in Jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in Jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g)	Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein. First, the term “knows” is undefined in the Proposed Rule. Second, we are concerned by the use of the term “material” without a correlating definition. Third, we believe the Proposed Rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. Fourth, we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an	The requirement that the new evidence be “credible, material . . . [and] creat[e] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted” sets a high standard to trigger the duty of disclosure. In addition, given the knowledge standard, it is likely that a prosecutor who is a stranger to a case will seldom have knowledge of such evidence. The Commission does not believe that the use of the terms “know,” “material,” and “promptly” in Proposed Rule 3.8(g) are in any way unusual or anomalous or that they call for specific definition in connection with this rule. In general, paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of “new, credible and material evidence” that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = _7_ Agree = _1_
Disagree = _1_
Modify = _4_
NI = _1_**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(h)	investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence. Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein. First, similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Second, and perhaps most troubling, is Proposed Rule 3.8(h)’s mandate that a prosecutor “shall seek to remedy the conviction.” This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment [8] attempts to clarify this mandate but falls short. The use of the phrase “may include” render the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant’s innocence will in some circumstances be required to do more, with no guidance as to what this more is.	See Response to Comment re 3.8(g), above. The Commission believes that the illustrative examples in Comment [8] provide adequate guidance to a prosecutor and do not impose an unreasonable burden on a prosecutor in possession of such new and material exculpatory evidence.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 7 Agree = 1
Disagree = 1
Modify = 4
NI = 1**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9]	Proposed Comment [9]'s "good faith" exception is troublesome. We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. But, we believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to "know" of evidence triggering obligations under the Proposed Rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not "know" of such evidence. The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.	The Comment's provision of a "good faith" exception goes beyond the corresponding ABA Model Rule in providing a definition of "good faith judgment" in terms of "reasonable belief." The Commission believes that this clarification provides sufficient guidance to the prosecutor who is evaluating whether disclosure is required in a given case.

Rule 3.8: Special Responsibilities of a Prosecutor

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: Rule 5-110 provides as follows:

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

In addition, Rule 5-220 provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.”

Connecticut omits paragraphs (e) and (f).

District of Columbia: Every paragraph of Rule 3.8 differs from the Model Rule. The D.C. version of Rule 3.8 provides that the prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating

information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

Florida omits paragraphs (b), (e), and (f) of ABA Model Rule 3.8.

Georgia: In place of Rule 3.8(b) and (c), Georgia substitutes the simple caution that a prosecutor shall "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel." Georgia also shortens Rule 3.8(d) by eliminating the part that begins "in connection with sentencing." Georgia also limits the application of Rule 3.8(e) to statements the prosecutor would be prohibited from making only under Rule 3.6(g) (as opposed to the entire rule).

Illinois: In the rules effective January 1, 2010, Rule 3.8 adds the following sentence: "The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." Comment 1A elaborates on this sentence, quoting cases concerning a prosecutor's duties.

Massachusetts: Rule 3.8(c) prohibits prosecutors from seeking waivers of important pretrial rights from unrepresented defendants unless "a court has first obtained from the accused a knowing and intelligent written waiver of counsel." Massachusetts Rule 3.8(f) tracks ABA Model Rule 3.8(e), but adds that the prosecutor must obtain "prior judicial approval after an opportunity for an adversarial proceeding."

Massachusetts also adds paragraphs (h) and (i), which track DR 7-106(C)(3) and (4), and adds a new paragraph (j) providing that a prosecutor in a criminal case shall "not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused."

The Massachusetts federal court version of Rule 3.8(e) — Local Rule 3.8(f) — was declared invalid in *Stern v. United States District Court for the District of Massachusetts*, 16 F. Supp. 2d 88 (1st Cir.), *reh'g and reh'g en banc denied*, 214 F.3d 4 (1st Cir. 2000) (concluding that "the adoption of Local Rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas" in federal courts).

Michigan omits paragraphs (e) and (f).

New Jersey: Rule 3.8(c) prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver only of important “post-indictment” pretrial rights, and New Jersey Rule 3.8(d) requires timely disclosure to the defense only of all “evidence,” not “information.”

New York: In the rules effective April 1, 2009, Rule 3.8 is substantially similar to DR 7-103(A) of the old Model Code. Rather than adopting Model Rule 3.8(g) and (h), New York endorses similar, but less strict, procedures in Comments 6A-6E.

North Carolina: Rule 3.8(e) adds that the prosecutor shall not “participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer,” unless the conditions stated in ABA Model Rule 3.8(e) are satisfied.

Ohio: Rule 3.8(a) provides that a prosecutor shall not “pursue or” prosecute a charge that the prosecutor knows is not supported by probable cause. (A note by the drafters says the rule is thus expanded to prohibit either the pursuit or prosecution of unsupported charges and thus is broad enough to include grand jury proceedings.) Ohio omits Rule 3.8(b) because (according to a Model Rules Comparison) ensuring that the defendant is advised about the right to counsel is a police and judicial function, and because Rule 4.3 already sets forth duties applicable to all lawyers in dealing with unrepresented persons. Ohio also omits Rule 3.8(c) because that rule has a potential adverse impact on defendants who seek continuances or seek to participate in diversion programs. Rule 3.8(d) deletes the words “and to

the tribunal” in connection with sentencing disclosures. Ohio omits Rule 3.8(f) because prosecutors, like all lawyers, are already subject to Rule 3.6.

Pennsylvania deletes Rule 3.8(e) (governing subpoenas to lawyers) and instead adopts a separate rule, Pennsylvania Rule 3.10, which forbids a prosecutor or other governmental lawyer, absent judicial approval, to subpoena a lawyer before a grand jury or other tribunal investigating criminal conduct if the prosecutor seeks to compel evidence concerning a current or former client of the lawyer.

Texas: Rule 3.09(a) provides that a prosecutor shall refrain from prosecuting “or threatening to prosecute” a charge that the prosecutor knows is not supported by probable cause. Texas Rule 3.09(b) and (c) provides that a prosecutor shall:

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights.

Texas omits paragraph (e) and the first half of ABA Model Rule 3.8(f) but retains in Rule 3.07 the obligation to exercise reasonable care to prevent “persons employed or controlled

by the prosecutor” in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making.

Utah: Rule 3.8(d) eliminates the obligation to disclose unprivileged mitigating information “to the tribunal” in connection with sentencing; Utah omits ABA Model Rule 3.8(e) (regarding subpoenas to lawyers); and Utah’s equivalent to ABA Model Rule 3.8(f) deletes everything up to the phrase “exercise reasonable care.”

Virginia: Rule 3.8, which Virginia calls “Additional Responsibilities of a Prosecutor,” states that a prosecutor shall:

(b) not knowingly take advantage of an unrepresented defendant.

(c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense.

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . .

Virginia omits paragraph (e) and the first half of paragraph (f) of ABA Model Rule 3.8 and replaces the duty to “exercise reasonable care to prevent” in the second half of Rule 3.8(f) with a mandate that a prosecutor not “direct or encourage”

others to make statements that Rule 3.6 would prohibit the prosecutor from making.

Wisconsin has adopted Model Rule 3.8(g) and (h) nearly verbatim effective July 1, 2009, becoming the first state to do so. The Wisconsin version of Rule 3.8(b), however, varies from the Model Rule in that it requires a prosecutor who is “communicating with an unrepresented person in the context of an investigation or proceeding” to “inform the person of the prosecutor’s role and interest in the matter.”

Proposed Rule 3.9 [N/A]

“Advocate In Nonadjudicative Proceedings”

(XDraft #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 rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

Statutes

Case law

Government Code sections 11440.60, 82002(a),(b),(c)

- ☒ 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 6

Opposed Rule as Recommended for Adoption 5

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:

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*

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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.

* Proposed Rule 3.9, XDraft 3 (3/27/10).

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).

<u>ABA Model Rule</u> Rule 3.9 Advocate in Nonadjudicative Proceedings	<u>Commission's Proposed Rule*</u> Rule 3.9 Advocate in Nonadjudicative Proceedings	<u>Explanation of Changes to the ABA Model Rule</u>
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~~<u>communicating in</u> a ~~client~~<u>before</u><u>representative capacity with</u> a legislative body or administrative agency in <u>connection with</u> a ~~nonadjudicative~~<u>pending non-adjudicative matter or</u> proceeding shall disclose that the appearance is in a representative capacity, <u>except when the lawyer seeks information from an agency that is available to the public</u>~~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, XDraft 3 (03/27/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Commission's Proposed Rule</u>* Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 <u>non-judicial</u> bodies such as legislatures, <u>municipal</u>~~city~~ councils, ~~and executive boards of supervisors, commissions,~~ and administrative agencies acting in a <u>rule</u>~~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~~ <u>in arguments regarding</u> 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

<u>ABA Model Rule</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Commission's Proposed Rule*</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[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.</u>	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.

<u>ABA Model Rule</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Commission's Proposed Rule*</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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 (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 Non-adjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 4 **Agree = 2**
Disagree = 0
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	M	Yes		"Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance is required by ABA MR 3.9. We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings."	See response to SDCBA, below.
3	Office of Chief Trial Counsel	M	Yes		OCTC is concerned with the Commission's departing 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	See response to SDCBA, below.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.9 Non-adjudicative Proceedings [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [1]-[2]	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 not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule. If the rule is changed to be like Model Rule 3.9, then the Comments will have to be changed or deleted. Comments [1]-[2] are too general and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC would also request a Comment that other rules may apply depending on the facts and circumstances.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. The Commission disagrees that such a comment is necessary.
4	San Diego County Bar Association Legal Ethics Committee	A	Yes		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	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

Rule 3.9 Non-adjudicative Proceedings [Sorted by Commenter]							TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
					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.	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 believes that these risks outweigh adopting the Rule incorporating the requirements of Rule 4.1	

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.

Proposed Rule 3.10 [5-100]
“Threatening Criminal, Administrative, or Disciplinary Charges”
(XDraft #4, 8/12/08)

Summary: This Rule will repeat the substance of existing California Rule of Professional Conduct 5-100. There is no model rule counterpart. The Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. It reflects California disciplinary decisions that preceded the adoption of the 1975 Rules of Professional Conduct and has also been applied in civil cases. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☒ No ABA Model Rule counterpart	☒ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 5-100

Statute

Case law

See, e.g., *Lindenbaum v. State Bar* (1945) 26 Cal. 2d 565; *Libarian v. State Bar* (1952) 3 Cal. 2d 328; and *Arden v. State Bar* (1959) 52 Cal. 2d 310; *Bluestein v. State Bar* (1974) 13 Cal. 3d 162; *Kinnamon v. Staitmen & Snyder* (1977) 66 Cal. App. 893; *Crane v. State Bar* (1981) 30 Cal. 3d 117; *In the Matter of Rodriguez* (Rev. Dept. 1993) 2 State Bar Ct. Rptr. 480.

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☒ Other Primary Factor(s)

Threats to present criminal, administrative, or disciplinary complaints in order to gain an advantage in a civil dispute have long been prohibited by decisional law in this State. A Rule of Professional Conduct should memorialize the substance of those decisions so that lawyers have clear notice that such conduct is prohibited. Repealing the existing rule would incorrectly suggest that such conduct would be permissible in the future.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.10* Threatening Criminal, Administrative, or Disciplinary Charges*

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 3.10 is based on current California Rule 5-100, which makes a lawyer subject to discipline and civil liability for threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. That rule is based on 1975 California Rule of Professional Conduct 7-104. That, in turn, was based on American Bar Association Disciplinary Rule 5-105(a). Both the current and proposed Rule reflect California disciplinary decisions that preceded the adoption of the 1975 Rules of Professional Conduct. See, e.g., *Lindenbaum v. State Bar* (1945) 26 Cal. 2d 565; *Libarian v. State Bar* (1952) 3 Cal. 2d 328; *Arden v. State Bar* (1959) 52 Cal. 2d 310. The current rule and predecessors have also been applied in civil cases. See, e.g., *Kinnamon v. Staitmen & Snyder* (1977) 66 Cal. App. 893. The current American Bar Association Model Rules contain no counterpart to this rule. The Commission decided to retain the substance of the existing California Rule and to expand the Comment to describe its scope.

The current California Rule applies regardless of whether there is a civil action pending. A threat made before a formal civil action has been commenced also comes within the rule.

The Commission published for public comment a proposed expansion of Comment [2] that would have outlined the application of the Rule to proposed release-dismissal agreements in which prosecutors might agree to drop criminal charges in exchange for a defendant's agreement not to pursue a civil complaint against arresting officers or a government entity. The comments and criticisms regarding that proposed expansion were to the effect that it would give too much authority to prosecutors. The Commission rescinded most of that proposal in light of the comments.

* Proposed Rule 3.10, XDraft 4 (8/12/08).

INTRODUCTION (Continued):

The Commission's conclusion was that the applicability of the rule to that process should play out on a case by case basis in light of the facts. As a result of the deletion of most of the proposed language, the only expansion of proposed Comment [2] exempts from the rule an offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78, and the comments on this subject became moot.

Variation in Other Jurisdictions. Most states do not have a rule similar to existing California Rule 5-100. Colorado, South Carolina, Virginia, the District of Columbia, Louisiana, and Maine have similar rules. Hawaii, Idaho, Connecticut, Georgia, New Jersey, and Tennessee limit their rules to threats of criminal charges and do not include threats of criminal or disciplinary charges.

Minority. A minority of the Commission recommends against adoption of proposed Rule 3.10 for the reasons the ABA omitted such a rule from the Model Rules in 1983. The drafters of the Model Rules viewed a similar prohibition in former ABA Model Code DR 7-105(A) (1969), on which California Rule 5-100 is based, as overly broad and unnecessary. Threats of criminal prosecution or administrative charges that amount to extortionate conduct under the law are adequately covered under proposed Rule 8.4(b) which expands on Model Rule 8.4(b). Proposed Rule 3.10 is considerably broader than the rule in the few states that retain the earlier ABA Model Code rule which is limited to threats of criminal prosecution. What constitutes a "threat" under the proposed rule is incapable of adequate definition to inform lawyers in advance what conduct is prohibited. As drafted, the proposed Rule would unreasonably impede legitimate negotiation tactics in criminal and civil matters. There is no showing of a need to depart from the Model Rules by having a separate rule that prohibits extortionate conduct in addition to proposed Rule 8.4, which regulates lawyer misconduct.

<u>California Rule 5-100</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges	<u>Explanation of Changes to Current California Rule 5-100</u>
(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.	(Aa) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.	Because there is no Model Rule similar to existing California Rule of Professional Conduct 5-100, the comparisons in this table are to the existing California rule. The Commission changed “member” to “lawyer” to track the Model Rule’s convention of referring to lawyers rather than to members.
(B) As used in paragraph (A) of this rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.	(Bb) As used in paragraph (Aa) of this ~~rule~~Rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.	Proposed paragraph (b) is identical to current rule 5-100(B), except that the reference to paragraph (a) is now lower case, and the word “rule” has been capitalized.

* Proposed Rule 3.10, XDraft 4 (8/12/08). Redline/strikeout showing changes to the current California Rule (no ABA Model Rule counterpart)

<u>California Rule 5-100</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges	<u>Explanation of Changes to Current California Rule 5-100</u>
(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.	(C) As used in ~~paragraph (A) of this rule~~Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.	Proposed paragraph (c) is substantially the same as existing California Rule 5-100(C). The definition of "civil dispute" will now apply to all parts of the proposed new Rule.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment	<u>Explanation of Changes to the California Rule 1-710</u>
	<u>[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. (See, e.g., <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue "all available legal remedies," or words of similar import, by itself does not violate this Rule.</u>	Comment [1] is new and does not appear in current California rule 5-100. The Commission added this comment in order to describe the scope of the proposed Rule and to make clear that whether a lawyer's statement violates the Rule depends on the facts and circumstances in which the statement is made. The limitations on the scope of the Rule stated in the proposed Comment are consistent with existing California law. For example, current California rule 5-100 only prohibits threatening criminal or similar charges to gain an advantage in a civil dispute. Actually filing such charges is not prohibited, even if doing so is for the purpose of gaining an advantage in a civil dispute. See, e.g., Los Angeles County Bar Association Formal Opinion 469 (1993).

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment	<u>Explanation of Changes to the California Rule 1-710</u>
Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.	[2] <u>This Rule 5-100 is does not intended to apply to (i) a member's threatening threat to initiate contempt proceedings against a party for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.</u>	This Comment, which is based on the first Discussion paragraph to current rule 5-100, has been reworded to make it active voice and to clarify that the Rule do not apply in two situations. The first exception is substantially the same as in current rule 5-100. The second exception is to make clear that, if a person has been injured by an act constituting a misdemeanor, and that person has a remedy by a civil action, a prosecutor may offer to compromise the misdemeanor action in accordance with Penal Code sections 1377-78 without fear of violating this Rule. The version of this Rule circulated for public comment contained a more lengthy description of circumstances in which release-dismissal agreements in criminal cases might or might not violate this Rule. However, the Commission deleted most of those sentences in light of adverse public comment.
Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.	[3] Paragraph (B) ~~is intended to exempt~~ <u>exempts</u> the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.	Comment [3] is substantially the same as the second paragraph of the Discussion in current rule 5-100. The Comment now affirmatively states the exemption instead of couching it in terms of the intent of the drafters.
For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.	~~For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.~~	The Commission recommends deleting the last Discussion paragraph of current rule 5-100 as unnecessary. Proposed paragraph (c) of the Rule expressly refers to a "potential controversy," thereby obviating this paragraph.

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
 - (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
 - (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.
- [2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.
 - [3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

Comment

- [1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, by itself does not violate this Rule.

**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association	M	Yes	Comment [2]	Comment [2]: replace “good faith” standard with a “probable cause” standard.	In response to comments by this bar association and others, the Commission previously deleted the language that was the basis of the commenter’s concern.
2	Office of Chief Trial Counsel	A	Yes		OCTC supports this rule but believes that there are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
3	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 3.10 and the Comments to the Rule.	No response required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

California Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

Jurisdictions with provisions similar to California:

Colorado

[Rule 4.5\(a\)](#) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

South Carolina

[Rule 4.5](#) A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.

Virginia

[Rule 3.4\(i\)](#) [A lawyer shall not] Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

District of Columbia

[Rule 8.4\(g\)](#) [It is professional misconduct for a lawyer to] Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Louisiana

Rule of Professional Conduct 8.4(g) [It is professional misconduct for a lawyer to] Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Maine*

Rule 3. Code of Professional Responsibility. 3.6 Conduct During Representation. (C) Threatening Prosecution. A lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter.

*This rule is no longer effective. The Maine Rules of Professional Conduct (which follow the ABA numbering system and do not include a specific provision on threatening to present charges) became effective on 8/1/2009.

Jurisdictions with provisions relating only to threats of criminal charges:

Hawaii – [Rule 3.4\(i\)](#)

Idaho - [Rule 4.4\(a\)\(4\)](#)

Connecticut – [Rule 3.4\(7\)](#)

Georgia – [Rule 3.4\(h\)](#)

New Jersey – [Rule 3.4\(g\)](#)

Tennessee – [Rule 4.4\(b\)](#)

Other Resources:

ABA Article, [Making Threats](#), (October 2008), discussing history of prohibition against threats and state bar rules and ethics opinions on the subject. Note: some rule citations no longer effective and/or amended.

[ABA Formal Opinion 92-363](#) *Use of Threats of Prosecution in Connection with a Civil Matter* (1992).

Proposed Rule 4.2 [2-100]
“Communication with a Represented Person”
(XDraft 19.1, 06/30/10)

Summary: Proposed Rule 4.2(a), which regulates a lawyer’s communications with persons – regardless of whether they are parties or witnesses in a matter, tracks the language of Model Rule 4.2 which is the standard in nearly every jurisdiction. However, similar to current rule 2-100, it provides detailed guidance as to how the rule is intended to apply in certain contexts. It should be noted that representatives from the California Attorney General, Public Defenders and District Attorneys have criticized the Commission’s recommendation to follow the Model Rule in applying the Rule to a lawyer’s communications with “persons,” not just “parties.” See Introduction and Public Comment Chart.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule	RPC 2-100.
Statute	
Case law	<i>Matter of Dale</i> (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

California Attorney General, California Public Defenders Assoc., CA Attorneys for Criminal Justice, Los Angeles Co. Pub. Defender, Orange Co. Pub. Defender, Nat. Assoc. of Criminal Defense Lawyers, SD Criminal Defense Bar Assoc., and various District Attorney offices in California. See Public Comment Chart for complete list.

☒ Very Controversial – Explanation:

Prosecutors and defense attorneys complain that the change from “party” to “person” will inhibit ability to investigate cases and contact witnesses. Others complain that the prohibition against contacting public officials is too broad.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.2* – “Communication with a Represented Person”

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 4.2(a) follows the basic “no-contact” rule in Model Rule 4.2, except that the proposed Rule makes clear that a lawyer is prohibited from communicating indirectly as well as directly with a person known to be represented in the matter. In addition, the proposed Rule goes beyond its Model Rule counterpart by providing more detailed guidance as to how the Rule is intended to apply in certain contexts. For example, while the Model Rule expresses the general prohibition against communications with persons represented by counsel, it does not attempt to resolve the difficult challenges that the Rule has engendered historically and in practice. Unlike the Model Rule, the proposed Rule defines which individuals within an organization qualify as a “person” when the communication is with an agent or employee of the organizational entity. The Rule also sets forth exceptions for communications with public officials, and government boards and committees, as well as communications from a person involved in the matter who is seeking independent legal advice. In keeping with California’s traditional policy of protecting a client’s confidential information and the attorney-client relationship, the proposed Rule also provides that even where a communication is permitted under the Rule, a lawyer may not seek to obtain privileged or confidential information. Additionally, the Rule provides that a lawyer representing an organizational client may not falsely represent that he or she represents all employees or constituents of the organization.

Public Comment: “Person”. Notwithstanding the fact that the overwhelming majority of jurisdictions have adopted rules governing communications with a represented “person” rather than a represented “party,” and the fact that lawyers who practice in the lawyer discipline area in California have interpreted “party” in current rule 2-100 to encompass any represented person in a matter, the Commission received a

* Proposed Rule 4.2, XDraft 19.1 (06/30/10).

INTRODUCTION (Continued):

significant amount of input from the public on using “person” in the proposed Rule. Input was received during both the initial and subsequent public comment periods, as well as during the Commission’s open session meetings. In response to the initial public comment distribution of the rule, representatives of the California Attorney General; Public Defender and District Attorney offices in California, and their representative organizations; and representative organizations of the California criminal defense bar raised concerns over the substitution of “person” in the proposed Rule for “party” in current rule 2-100. The Commission carefully considered the concerns that these commenters expressed at meetings and in writing, but ultimately retained “person” in the Rule. The Commission drafted several comments to accommodate these concerns, but the interested parties ultimately rejected them. Nevertheless, the Commission believes that the comments it drafted are a reasonable compromise between protecting attorney-client relationships of *all* persons involved in a matter and permitting law enforcement agencies and the criminal defense bar to conduct their investigations. See Explanation of Changes for paragraph (c)(3) and Comments [18]-[21]. In response to the subsequent public comment distribution of the rule, there were less comments received but among them was a comment from the San Bernardino County Public Defender that similarly objected to the change from “party” to “person” and emphasized an anticipated detrimental impact on the ability of defense counsel to investigate cases and to conduct interviews of witnesses. To address this concern, the Commission added a new sentence to Comment [20] clarifying that the change from “party” to “person” is not intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.

Public Comment: “Public Official”. During the Commission’s deliberations, the Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, concerning the exception for communications with a “public official” stated in paragraph (c)(1). The Commission carefully considered the concerns that these commenters expressed at meetings and in writing. The Commission believes that the rule provision and comment it drafted are a reasonable compromise between the interests of the government and lawyers representing persons who are petitioning the government. See Explanation of Changes for paragraph (c)(1) and Comment [16].

Variations in Other Jurisdictions. Every other jurisdiction has adopted a rule that governs communications with a represented “person” rather than a represented “party.” The Commission is aware of only four jurisdictions that still retain “party” in the black letter of its Model Rule 4.2 counterpart: Alabama, Arizona, Connecticut and Mississippi. In each instance, however, the jurisdictions use “Person” in the title of the rule and include a comment that provides: “This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel

concerning the matter in question.” Within the last year and a half, both Illinois, Kentucky, Maine and West Virginia have each rejected rules that formerly prohibited contact only with a “party” in favor of a more expansive rule that prohibits communications with a “person known by the lawyer to be represented.” Other states have rules similar to proposed California Rule 4.2 and current rule 2-100 that expressly address communications with members or constituents of organizations (e.g., District of Columbia, Louisiana, Maryland, New Jersey, New Mexico, and Texas). Also similar to the proposed California Rule, several states also address communications with the government (e.g., District of Columbia, Maryland, and North Carolina). Two other states, Maine and Utah, have rules that expressly address the conduct of prosecutors under the Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.	(a) In representing a client, a lawyer shall not communicate <u>directly or indirectly</u> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer ~~or is authorized to do so by law or a court order.~~	Paragraph (a) tracks the language of the single paragraph Model Rule 4.2, but adds the words “directly or indirectly” to make clear that the Rule applies to communications through an intermediary such as an investigator. The exception for communications authorized by law or court order have been moved to paragraph (c).
	(b) <u>For purposes of this Rule, a “person” includes:</u> (1) <u>A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or</u>	The Model Rule does not define “person” in an organizational or corporate setting. Therefore, the Commission recommends paragraph (b), which describes the types of organization constituents who fall within the proscription of the Rule. The Model Rule by contrast makes no attempt to define which constituents of a corporation or other association are subject to the protections afforded by the Rule. As result, the proposed changes provide greater guidance to lawyers seeking to communicate with a represented organization.

* Proposed Rule 4.2, XDraft 19.1 (06/30/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.</u>	Paragraph (b)(2) clarifies that the proposed Rule applies to certain other constituents of an organization not within the organization's "control group," and provides greater guidance and specificity than the Model Rule.
	<u>(c) This Rule shall not prohibit:</u> <u>(1) Communications with a public official, board, committee or body; or</u>	Subparagraph (c)(1) expresses an exception to the Rule that communications with public officers, board committees, and other similarly situated government employees and entities are permitted under the First Amendment and the right to petition government. This concept is found in a comment to the Model Rule. Paragraph (c) places the exception in the black letter of the Rule for greater clarity.
	<u>(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or</u>	Subparagraph (c)(2) carries forward an exception found in current Rule 2-100.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(3) <u>Communications authorized by law or a court order.</u>	This exception stated in subparagraph (c)(3) is identical to the exception found in the Model Rule. It has been placed with the other express exceptions to the proposed Rule for clarity.
	(d) <u>When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.</u>	Paragraph (d) adds an important public protection not found in the Model Rule. It is designed to prevent misleading a person with whom communication is permitted.
	(e) <u>In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.</u>	Paragraph (e) adds protections not found in the Model Rule against unwarranted intrusions into the attorney-client or other privilege. Thus, even where a communication is permitted by the Rule, the lawyer may not seek to obtain privileged or confidential information that the lawyer is not entitled to receive.
	(f) <u>A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.</u>	Paragraph (f) is intended to prevent an attorney for an organization from thwarting legitimate inquiries and investigations by falsely representing that he or she represents all of the employees or other constituents of the organization. As such, it adds more public protection by preventing misuse of the Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(g) <u>As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).</u>	Paragraph (g) defines the term "public official" as used in paragraph (c)(1). The Model Rule recognizes that lawyers are authorized by law to communicate with government on behalf of clients who are exercising their constitutional rights. However, this exception is found in a comment to the Model Rule, whereas the proposed Rule includes the exception in the black letter for greater clarity, specificity, and guidance.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.	<u>Overview and Purpose</u> [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the ~~uncounselled~~<u>uncounseled</u> disclosure of information relating to the representation.	Comment [1] is identical to Model Rule 4.2, cmt. [1], except for the spelling of “uncounseled.”
[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.	[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.	Comment [2] is identical to Model Rule 4.2, cmt. [2].
[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.	[3] ~~The~~<u>This</u> Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.	Comment [3] is identical to Model Rule 4.2, cmt. [3], except for the substitution of “This” for “The”.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.</u>	Comment [4] explains use of the terms "person" and "matter" as used in the Rule. The proposed Rule uses the term "person" rather than "party" as in present Rule 2-100 to clarify that the Rule is not limited to litigation contexts and does not refer only to parties to litigation. (Cf. <i>Matter of Dale</i> (Rev.Dept. 2005) 4 Cal. State Bar Ct.Rptr. 798, 804-807.)
	<u>[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.</u>	Comment [5] clarifies the use of the words "directly or indirectly" in Paragraph (a).
[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule	~~[4]~~ This Rule does not prohibit ~~communication~~ <u>communications</u> with a represented person, or an employee ~~or~~ <u>member</u>, agent, <u>or other constituent</u> of ~~such~~ <u>a person represented organization</u>, concerning matters outside the representation. For example, the existence of a controversy, <u>investigation or other matter</u> between ~~at the government agency~~ and a private ~~party~~ <u>person</u>, or between two organizations, does not prohibit a lawyer for either from communicating with <u>the other</u>, <u>or with</u> nonlawyer representatives of the other, regarding a separate matter. ~~Nor does this Rule preclude communication with a represented person~~	Comment [6] is based on Model Rule 4.2, cmt. [4], which has been modified to conform to the terminology used in paragraph (b). That paragraph defines "person" in an organizational context. The revisions also clarify the language of the Model Rule comment. The last four sentences of the comment have not been adopted because they do not materially add to an understanding of the Rule, are covered by other comments or are self-evident from a reading of the black letter of the Rule itself. The point stated in the stricken sentence--that parties to a matter may communicate directly with each other -- is addressed in Comment [7] below.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.	~~who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.~~	
[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.	<u>Communications Between Represented Persons</u> ~~[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.~~	The concepts contained in Model Rule 4.2, cmt. [5] are covered in more detail in Comments [16] and [19], and so the Model Rule comment has been stricken.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).</u>	The gist of Comment [4] – that represented persons may communicate with each other – is found in Model Rule, cmt. [4]. The second sentence of this comment, which states that a lawyer may advise a client on what to say or not to say to the represented person. is designed to address the issue of whether giving a client instructions or directions on what to say to the represented person amounts to an “indirect communication” with the represented person. (Cf. COPRAC Opn. 1993-131.) This comment thus seeks to clarify that a lawyer can advise or edit a client's communications with the represented party without the communication being deemed an indirect communication. The Model Rule does not address the concept of indirect communications with represented persons; hence the need to add this comment.
	<u>[8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.</u>	Comment [8] has no counterpart in the Model Rule. As noted in Comment [7], represented persons in a matter may communicate directly with each other. Comment [8] clarifies that the Rule does not preclude a lawyer who is a party from communicating with the represented person. The second sentence provides cautionary advice on how a represented person may avoid abuses.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Knowledge of Representation and Limited Scope Representation</u> <u>[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)</u>	The substance of Comment [9] is in Model Rule 4.2, cmt. [8].
	<u>[10]When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.</u>	Comment [10] has no counterpart in the Model Rule. California authorizes limited scope representation in civil cases and family law cases. (California Rules of Court, Rules 3.35-3.37; 5.70 & 5.71) Limited scope representation occurs where a lawyer may be hired to represent a person only for limited tasks, which renders the person to be contacted, at the same time, both represented and unrepresented. Model Rule 1.2 recognizes that a lawyer may limited the scope of representation, but neither that Rule nor Model Rule 4.2 provide guidance on how to handle communications with partially represented persons. Comment [10] is intended to fill this void.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Represented Organizations and Constituents of Organizations</u> <u>[11]"Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.</u>	Comments [11] to [15] explain paragraph (b), a provision not found in Model Rule 4.2. Model Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted when the organization is represented by counsel.
	<u>[12]As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.</u>	See Explanation of Changes for Comment [11].
	<u>[13]Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)</u>	See Explanation of Changes for Comment [11].

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[14]If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.	See Explanation of Changes for Comment [11].
	[15]This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.	See Explanation of Changes for Comment [11].
	<u>Represented Governmental Organizations</u> [16]Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization	Comment [16] explains paragraph (c)(1), which has no counterpart in the Model Rule. (See discussion above regarding Paragraph (c)(1).) This Comment also provides parameters on permissible communications.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.</u>	
	<u>Represented Person Seeking Second Opinion</u> <u>[17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. See, e.g., Rules 1.7 and 7.3.</u>	Comment [17] explains paragraph (c)(2), which has no counterpart in the Model Rule.
	<u>Communications Authorized by Law or Court Order</u> <u>[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These</u>	This comment explains what is meant by the “authorized by law exception.” It expands on Comment [5] of the Model Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.	
	[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.	Comment [19] recognizes that law enforcement agencies, as permitted by the "authorized by law" exception in Paragraph c(3), may engage in investigative activities which involve communications with persons represented by counsel and which are necessary to promote legitimate law enforcement functions. The comment provides additional guidance not found in Model Rule 4.2, cmt. [5].

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.	Comment [20] explains that the change from "party" in current Rule 2-100 to "person" in the proposed Rule is not intended to alter existing investigative communication exceptions that were recognized under current rule 2-100. The comment has no Model Rule counterpart since ABA Rule 4.2 does not use the word "party." Input from public defenders indicated that the rule's proposed change from "party" to "person" would impair an accused's constitutional rights. To respond to this concern the Commission added a new sentence at the end of Comment [20] clarifying that the rule is not intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.
[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.	[621] A lawyer who is uncertain whether a communication with a represented person is permissible ~~may~~ might be able to seek a court order. A lawyer ~~may~~ also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.	Comment [21] addresses the "authorized by court order" exception in paragraph (c)(3). Except for minor changes, this comment is identical to Comment [6] to the Model Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.	~~[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.~~	The subject matter of Model Rule 4.2, cmt. [7], is addressed more fully in paragraph (b) and Comments [11] to [15] of the proposed Rule. See Explanation of Changes, above.
[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.	<u>Prohibited Objectives of Communications Permitted Under This Rule</u> ~~[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.~~	Model Rule 4.2, cmt. [8], although stricken, is found in the black letter and in Comment [9] of the proposed Rule (see above).

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).	Comment [22] serves as a reminder that even if a communication is permitted by this Rule, a lawyer must not abuse the privilege by disregarding the lawyer's obligations under paragraphs (d) and (e). There is no counterpart to paragraphs (d) and (e) in the ABA Rule.
	[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 8.4(c) and 8.4(d).	Comment [23] clarifies the scope and application of paragraphs (d) and (e), which are not found in the ABA rule. References to Rule 4.4 are in brackets pending the Commission's final consideration of that Rule.
[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.	[924] ~~In the event the person~~ When a lawyer's communications with ~~whom~~ a person are not subject to this Rule because the lawyer ~~communicates~~ does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not ~~known to be~~ represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.	Comment [24] is based on Model Rule 4.2, cmt. [9], but corrects an error in it. Rule 4.3 applies when a lawyer is communicating with a person the lawyer knows to be unrepresented by counsel, and it also applies when the lawyer doesn't know if the person is unrepresented. Both Model Rule 4.2 and proposed Rule 4.2 apply when the lawyer is communicating with a person the lawyer knows to be represented by counsel.

Rule 4.2: Communication with a Represented Person

(Redline Comparison of the Proposed Rule to Public Comment Draft)

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a “person” includes:
 - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
 - (2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.
- (c) This Rule shall not prohibit:
 - (1) Communications with a public official, board, committee or body; or
 - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person’s choice; or
 - (3) Communications authorized by law or a court order.
- (d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.
- (g) As used in this Rule, “public official” means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

COMMENT

Overview and Purpose

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] As used in paragraph (a), “the subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.
- [5] The prohibition against “indirect” communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

- [7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer’s client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client’s communications with a represented person, subject to paragraph (e).
- [8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

- [9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. ~~See~~ Rule 1.0.1(f).➔

- [10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

- [11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.
- [12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an

admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)

- [14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.
- [15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.

Represented Governmental Organizations

- [16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented

in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

- [17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules ~~7-3~~[1.7](#) and ~~7.3~~[1.7](#).)

Communications Authorized by Law or Court Order

- [18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.
- [19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule,

nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

- [20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. [Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.](#)
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be

prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. ~~(See [Rule 4.4].)~~ Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules ~~[4.4]~~, 8.4(c) and 8.4(d).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule ~~2-100~~4.2 Communication With a Person Represented ~~Party~~By Counsel

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A) While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person the ~~member~~lawyer knows to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.
- (b) ~~(B)~~For purposes of this ~~rule~~Rule, a "~~party~~person" includes:
- (1) ~~An A current~~ officer, director, partner, or managing agent of a corporation ~~or partnership~~, association, ~~and a partner or managing agent of a partnership~~other represented organization; or
 - (2) ~~An association member or an A current~~ employee ~~of an association, corporation, member, agent or partnership, other constituent of a represented organization~~ if the subject matter of the communication is any act or omission of ~~such person~~the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or ~~whose~~self the statement of such person may constitute an admission on the part of the organization.
- (c) ~~(C)~~This ~~rule~~Rule shall not prohibit:
- (1) Communications with a public ~~officer~~official, board, committee, or body; or
 - (2) Communications initiated by a ~~party~~person seeking advice or representation from an independent lawyer of the ~~party's~~person's choice; or
 - (3) Communications ~~otherwise~~authorized by law or a court order.
- (d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.
- (g) As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

Discussion:-

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer party, and (2) not to accept or engage in communications with the lawyer party.~~

~~Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.~~

~~As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.~~

~~Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)~~

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)~~

COMMENT

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer

learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).

[8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. See Rule 1.0.1(f).

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. See Comment [6]. In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) “managing agent” means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. See Evidence Code section 1222.

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

[15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a “person” under paragraph (b)(2) with whom communications are prohibited by the Rule.

Represented Governmental Organizations

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California

Constitution. A “public official” as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

[17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. See, e.g., Rules 1.7 and 7.3.

Communications Authorized by Law or Court Order

[18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person’s right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of

crimes that might be authorized under the Sixth Amendment or other constitutional right.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 8.4(c) and 8.4(d).

[24] When a lawyer’s communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

Rule 4.2: Communication with a Represented Person
(Commission's Proposed Rule – Clean Version)

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a "person" includes:
 - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
 - (2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.
- (c) This Rule shall not prohibit:
 - (1) Communications with a public official, board, committee or body; or
 - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or
 - (3) Communications authorized by law or a court order.
- (d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.
- (g) As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).

COMMENT

Overview and Purpose

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] As used in paragraph (a), “the subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.
- [5] The prohibition against “indirect” communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

- [6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

- [7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer’s client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client’s communications with a represented person, subject to paragraph (e).
- [8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

- [9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. See Rule 1.0.1(f).

- [10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. See Comment [6]. In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.

Represented Organizations and Constituents of Organizations

- [11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.
- [12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an

admission on the part of the organization under the applicable California laws of agency or evidence. See Evidence Code section 1222.

- [14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.
- [15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.

Represented Governmental Organizations

- [16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented

in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

- [17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. See, e.g., Rules 1.7 and 7.3.

Communications Authorized by Law or Court Order

- [18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.
- [19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule,

nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person’s right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

- [20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law. Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be

prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 8.4(c) and 8.4(d).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

**TOTAL = 6 Agree = 0
Disagree = 4
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No		The Proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel. The Proposed Rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-attorney governmental employees may be contacted by an outside lawyer without permission. However, the Rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the Rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.	The Commission disagrees that "public official" should be defined independent of the cross-reference to business entities in subparagraph (b). In defining "public official" the intent was not to bring in all agency employees within that rubric of "public official," but only those with managerial authority comparable to the authority conferred on officers, directors, partners, or managing agents of non-public organizations. While it may in some cases be difficult to draw the line between categories of public officials, these concerns are found in both the private and public sectors. For example, whether a constituent is a partner or managing agent may have to be determined on a case by case basis since an all-encompassing delineation of permissible versus impermissible contacts is not possible.
2	Dalton, John W.	D	No		The Proposed Rule will severely prejudice plaintiffs in employment cases and be tremendously helpful to the defense in such cases. All the defense would have to do is	The Commission disagrees. The commenter has overlooked Paragraph (f) of the Rule which provides: "[a] lawyer for a corporation, partnership, association or other organization shall not represent

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					send a letter to plaintiff's counsel indicating that all employees of the company are "represented" for the sole purpose of litigation and plaintiffs will be prohibited from interviewing percipient witnesses. Such a rule has no impact on "attorney misconduct" by an attorney, it would merely allow the defense in employment cases to "hide the ball" from plaintiff's counsel who are conducting good faith investigations into, what are often, very serious allegations of work place misconduct. The Proposed Rule places plaintiffs at a huge disadvantage and strongly favors the defense in employment cases.	that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true."
3	Office of Chief Trial Counsel	M	Yes		OCTC is concerned that this rule may still not address the issues raised in <i>In the Matter of Dale</i> . In <i>Dale</i> , the Review Department failed to find an attorney culpable of violating Current Rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the Dale type of	The Commission does not believe any additional clarification is necessary. The change from "party" to "person" is intended to make clear that whether a communication is prohibited under the Rule does not depend on whether the person contacted is a party to a criminal, civil or other judicial proceeding. The Rule errs on the side of protecting the attorney-client relationship regardless whether the person contacted is a party to any proceeding.

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					situation. Even the court in Dale appeared to encourage that. While the rule now states “person” and not “party” so that the conduct in Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a Comment should be added to clarify that the <i>Dale</i> type of situation is covered by this rule. There are way too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
				Comments [7] & [12]	Comments [7] and [12] should be in the Proposed Rule, not a Comment.	The Commission believes that the points addressed in these comments belong in the comments and not in the rule. They are explanatory of the essential standard that is in the rule.
4	Oliver, Jason L.	D	No		I am writing to voice my strong opposition to the Proposed Rule which would prohibit contacting a “person” represented by counsel, as opposed to the current rule which prohibits contact with a “party” represented by counsel. Currently, a plaintiff’s lawyer may contact “persons” (who are not managing	The Commission disagrees. The commenter has overlooked Paragraph (f) of the Rule which provides: “[a] lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.”

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					agent/control group types) as long as that person is not a “party” in the case. Under the current system, a defense lawyer or employer defendant may not “convert” a rank and file employee, whether represented or not, into a “party,” just by sending a letter or by having the employer include a provision in an employee handbook about representation. Under the new rule, this would be possible. Based on what I see every day, I would say such abuse will not just be possible, but likely, as defendants fight these cases tooth and nail and seek every advantage they can get. In civil rights and employment cases, our pre-filing and post-filing investigations are of paramount importance to vindicating the important rights of our clients. If the Proposed Rule is adopted, defendant employers will be handed a huge advantage over plaintiffs with meritorious cases, since there will likely be wholesale restrictions on who we can speak to in our investigations.	
5	San Bernardino County Public Defender	D	Yes		Proposed Rule 4.2 will impermissibly infringe on a criminally accused's right to effective assistance of counsel by limiting defense counsel's ability to fulfill his/her duty to investigate. Proposed Rule 4.2 restricts defense counsel's ability to investigate, will overburden scant judicial resources, and cause unnecessary costs, delay and backlog.	The Commission disagrees. Whether a defense attorney has a reciprocal right under the Sixth Amendment to communicate with a person represented by counsel depends on whether such a communication is “authorized by law” pursuant to Paragraph (c) (3). Whether such contacts are authorized by law is beyond the scope of the Rule. Comment [20] explains that the change from “party”

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Recognizing the inevitable confusion of this Proposed Rule, Comment [21] suggests a lawyer may seek a court order in order to communicate with a represented person. This suggestion will bring possibly thousands of otherwise unnecessary proposed orders to the courts, thereby wasting judicial resources, slowing case processing, and increasing case backlog in our already overburdened justice system. Proposed Rule 4.2 will deprive the criminally accused the right to equal protection of the law. Both the government and the defendant are entities similarly situated as both deserving due process in a criminal proceeding. However, Proposed Rule 4.2 violates the equal protection clause because prosecutors will have an overwhelming advantage prosecuting cases because they can contact any "person" while the defense cannot. To correct this problem, allow the exemption to apply to prosecutors <i>and</i> the defense bar. That will level the playing field and the Proposed Rule 4.2 will accurately articulate the Commission's intent.	to "person" is not intended to preclude legitimate communications by or behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations. However, because Comment [20] may be read to suggest that an "authorized by law" exception in this area applies only to prosecutors and that a reciprocal right does not exist in favor of defense lawyers or investigators, the Commission has amended Comment [20] to allow for that possibility. The penultimate sentence has been added as follows: "Nor is this change intended to preclude legitimate communications by or on behalf of lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment or other constitutional right.
6	San Diego County Bar Association	D	Yes		Change from "party" to "person" is not a clarifying change as Commission has asserted. (Dale, 4 Cal. State. Bar. Rptr. 798)	The discussion section to current Rule 2-100, in part, states that "matter" and "party" are "not limited to a litigation context" and the Commission believes that many lawyers have construed the rule's use of "party" as a term of art.

**Rule 4.2 Communication with a Person Represented by Counsel.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Proposed rule would expand a lawyer's duties to non-clients, increase risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court. Keep existing rule 2-100 but modify to add a new subsection (C)(4) for communications with an investigative officer in civil or criminal case.	Substituting "person" for "party" adopts the Model Rule language and brings California in line with the overwhelming majority of jurisdictions. Commenters opposed to the adoption of the Model Rule's use "person" have been unable to demonstrate that the use of that term has caused any significant problem elsewhere, and the Commission is not aware of any. Other additions codify case law and other developments in this area of lawyer conduct (see, i.e., paragraph (e)). The Commission believes that the decision in the Dale case requires that the existing rule be modified.

Rule 4.2: Communication with Person Represented by Counsel

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 4.2 restricts communication with a “party” rather than a “person” and omits the phrase “or a court order.”

California: Rule 2-100 (Communication with a Represented Party), provides as follows:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the

matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Colorado: Rule 1.2(c) permits “limited representation of a pro se party” as provided by specified Colorado Rules of Civil Procedure. Rule 5 of the Colorado Rules of Civil Procedure provides that such limited representation of a pro se party “shall not constitute an entry of appearance by the attorney . . . and does not authorize or require the service of papers upon the attorney.”

District of Columbia adds the following three paragraphs to Rule 4.2:

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Florida: Rule 4.2 deletes the phrase "or is authorized to do so by law or a court order" and substitutes the following new language:

[A]n attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute, court rule, or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

In addition, Florida adds a new paragraph (b) stating as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida's version of Rule 1.2(c) provides, in part, that "a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.")

Georgia replaces the phrase "authorized to do so by law" with the phrase "authorized to do so by constitutional

law or statute.” Georgia also adds a new paragraph (b) that provides: “Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.”

Illinois: In the rules effective January 1, 2010, Illinois adopts ABA Model Rule 4.2.

Louisiana adds a new paragraph (b) that prohibits communication with:

a person the lawyer knows is presently a director, officer, employee, member, shareholder, or other constituent of a represented organization and

(1) Who supervises, directs or regularly consults with the organization’s lawyer concerning the matter;

(2) Who has the authority to obligate the organization with respect to the matter; or

(3) Whose act or omission in connection with the matter may be imputed to the organization for purpose of civil or criminal liability.

Maryland adds the following paragraphs to Rule 4.2 and limits the reach of paragraph (a), which is the same as ABA Model Rule 4.2, by reference to paragraph (c):

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization’s (1) current officers, directors, and managing agents and (2) current agents or

employees who supervise, direct, or regularly communicate with the organization’s lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer’s identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer’s client and the lawyer first makes the disclosures specified in paragraph (b).

Michigan currently retains the pre-2002 version of ABA Model Rule 4.2 (which lacks an express “court order” exception).

New Jersey: Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization’s litigation control group as

defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Rule 4.2 must be read in conjunction with New Jersey's Rule 1.13, which defines the phrase "litigation control group" as follows:

For the purposes of RPC 4.2 and 4.3 . . . the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the

organization's lawyer but may at any time disavow said representation.

New Mexico adds the following sentence to Rule 4.2: "Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel."

New York: In the rules effective April 1, 2009, New York Rule 4.2(a) is the same as Model Rule 4.2 except that New York substitutes "party" for "person," adds "or cause another to communicate" before "about," and deletes "or a court order." New York adds Rule 4.2(b) as follows, which uses "person," not "party."

Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

North Carolina: Rule 4.2(a) adds: "It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy." North Carolina also adds a new Rule 4.2(b) that provides as follows:

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Oregon: Rule 4.2 provides as follows:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Texas: Rule 4.02 provides:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with

the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Utah: Rule 4.2 contains 17 separate paragraphs and subparagraphs. Rule 4.2(a) begins by tracking ABA Model Rule 4.2, but omits “or is authorized to do so by law or court order” and adds that an attorney may, without prior consent, communicate with another lawyer’s client “if authorized to do so by any law, rule, or court order . . . or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.” Paragraphs (b) and (d) cover “Rules Relating to Unbundling of Legal Services” and “Organizations as Represented Persons.” Paragraph (c), which is highly unusual, provides as follows:

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer’s direction in the matter, may communicate with a person known to be represented by a lawyer if:

(1) the communication is in the course of, and limited to, an investigation of a different matter

unrelated to the representation or any ongoing, unlawful conduct; or

(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

Paragraph (e), which covers “Limitations on Communications,” provides that when communicating with a represented person pursuant to this Rule, no lawyer may:

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to

forgo representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Wyoming: Wyoming makes clear that Rule 4.2 applies to communications with a person "or entity" represented by another lawyer.

Proposed Rule 4.3 [n/a]

“Dealing with Unrepresented Person”

(XDraft #5.1, 10/15/08)

Summary: Proposed Rule 4.3(a) substantially follows Model Rule 4.3 by placing restrictions on a lawyer's communications with an unrepresented person and seeking to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf. A new paragraph (b) has been added to prohibit a lawyer from seeking to obtain privileged or other confidential information from an unrepresented person when the lawyer knows or reasonably should know the person may not reveal the information without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comparison with ABA Counterpart	
Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-600(D).

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

San Diego County Bar Association believes common law provides sufficient protection against lawyers' abuses toward the unrepresented without adding a disciplinary rule.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.3* Dealing with Unrepresented Person

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 4.3 is similar to Model Rule 4.3 in placing restrictions on a lawyer's communications with an unrepresented person. Restrictions on a lawyer's communications with a represented person are governed by proposed rule 4.2. Rule 4.3 is intended to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf and provides protection against overreaching by the lawyer. Paragraph (a) is a variation of Model Rule 4.3 in addressing the same three requirements as the Model Rule. First, a lawyer must not mislead the unrepresented person about the lawyer's role. Second, when the lawyer knows or reasonably should know that the person incorrectly believes the lawyer is disinterested, the lawyer must take reasonable steps to correct the misunderstanding. Third, when the lawyer knows or reasonably should know that interests of the unrepresented non-client are in conflict with the interests of the lawyer's client, the lawyer shall not give legal advice to the unrepresented person except that the lawyer may advise the person to secure counsel.

Paragraph (b) is new and provides that in communicating with an unrepresented person, a lawyer shall not seek to obtain information that should not be disclosed by the unrepresented person because the information is privileged or is subject to another legally recognized confidentiality obligation. Paragraph (b) is intended to further the lawyer's obligations under Model Rule 4.4(a) in the context of communicating with an unrepresented person.

* Proposed Rule 4.3, Draft 5.1 (10/15/08).

INTRODUCTION (Continued):

Minority. A minority of the Commission objects to paragraph (a) because it creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client. The term "disinterested" does not have a clear meaning. The prohibition on "implying" that the lawyer is "disinterested" furthers the ambiguity, so that lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The minority of the Commission also objects to the last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person's dispute with the client is inevitable. While Comment [3] allows lawyers "merely" to state a client's legal position to an unrepresented person, the Comment does not explain what distinguishes a mere statement of a client's legal position from advice that would subject the lawyer to discipline. California law historically has avoided imposing duties on lawyer's to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such a conflict.

A minority of the Commission objects to paragraph (b) because it also compromises a lawyer's ability to represent a client with respect to an unrepresented person. There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The knows or reasonably should know standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not distinguish situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer's client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented. The minority believes that paragraph (b) would do more harm than good.

Current California Law and Variations in Other Jurisdictions. Although there is no counterpart to Model Rule 4.3 which imposes duties on a lawyer in dealing with unrepresented persons, current California rule 3-600(D) imposes similar duties on lawyers representing an organization as to constituents of an organization. Approximately 12 states have adopted variations of Model Rule 4.3. Kansas, Maryland and Michigan, for example, retain the pre-2002 version of the rule which does not include the third

INTRODUCTION (Continued):

requirement against giving legal advice to an unrepresented person. Several states, including New Jersey, have added a provision dealing with communications with persons who are officers, directors or other constituents of an organization represented by the lawyer. Florida's rule provides that a lawyer shall not give legal advice to any unrepresented person other than advice to secure counsel. Florida's rule also has a separate paragraph on communicating with a person to whom limited representation is being provided. Georgia's rule includes a 30 day cooling off period prior to any contact with a potentially adverse party in a matter involving an accident or disaster involving that person or a relative of that person. Utah has added a provision on who qualifies as a represented and unrepresented person for purposes of rules 4.2 and 4.3. Washington adds a comment on communications by government lawyers that do not violate the rule. Several other jurisdictions, including the District of Columbia, North Carolina and Pennsylvania track the substance of the Model Rule but reorder the language and divide the rule into subparagraphs.

Rule 4.3 Dealing With Unrepresented Person Rules Revision Commission – Minority Dissent

This Rule should not be adopted. The Rule creates a special burden on lawyers in communicating with unrepresented person that does not exist when communicating with other lawyers. In so doing, the Rule creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client.

The proposed Rule has three significant flaws. The term "disinterested" is ambiguous. Because of its ambiguity, lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons, and related Comment [3] are unclear and do not clarify the difference between merely stating a client's legal position and advice that would subject a lawyer to discipline. Paragraph (b) is overbroad and would chill communications with unrepresented persons on behalf of a client.

California law historically has avoided imposing duties on lawyers to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such conflicts. It will permit discipline of lawyers for saying things that are not improper, are not misleading, might be in the best interests of lawyers' clients, and

might be in the best interests of unrepresented persons. This rule contains oversimplifications that do not apply in the day to day practice of law and will be wrong as disciplinary standards.

The Disinterested Standard in Paragraph (a) Is Ambiguous

We would have no objection if the Rule stated that, in communicating with an unrepresented person, a lawyer shall not represent that the lawyer is not communicating on behalf of a client, when that is not the case. Lawyers cannot engage in a fraud when dealing with other lawyers or an unrepresented person. However, this proposed rule does not say that. Instead, it creates a special prohibition with respect to an unrepresented person that would discipline a lawyer for implying that he or she is "disinterested."

The word "disinterested" is ambiguous because it has no established meaning. It can have multiple meanings to different people on different occasions. For example, it might mean impartiality, or it might mean that the lawyer does not own an interest in the matter at hand. The rule increases the ambiguity of the word "disinterested" by coupling that word with the word "imply." The rule does not prohibit a lawyer from telling an unrepresented party that the lawyer has no client. Instead, it forbids a lawyer from "implying" that the lawyer is "disinterested."

As a result, the rule creates a situation where a lawyer acts at his or her peril in communicating with an unrepresented person on behalf of a client. No one can tell from the rule what statement is sufficient to “imply” that he or she is “disinterested” and lead to disciplinary proceedings. A totally innocent statement can be interpreted to “imply” that a lawyer is “disinterested.” Consequently, a legitimate statement may lead to a disciplinary complaint.

For example, an attorney for an employee may tell his client’s employer that he represents the employee, that the employer is subject to the Fair Employment and Housing Act, and that racial discrimination is prohibited under FEHA. That comment may be totally correct and not misleading; it may even be in the best interests of the lawyer’s client. But if the employer thinks the lawyer is being objective, that innocent statement is prohibited because it “implies” that the lawyer is disinterested.

Conversely, the lawyer may tell the employer that the lawyer does not have a stake in the dispute between the employee and the employer. That statement may literally be true because the lawyer does not have a contingent fee. However, the statement can be argued to “imply” that the lawyer is “disinterested.” Therefore, it would be a violation of this ambiguous rule.

Comment [1] furthers the problem with the Rule by suggesting that a lawyer may be disciplined for implying that he or she “is a disinterested authority on the law.” Suppose a lawyer is recognized as an expert in employment law. She truthfully states that “I lecture to

employers, law schools, and business schools on wage and hours laws. In my opinion, you have violated those laws, but I want to try to reach an agreement with you to head off a lawsuit that you and my client should want to avoid.” It violates both proposed rule 4.3(a) and its Comment [1]. It is a violation, even if it is the literal truth, even if the employer knows who the lawyer’s client is, even though the employer knows the lawyer is not representing the employer, and even if both the client employee and the unrepresented employer would both be benefitted by a settlement instead of litigation. The rule prohibits a lawyer from expressing objectivity.

All of this impacts the representation of clients. In ways that would be detrimental to the client, it impedes the role of lawyers who communicate with unrepresented persons on behalf of clients. Proposed Rule 3.4(a) would make totally truthful statements, that cause no harm, disciplinable offenses.

The Prohibition on Giving Legal Advice Is Ambiguous and Improper

Paragraph (a)’s prohibition on giving legal advice also is problematic. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person’s dispute with the client is inevitable. The Rule does not define what constitutes giving legal advice. While Comment [3] allows lawyers “merely” to state a client’s legal position to an unrepresented person, the Comment does not explain what distinguishes a “mere” statement of a client’s legal

position from advice that would subject the lawyer to discipline.

The lack of clarity in this Rule creates a conflict between a lawyer's duty to represent a client's interests and a new duty to an unrepresented adverse party, which inevitably will impact the representation of clients. The Rule creates this conflict by creating a situation in which a lawyer communicates with an unrepresented person at his or her peril.

For example, assume a lawyer is communicating with an unrepresented person who is trespassing on a client's property. We presume that writing a letter to an unrepresented person saying you are trespassing is merely stating the client's legal position. But does the Rule apply if the lawyer goes on to say, "your actions are a violation of the Penal Code and may subject you to arrest and prosecution." How about if the lawyer goes on to say, "if you continue, my client will sue you and you could be liable for damages in excess of \$\$\$." That arguably exceeds "merely" stating the client's legal position. How about if the lawyer says, "If you want to avoid incurring any further liability, we advise you to take the following steps." Does using the word "advise" subject the lawyer to discipline? Would the result be different if the lawyer says, "My client is willing to drop this matter if you take the following steps." How is a lawyer, who is not steeped in these rules and who will have no precedent as guidance for interpreting them, going to understand the differences?

Another example would be settling a matter with an unrepresented person. Assume the settlement requires the unrepresented person to take certain legal steps to effectuate the settlement. Suppose the lawyer needs to explain how to perform those legal steps to the unrepresented person in order to assure that the client's interests in an effective settlement are achieved. Is that giving legal advice? Is that just a "mere" statement of a client's legal position? What distinguishes "merely stating a client's legal position" from non-mere statements of a client's legal position that get the lawyer disciplined?

Furthermore, there often are situations where lawyers should give legal advice to unrepresented persons, even if they do not represent that person. Such advice often benefits both the lawyer's client and the unrepresented person.

For example, if the client and the other person have conflicts of interest, but the client might be vicariously liable for the acts of the unrepresented person, this rule would forbid the lawyer from telling the unrepresented person that she should file an answer to the complaint a third person filed against both the client and the unrepresented person. Even if the client is not vicariously liable for the conduct of the unrepresented person, if they are both defendants in the same case, there is nothing improper about a lawyer warning the unrepresented defendant that she "should file an answer to the complaint." However, that innocent advice would violate both the first sentence of paragraph (a) [because the defendant can interpret the statement as "implying"

that the lawyer is disinterested because it hints that the lawyer is impartial], and it also violates the last sentence of paragraph (a), because it is legal advice given when the lawyer knows there is a conflict of interest.

Even if the lawyer knows the unrepresented person has no money with which to hire a lawyer, all the lawyer will be permitted to say is the unhelpful statement, “Hire a lawyer.” If a lawyer helps a *pro se* party avoid a default, and that advice does not harm the lawyer’s client, why should the lawyer be disciplined for doing so?

Many states have declined to adopt the second sentence in paragraph (a) to the Model Rule. California would be well served to join those states. The last sentence in paragraph (a) is not necessary and should be deleted along with the related discussion in Comment [3].

Paragraph (b) Would Interfere with Proper Representation of Clients

Paragraph (b) of this rule is also wrong. It prohibits a lawyer from asking for information that might help the lawyer’s client and, if interpreted literally, prohibits asking questions that should be permissible.

There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The “knows or reasonably should know” standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not provide

any exception for situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer’s client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented.

For example, suppose an opposing party has fired his lawyer. In conversation with that party, the lawyer asks whether the unrepresented party was ever told about the wage and hours laws. The unrepresented party has a choice: answer or refuse to answer. The question is permissible. The *pro se* litigant knows that the lawyer is not representing him. Not hiring a lawyer inherently places the unrepresented party in the position of having to decide for himself whether to answer questions asked by an opposing lawyer. The lawyer who asks the question is not doing anything improper, is not deceiving the unrepresented party, and is properly representing his client. However, the lawyer will have violated paragraph (b) because she has asked the other party a question that might elicit privileged information. That should not be a disciplinable offense. Yet it could be under the proposed Rule.

Suppose a lawyer represents a shareholder, interviews a corporation’s unrepresented former employee, and asks her why options were backdated. She might reply that they were backdated “. . . because our lawyer told me and the chief financial officer that we could and should do

so.” The lawyer asked a legitimate question but has violated paragraph (b) of the proposed rule because the question asks that person to reveal information that arguably violates a duty to the former employer.

Suppose a lawyer doing tax or estate planning for an adult child asks a parent questions that elicit information that the parent could be privileged not to disclose, such as tax return information, but which is relevant estate planning for the child (such as whether gift tax returns were filed and, if so, the value used for an asset in the return, or whether the parent has depreciated an asset, and, if so, what depreciation has been claimed on the parent's income tax return). The lawyer is asking an unrepresented party for information that is privileged because the tax or gift tax returns are confidential. Those innocent questions would be disciplinable under paragraph (b) of this rule.

These examples show that paragraph (b) would do more harm than good. Paragraph (b) is not in the Model Rule. The new requirement in paragraph (b) is overbroad and would produce results that are unwarranted.

Conclusion

As shown by the examples above, this rule would apply in infinite numbers of situations in which it should not apply. It is overbroad, poorly worded, inconsistent with lawyers' duties to their clients in many circumstances, and forbids lawyers from saying words that might benefit both their own clients and unrepresented persons.

This proposed Rule will impose special duties on lawyers to unrepresented persons that will conflict with the lawyer's duties to their clients. Its ambiguities will cause lawyers to communicate with unrepresented persons at their peril and at the cost of effective client representation. It should not be adopted.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person	<u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person	<u>Explanation of Changes to the ABA Model Rule</u>
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.	(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person ~~misunderstands~~ <u>incorrectly believes</u> the ~~lawyer's role~~ <u>lawyer is disinterested</u> in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if~~ <u>the lawyer knows or reasonably should know that the interests of such an unrepresented person are or have a reasonable possibility of being</u> in conflict with the interests of the client, <u>the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.</u>	The first sentence in paragraph (a) follows Model Rule 4.3. The second sentence is revised to make it clearer that the lawyer's duty to correct the unrepresented person's misunderstanding arises when the lawyer knows or reasonably should know that the person "incorrectly believes the lawyer is disinterested" rather than "misunderstands the lawyer's role" in the matter. No substantive change is intended. The third sentence is rewritten to make the lawyer's obligation more definite by removing the phrase "or have a reasonable possibility of being in conflict" and reversing the order of the sentence. The sentence is also changed to provide that advising the person to secure counsel is discretionary depending on the circumstances and not a requirement.

* Proposed Rule 4.3, Draft 5.1 (10/15/08). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person	<u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(b) <u>In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.</u>	Paragraph (b) does not have a counter-part in Model Rule 4.3 although there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violates the legal rights of a third person. The Commission believes that including a requirement in this Rule that prohibits a lawyer from seeking to obtain privileged or other confidential information that the lawyer knows or reasonably should know the person may not reveal without violating a duty to another, or which the lawyer is not otherwise entitled to receive, is important to protect the attorney-client privilege and legal rights of third persons with whom the lawyer interacts.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).	[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In ~~order acting to avoid~~<u>correct a misunderstanding about the lawyer's role,</u> a lawyer ~~will typically need to identify~~<u>may disclose the client's identity if it is not confidential.</u> ~~Whether the lawyer identifies~~ <u>the lawyer's client</u>~~and, the lawyer shall explain,~~ where necessary, ~~explain~~ that the client has interests opposed to those of the unrepresented person. For ~~misunderstandings that sometimes arise~~<u>guidance</u> when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(~~df~~).	Comment [1] explains the purpose of the Rule and is a modified version of Comment [1] to Model Rule 4.3. The second sentence has been changed to point out that the client's identity may be disclosed if it is not confidential and that the lawyer must explain if necessary that the client has interests opposed to those of the unrepresented person whether the client's identity is disclosed. The third sentence has been shortened and the cross reference changed to the relevant paragraph of proposed Rule 1.13 dealing with the Organization as Client
	<u>[2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.</u>	Comment [2] is new and is intended to provide guidance by identifying erroneous assumptions and other misunderstandings that an unrepresented person might have when dealing with a lawyer.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.	[23] ~~The Rule~~ <u>Paragraph (a)</u> distinguishes between ~~situations involving~~ <u>the situation in which a lawyer knows or reasonably should know that an unrepresented person has</u> interests ~~may be that are~~ <u>adverse</u> to those of the lawyer's client and ~~those~~ <u>the situation</u> in which the ~~person's interests are~~ <u>lawyer does not in conflict with the client's have that actual or presumed knowledge</u>. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. ~~This Rule A lawyer~~ <u>A lawyer</u> does not ~~prohibit~~ <u>give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer from also does not give legal advice merely by</u> negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may <u>state a legal position on behalf of the lawyer's client</u>, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.	Comment [3] is a modified version of Model Rule 4.3, cmt. [2]. The first sentence is revised to be more precise and to conform to the wording of the Rule without changing its meaning. The third sentence clarifies that simply stating the client's legal position is not giving legal advice under the rule. The fourth sentence has been changed to make to same point.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules [4.4], 8.4(c) and 8.4(d).	Comment [4] is new and explains the prohibition in paragraph (b) against seeking to obtain information that should not be disclosed by an unrepresented person due to its privileged nature or some other legally-cognizable confidentiality obligation. A cross reference has been added to other rules that might also be violated if the lawyer knows or reasonably should know that the information obtained is legally protected from disclosure. Brackets have been placed around "4.4" pending the Commission final consideration of that Rule.
	[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.	Comment [5] is new and explains that paragraph (b) does not prohibit seeking information from third persons through the use of discovery in litigation or at trial.
	[6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.	Comment [6] is new and points out that paragraph (a) does not apply to lawful government or private covert criminal and civil investigations.

Rule 4.3 Dealing with Unrepresented Person (Commission's Proposed Rule – Clean Version)

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of an unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.
- (b) In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

COMMENT

- [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In acting to correct a misunderstanding about the lawyer's role, a lawyer may disclose the client's identity if it is not confidential. Whether the lawyer identifies the lawyer's client, the lawyer shall explain, where necessary, that the client has interests opposed to those of the unrepresented person. For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

- [2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.

- [3] Paragraph (a) distinguishes between the situation in which a lawyer knows or reasonably should know that an unrepresented person has interests that are adverse to those of the lawyer's client and the situation in which the lawyer does not have that actual or presumed knowledge. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice merely by negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may state a legal position on behalf of the lawyer's client, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the

meaning of the document or the lawyer's view of the underlying legal obligations.

- [4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules 4.4, 8.4(c) and 8.4(d).
- [5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.
- [6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.

**Rule 4.3 Dealing with Unrepresented Person.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 1
Disagree = 2
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed rule 4.3 and the Comments to the Rule.	No response required.
2	Long, Patricia J.	D	No		In Family Law cases, divorcing spouses have a duty to give full financial disclosure. As a Family Law practitioner, I worry I would be accused of a violation of this rule by seeking to get this private financial information under Family Law Code. Examples are needed to describe what constitutes misleading the opposing, unrepresented spouse. Family Law lawyers often must deal with issues of mental illness, substance abuse, and/or cultural differences which can affect a person's perception of being misled. Prior experience with rule violations by opposing counsel being overlooked by the State Bar questions enforcement of proposed rules.	No change in the Rule is necessary. Paragraph (a) and Comment [1] clearly provides that in seeking information on behalf of a client from an unrepresented person, the lawyer may not mislead the person <i>concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents.</i>" If the lawyer knows or reasonably should know that the unrepresented person incorrectly believes that the lawyer is disinterested, the lawyer must make reasonable efforts to correct the misunderstanding. "Reasonably" and "reasonable should know" are defined terms for purposes of the rules. See proposed Rule 1.0. Paragraph (a) is based primarily on Model Rule 4.3. a rule that is followed in most jurisdictions and is consistent with case law.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 4.3 Dealing with Unrepresented Person.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 1
Disagree = 2
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	San Diego County Bar Association	D	Yes		Common law provides sufficient protection against the abuses of lawyers toward the unrepresented without adding a rule of discipline. Comment [4] and [5] state exceptions not found in the Rule itself. Unclear what “reasonable possibility of being in conflict” means and whether it is limited to the present or foreseeable future.	Commission disagreed, in part, because the longstanding Model Rule counterpart and existing California ethics opinions and case law that address this area of public protection favor the guidance that is afforded by having a rule of professional conduct. The Commission made no change because it disagrees. Comment [4] states no exception to paragraph (b), and Comment [5] explains “not otherwise entitled to receive” in paragraph (b). The questioned language comes directly from the Model Rule. The Commission is not aware that it has caused any difficulty and, because the application of the rule necessarily will be fact specific, it does not believe that any meaningful refinement of the language is possible.

Rule 4.3: Dealing with Unrepresented Person

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.

District of Columbia: Rule 4.3 contains the same words as ABA Model Rule 4.3, but D.C. divides the rule into paragraphs and subparagraphs.

Florida: The last sentence of Rule 4.3 provides only that a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel.” Florida also adds a new Rule 4.3(b) that provides as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida’s version of Rule 1.2(c) provides, in part, that “a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.”)

Georgia adds that a lawyer shall not:

(c) initiate any contact with a potentially adverse party in a matter concerning personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the contact is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the contact.

Kansas, Maryland, and **Michigan** retain the pre-2002 version of Rule 4.3.

New Jersey: Rule 4.3 deletes the last sentence of ABA Model Rule 4.3 and adds the following new sentence:

If the person is a director, officer, employee, member, shareholder or other constituent of an

organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

New Jersey Rule 4.3 must be read in conjunction with New Jersey Rule 1.13(a), which provides that, for purposes of Rules 4.2 and 4.3, a lawyer employed or retained to represent an organization represents not only the organization but also the members of its "litigation control group," which includes "current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter. . . ." Former employees who were members of the litigation control group "shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation."

New York: In the rules effective April 1, 2009, Rule 4.3 tracks the ABA Model Rule except that it substitutes "communicating" for "dealing" as the second word of the rule.

North Carolina and **Pennsylvania:** Rule 4.3 tracks the substance of ABA Model Rule 4.3, but reorders the language and divides the rule into subparagraphs.

Utah adds Rule 4.3(b), which provides that if a person's counsel does not represent the person in all aspects of a particular matter, a lawyer may consider the person to be entirely "unrepresented" for purposes of this Rule and Rule 4.2, "unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel."

Washington: Washington adds the following new Comment to Rule 4.3: "Government lawyers are frequently called upon by unrepresented persons, and in some instances by the courts, to provide general information on laws and procedures relating to claims against the government. The provision of such general information by government lawyers is not a violation of this Rule."

Wisconsin: The first sentence of Rule 4.3 provides that in dealings on behalf of a client with a person who is not represented by counsel, "a lawyer shall inform such person of the lawyer's role in the matter."

Proposed Rule 4.4 [n/a]

“Respect for Rights of Third Persons”

Rule Is Not Recommended For Adoption

Summary: The Commission recommends against adoption of paragraph (a) of Model 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. Following consideration of subsequent public comment, the Commission also recommends against adoption of paragraph (b) of Model Rule 4.4, in part, because a lawyer’s duties concerning inadvertently transmitted writings often are fact bound inquiries and therefore difficult to specify in rule that will have disciplinary consequences.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☒ ABA Model Rule substantially rejected	☒ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule	Rule 3-200.
Statute	Bus. & Prof. Code §§ 6128(b); 6068(f).
Case law	<i>Rico v. Mitsubishi Motors Corp.</i> (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 of (Rule 4.4(b)) 5

Opposed Rule as Recommended for Adoption (Rule 4.4(b)) 6

Abstain (Rule 4.4(b)) 0

Favor Recommendation that Rule **Not** be Adopted (Rule 4.4(a)) 11

Opposed Recommendation that Rule **Not** be Adopted (Rule 4.4(a)) 0

Abstain (Rule 4.4(a)) 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction, & Rule/Comment Comparison Chart): ☒ Yes ☐ No

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The Commission is now recommending that no aspect of Model Rule 4.4 should be adopted. Some public commenters including, including the San Diego Bar Association Ethics Committee and the ethics law professor group urged that Model Rule 4.4(a) be adopted.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.4* Respect for Rights of Third Persons

July 2010

(Following the June 15, 2010 public comment deadline, a rule is *not* recommended for adoption.)

INTRODUCTION:

Model 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 also recommends against adoption of paragraph (b) of Model Rule 4.4, in part, because a lawyer’s duties concerning inadvertently transmitted writings often are fact bound inquiries and therefore difficult to specify in rule that will have disciplinary consequences. In addition, case law may continue to evolve in this area of lawyer conduct in response to variations in factual situations.

Minority position: A minority of the Commission agrees with OCTC, and with the group of 29 ethics law professors and other commenters that Rule 4.4(a) provides important protection regarding the rights of third persons and should be adopted. Paragraph (a) has been the rule in most states for more than a quarter century without a showing that the rule has been misapplied or that it improperly chills legitimate advocacy. The majority's concern not only lacks empirical evidence but speaks only to the first part of paragraph (a). The majority does not address the second provision that prohibits the use of methods of obtaining evidence that violate the legal rights of third persons. Both paragraph (a) and (b) are consistent with existing California law. Many rules entail "fact bound inquiries" and paragraph (b) provides a clear and consistent standard of what is expected of lawyers in the case of an inadvertently transmitted document. The recommendation not to adopt this rule will signal to lawyers and the public that the legal rights of third persons are not entitled to the same protection in California as they are in other jurisdictions.

* No Rule is recommended for adoption.

<u>ABA Model Rule</u> Rule 4.4 Respect for Rights of Third Persons	<u>Commission's Proposed Rule*</u> Rule 4.4 Respect for Rights of Third Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(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). <u>Minority position:</u> The explanation for rejecting paragraph (a) only speaks to the first part of the paragraph and does not address the prohibition against using methods of obtaining evidence that violates the legal rights of third persons. There is no legal or factual support for concluding that either part of paragraph (a) would chill legitimate advocacy. Model Rule 4.4(a) has been in effect in most jurisdictions for more than 25 years without proof that the rule has not been properly applied. A rule protecting the rights of third persons provides important public protection and has been endorsed by OCTC, the group of 29 ethics law professors and the San Diego Bar Ass'n' Ethics Committee.
(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 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.~~	Following consideration of subsequent public comment, the Commission also recommends against adoption of paragraph (b) of Model Rule 4.4, in part, because a lawyer's duties concerning inadvertently transmitted writings often are fact bound inquiries and therefore difficult to specify in rule that will have disciplinary consequences. <u>Minority position:</u> paragraph (b) is consistent with California case law and should be recommended for adoption. The application of

* No Rule is recommended for adoption. Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 4.4 Respect for Rights of Third Persons	<u>Commission's Proposed Rule*</u> Rule 4.4 Respect for Rights of Third Persons	<u>Explanation of Changes to the ABA Model Rule</u>
		many rules of profession conduct depend on the particular facts. This rule articulates a clear and well established standard that lawyer are required to satisfy under existing case law.

<u>ABA Model Rule</u> Rule 4.4 Respect for Rights of Third Persons Comment	<u>Commission's Proposed Rule*</u> Rule 4.4 Respect for Rights of Third Persons Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.~~	See explanation of paragraphs (a) and (b).
[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 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	~~[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 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~~	See explanation of paragraphs (a) and (b).

<u>ABA Model Rule</u> Rule 4.4 Respect for Rights of Third Persons Comment	<u>Commission's Proposed Rule*</u> Rule 4.4 Respect for Rights of Third Persons Comment	<u>Explanation of Changes to the ABA Model Rule</u>
other electronic modes of transmission subject to being read or put into readable form.	~~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 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.~~	See explanation of paragraphs (a) and (b).

Rule 4.4: Duties Concerning Inadvertently Transmitted Writings

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

~~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.~~

~~professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.~~

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~~

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 **Agree = 1**
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)
2	Hazard, Geoffrey, Deborah Rhode & Richard Zitrin (ethics law professors group)	M	Yes	(a)	The Commission is concerned that such a rule might have "a chilling effect on legitimate advocacy." However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply <u>prevent</u> actions that embarrass, delay and burden. Rather it limits a lawyer where s/he uses "means that have <u>no substantial purpose</u> other than" these impermissible goals. Emphasis added.	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)
6	Law Practice Management & Technology Section, State Bar of California	D	Yes		LPMT's comment on Proposed Rule 4.4 concerns what was originally paragraph (b) but now constitutes the entire rule. We recommend that Proposed Rule 4.4 be removed from the Commission's proposed	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 **Agree = 1**
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					revisions. ABA Model Rule 4.4(b) is as Unsusceptible as 4.4(a) to Migration to the California RPC Rule 4.4 of the ABA Model Rules of Professional Conduct (MPRC) – from which Proposed Rule 4.4 is drawn – has always been a bit odd. With the title “Respect for Rights of Third Persons”, MPRC 4.4 paragraph (b) would appear tacked on for lack of a better home. Paragraph (a) is the only part that refers to third persons. The Commission has correctly decided not to keep paragraph (a). It should do the same for paragraph (b). We assume the Commission considered 4.4 because it was already part of the MRPC. Once the Commission decided to consider and revise rules of the MPRC for application to California, Rule 4.4 came up for review. Otherwise we doubt that the Commission would find a need for what has become Proposed Rule 4.4. It has no precedent in the CRPC, and its significance relates primarily to discovery, a topic generally omitted from the CRPC and the current	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					proposed rule revisions. Even those in favor of MRPC 4.4(b) [now the entire Proposed Rule 4.4], recognized the anomaly. See, e.g., Orange County Bar Association, Comments at Rule 4.4 Discussion Draft (April 24, 2010) at 24 (“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.”). Indeed, the Commission decided to split off MRPC 4.4(b), keeping only it, and the narrowing it further. Although the latest version bears the date of April 24, 2010, the Commission’s decision to include MRPC 4.4(b) [in the Public Comment version] presumably occurred before the enactment of the Electronic Discovery Act (“EDA”) (signed by the Governor on June 29, 2009) regarding electronic discovery. In any event, it appears unlikely the Commission took the EDA into account	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					because it does not cite the EDA in its listing of Existing California Law section 2031.285 of the California Code of Civil Procedure ("C.C.P."), which regulates inadvertently produced electronically stored information ("ESI") in discovery. In addition, it appears unlikely the Commission took into account the Judicial Council's subsequent related amendments to California Rules of Court, Rule 3.724. Duty to meet and confer. We should hesitate to select from the many California Supreme Court and Court of Appeal decisions regarding what parties and their attorneys must do and create a disciplinary rule where none existed before. In support of Proposed Rule 4.4, the Commission cites <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]. <i>Rico</i> provides a California rationale for Rule 4.4(b), but it is doubtful that proposed rule 4.4(a) would have made it onto the Commission's plate if there had been no MRPC on the subject. Existing law already gives lawyers the same guidance, if not more.	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]**TOTAL = 6** **Agree = 1**
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Where a statute and a rule of court address a lawyer's conduct in a particular circumstance, we believe the State Bar need not add a separate injunction. Among other reasons, the judicial interpretation of the concepts underlying a particular statute and a rule of court should retain primacy, especially where the application of a disciplinary rule by the State Bar may in time diverge from such judicial interpretation. A particular feature of American jurisprudence is that courts do not give advisory opinions. Rather American case law develops in response to disputes regarding the application of law to specific facts. Even when a senior appellate body, such as the California makes a broad pronouncement, it is left to the lower court to develop the contours of the law as applied, the nuances, and, for example here, such terms as "obviously appears", "reasonably apparent", and, particularly, "inadvertently." It is misguided to focus on the recipient-attorney instead of the producing/sending attorney.	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6	Agree = 1
	Disagree = 3
	Modify = 2
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Upon reviewing the rule, LPMT Executive Committee members reacted first – when noticing the title of <i>Duties Concerning Inadvertently Transmitted Writings</i> – that the emphasis in any rules governing a lawyer's conduct regarding transmitted writings should be on the duties of the sending or producing lawyer. That is not to say the Commission need add more to rule 4.4 – after all, California Business and Professions Code §6068(e)(1) already deals with a lawyer's disclosure of her or his client's confidential information. In addition the law and practice regarding the inadvertent sending and producing of confidential information is evolving. Rather, the proposed discipline by the State Bar of the receiving attorney for a lack of action is inapt. The State Bar should save its powder and devote its resources to helping lawyers develop procedures to reduce the risk of inadvertently sending a client's confidential information to another. As the Commission has stressed, “the State Bar disciplinary process has limited	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6	Agree = 1
	Disagree = 3
	Modify = 2
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy . . . when the law provides other . . . remedies.” Proposed Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation, Explanation of Changes to the California Rule 2-400, at 7. Inadvertent disclosure is a nuanced area, due to differences between litigation-related and transactional exchanges of information. As with the two salient California Supreme Court cases on the issue of inadvertent disclosure, the issue usually arises in the context of litigation. Indeed, the Commission recognizes as much when it inserts “or produced” into the equivalent text of the MRPC: “where it is reasonably apparent that the writing was inadvertently sent <i>or produced</i>, [the receiving lawyer] shall promptly notify the sender.” The <i>Rico</i> court’s agreement with <i>amicus curiae</i> The Product Liability Advisory Council, Inc. refers to the burden’s of responding to “a	

Rule 4.4 Respect for Rights of Third Persons (Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart) Rule 4.4(a) (Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.) [Sorted by Commenter]						
TOTAL = 6 Agree = 1 Disagree = 3 Modify = 2 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					request for mass production.” <i>Rico</i> at *5. Hence, the tribunal before which an instance of inadvertent disclosure arises has sufficient authority to sanction attorneys – including referral to the State Bar – if warranted. Metadata’s complexity and still-developing ethical principles warrant that the Commission decline to adopt Proposed Rule 4.4. LPMT has a further concern, particularly as the use of technology by lawyers is right in LPMT’s wheelhouse. Complex issues regarding the receipt of confidential material lie just under the surface of what appears to be a straightforward rule. An important example is that of the propriety of a receiving lawyer’s accessing or viewing metadata in the received item. Metadata is the hidden or embedded data in writing in an electronic medium. For such a writing, The Electronic Discovery Act uses the term “electronically stored information” (ESI). “‘Electronically stored information’ means information that is stored in an electronic	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6	Agree = 1
	Disagree = 3
	Modify = 2
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					medium.” C.C.P. § 2016.020(e). Examples of metadata include the “properties” in a Microsoft Word file (document), for example, when it was created and last modified. Formulas and comments in a spreadsheet, usually not visible in a printed copy, provide another example. An attorney may be unaware, however, of metadata’s presence or significance because: • Metadata is often hidden. • Metadata is often created automatically by the user’s computer. • As a piece of computer mumbo-jumbo, attorneys may be unaware of what metadata is or that it even exists. • Even those attorneys who know about metadata may be unaware of its special characteristics or what special care must be taken regarding it. • Metadata may be revealed by certain applications’ features such as MS Word’s Track Changes, of which many people are	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					unaware. (See full text of comment for more examples) Regarding metadata received from opposing counsel, even outside the context of litigation, several state ethics opinions prohibit the receiving party's viewing of any metadata. This prohibition may even apply to metadata that ordinarily would not be considered confidential – for example, the “full header”⁶ (a.k.a. “Internet header”) of a non-confidential email. Many states' ethics opinions decry such viewing of received metadata as unethical⁸ and worse. The heart of the matter is that such state ethics opinions presume that metadata is <i>per se</i> confidential to its author. Thus, even if the on its face the document is not confidential, these ethics opinions presume that the associated metadata is. There is a broad debate among attorneys who focus on technology and rules of professional conduct regarding those states' ethics opinions. Many criticize them as not	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = 3
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					comprehending the nuances of metadata. It should be noted that several jurisdictions have not adopted – or have specifically rejected – the proscriptions describe above. [See infra LPMT's comments on Proposed Rule 8.5 regarding the difficulties that would arise if a rule such as Proposed Rule 4.4 were part of the CRPC's extraterritorial scope.] California should follow the law as it evolves and not begin to discipline lawyers as prescribed by Proposed Rule 4.4. The rule is unnecessary in light of existing statute and case law. In addition, it is premature and likely unwise considering the many related but unacknowledged issues re e-discovery, including the appropriateness of accessing metadata in a document received from another party or its attorney. For the foregoing reasons, we recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.	
	Office of Chief Trial Counsel	M	Yes		OCTC is concerned that this Proposed Rule deviates substantially from the ABA Rule by eliminating the ABA's subparagraph (a), which prohibits an attorney from using means that have no substantial purpose other than to	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6	Agree = 1
	Disagree = 3
	Modify = 2
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted that they are concerned regarding the vagueness and over breadth of such terms as embarrass, delay, or burden a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and when balanced against the need to prevent litigation abuse, OCTC believes the ABA has it correct. Further, the State Bar Act already prohibits counseling or maintaining actions, proceedings, or defenses only as appear to him or her legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct already prohibit 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	

Rule 4.4 Respect for Rights of Third Persons

(Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart)

Rule 4.4(a)

(Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.)

[Sorted by Commenter]

TOTAL = 6	Agree = 1
	Disagree = 3
	Modify = 2
	NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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. (<i>United States v. Hearst</i> (9th Cir. 1981) 638 F2d 1190, 1197.) In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term “offensive personality.” While some of this misconduct can be handled under other rules, not all of it can or should be and this would give better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that 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 are consistent with the California Supreme Court’s decision in <i>Rico v. Mitsubishi</i>. We find either acceptable.	

Rule 4.4 Respect for Rights of Third Persons (Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart) Rule 4.4(a) (Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.) [Sorted by Commenter]						
TOTAL = 6 Agree = 1 Disagree = 3 Modify = 2 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [1] and [3]	Comments [1] and [3] seem more appropriate for a treatise, law review article, or ethics opinion.	
				Comment [2]	Comment [2] is too long and covers at least two distinct concepts. It could be two Comments.	
4	San Diego County Bar Legal Ethics Committee (re adoption of Rule 4.4)	D	Yes	(b)	Draft rule 4.4(b) restricts itself to in, documents that "obviously appears to be privileged or confidential" consistent with Rico v. Mitsubishi. It should be adopted as drafted by the Commission.	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)
5	San Diego County Bar Legal Ethics Committee (re recommendation that Rule 4.4(a) not be adopted)	D	Yes	(a)	The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against "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 "would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim.	Following consideration of the public comments received, the Commission determined to not recommend adoption of any aspect of ABA Model Rule 4.4. (See Introduction to the Model Rule Comparison Explanation chart.)

Rule 4.4 Respect for Rights of Third Persons (Comments received in response to public comment proposal to adopt only para.(b) of the Model Rule Counterpart) Rule 4.4(a) (Comments received in response to public comment proposal stating a recommendation that para.(a) not be adopted.) [Sorted by Commenter] TOTAL = 6 Agree = 1 Disagree = 3 Modify = 2 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response

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

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

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.

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.”

Proposed Rule 5.1 [RPC N/A]

“Responsibilities of Partners, Managers, and Supervisory Lawyers”

(XDraft #10, 9/13/09)

Summary: Proposed Rule 5.1 imposes a duty on partners, lawyers with comparable managerial authority and lawyers who directly supervise other lawyers to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer's misconduct and fails to take steps to prevent or mitigate the consequences.

Comparison with ABA Counterpart	
Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-110, Discussion

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10
Opposed Rule as Recommended for Adoption 2
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

The California Public Defenders Association, California Council of Chief Defenders and several District Attorney and Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The California Public Defenders Association and several District Attorney and Public Defender offices in California expressed concerns that adoption of proposed Rule 5.1 could result in the imposition of vicarious responsibility on experienced lawyers in the office who informally take on the mentoring of recent hires. They also argue that adoption of the Rule would discourage such mentoring, which is critical in the training of new lawyers. See Public Comment Chart for Commission responses to their expressed concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.1* Responsibilities of Partners, Managers, and Supervisory Lawyers

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.1, which substantially tracks Model Rule 5.1, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer's misconduct and fails to take steps to prevent or mitigate the consequences.

Paragraph (a) of the rule imposes a duty on a lawyer who is a partner or who, individually or with other lawyers, possesses comparable managerial authority to make reasonable efforts to establish measures to ensure compliance with the rules of professional conduct. Paragraph (b) imposes a duty on a lawyer, whether or not a partner or a manager, who has direct supervisory responsibility over another lawyer to make reasonable efforts to ensure the other lawyer complies with the rules. Under paragraph (c)(1) any lawyer may be held responsible in discipline for another lawyer's ethical violation if the lawyer orders or ratifies the misconduct. Under paragraph (c)(2), a lawyer who is a partner, manager or direct supervisor of the offending lawyer, may be subject to discipline for the other lawyer's misconduct if the lawyer has knowledge of it at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.

* Proposed Rule, XDraft 10 (9/13/09).

INTRODUCTION (Continued):

Current California Law and Variations in Other Jurisdictions. Model Rule 5.1 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.1's duties on "each" managing partner, in effect preventing such managerial partners from delegating responsibility to a single managing partner. New York and New Jersey both provide for discipline of a law firm, in addition to the individual lawyers in the firm, under Rule 5.1. All jurisdictions have adopted some version of Model Rule 5.1(c). California does not have a counterpart to Rule 5.1. However, the Discussion to current rule 3-110 provides that the duties set forth in the rule include the duty to supervise the work of subordinate lawyers and non-lawyer employees and agents. Proposed Rule 5.1 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

Minority. A minority of the Commission views proposed Rule 5.1 as an overly ambitious rule that represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers, instead effectively imposing a strict liability standard on lawyers who did not engage in misconduct. The minority takes the position that the Rule unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct by other lawyers, without adequately describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule. Specifically, the minority opposes the Rule because the Rule: (1) imposes discipline for negligent conduct contrary to the Supreme Court's admonition that the disciplinary system should not be used to punish acts of negligence; (2) fails to articulate specific, definable or consistent standards for enforcement, and as result, is unconstitutionally vague; and (3) fails to give notice as to which lawyers in a law firm are subject to its requirements because the phrase "comparable managerial authority" is vague and undefined.

A detailed statement of the minority's position, with citation to authority, is provided in these materials after the Comment Comparison Chart, below. See Minority Dissent.

Proposed Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers Rules Revision Commission – Minority Dissent

1. Rule 5.1 Unfairly Imposes Disciplinary Liability On Innocent Lawyers For The Misdeeds And Culpable Misconduct Of Other Lawyers.

Rule 5.1 represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers and unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct of other lawyers without describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule.

In general, the Rule blurs the lines between the entity and its individual constituents. Partnerships and corporations are created precisely so as to create a separate entity from its constituents. But the Rule for all practical purposes potentially imputes the conduct of an individual culpable lawyer to the entity, and then effectively imputes the wrongdoing lawyer's conduct to its innocent constituents. This has been done because the Rules were not designed to impose discipline on law firms.

However, regulating law firms through their constituent lawyers is the wrong approach.

Paragraph (a) requires that partners in a law firm, which is defined to include lawyers with “comparable

managerial authority” in corporate law departments and public agencies, “make *reasonable efforts* to ensure that the firm has in effect measures giving *reasonable assurance* that all lawyers in the firm comply with the Rules of Professional Conduct.” Paragraph (b) provides that a “lawyer having direct supervisory authority over another lawyer shall make *reasonable efforts* to ensure that the other lawyer complies with the Rules of Professional Conduct.”

Paragraphs (a) and (b) are in stark contrast to accepted notions of derivative liability found in tort law where liability is only imposed on a person for the tortious conduct of another if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement or (b) gives substantial assistance in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846, citing, Rest.2d Torts, § 876. See also *Casey v. United States Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1146 (“a defendant can only aid and abet another's tort if the defendant knows what that tort is”).

Similarly, under criminal law a person who aids and abets the commission of a crime must have (1) knowledge of the unlawful purpose of the perpetrator and (2) act with the intent of committing, encouraging, or facilitating the

commission of the offense. *People v. Beeman* (1984) 35 Cal.3d 547, 554-555.

In contrast, Paragraphs (a) and (b) contain no knowledge or scienter requirement, and as explained below, operate to impose discipline *ex post facto*.

2. **Rule 5.1 Imposes Discipline For Negligent Conduct Contrary To The Supreme Court's Admonition That The Disciplinary System Should Not Be Used To Punish Acts Of Negligence.**

The Rule as a whole is structured so that innocent lawyers in a law firm will be disciplined for negligence. Rather than imposing discipline for intentional or knowing conduct, Rule 5.1 imposes discipline on lawyers for negligence by embracing what are essentially tort standards--"reasonable efforts" and "reasonable assurance" that another lawyer will comply with the Rules of Professional Conduct. However, the Supreme Court has rejected the concept that lawyers should be disciplined for negligence or mistakes in judgment. As the Supreme Court has noted: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." *Lewis v. State Bar* (1981) 23 Cal.3d 683, 688.

Worse yet, the Rule imposes discipline on lawyers merely for their perceived managerial authority because of their *status* as partners. The Rule approaches strict

liability by bringing within its scope not only lawyers with actual managerial authority, but also lawyers who "individually or together with other lawyers" possess what the Rule characterizes as "comparable managerial authority."

3. **The Rule Fails To Articulate Specific, Definable Or Consistent Standards For Enforcement, And As Result, Is Unconstitutionally Vague.**

Paragraphs (a) and (b) do not tell lawyers *before the fact* what measures or firm policies will run afoul of the Rule or what policies should be implemented to prevent violations of other rules. Paragraph (a) provides no standards to guide lawyers as to what "reasonable efforts" should be taken, or what "measures" should be in place that would "give reasonable assurance" that other lawyers comply with an endless number of Rules and ways in which the Rules may be violated. Once there is an underlying violation of a Rule, innocent lawyers in a firm will be blamed for failing to implement measures that would have prevented the violation by the culpable lawyer. The Rule is inherently hindsight-driven.

Similarly, paragraph (b) offers no guidance to supervisory lawyers as to what "reasonable efforts" are sufficient to ensure that a supervised lawyer complies with the Rules of Professional Conduct.

Paragraphs (a) and (b) purport to tell lawyers to abide by a standard of care, without defining what that standard is. Paragraphs (a) and (b), by imposing "reasonable efforts" or "reasonable assurances," effectively require proof of

breach of an unstated *standard of care*—which must be proved by expert testimony, essentially converting a State Bar proceeding into a claim for legal malpractice. Proof of a violation will turn on a “swearing contest” between experts testifying on questions of law practice management—i.e., as to whether a violation of a given Rule by a given lawyer could have been prevented by supposed “reasonable efforts” of other individual lawyers in firm—all with the benefit of hindsight.

Because proof of a violation will turn on undefined and unarticulated standards of care, rather than articulated and objective standards, the Rule will invite State Bar prosecutors to engage in post hoc second-guessing of firm policies and procedures to establish the causation element that paragraphs (a) and (b) necessarily implicates. In looking for violations, a State Bar prosecutor can “audit” the firm’s practices to find areas where the firm did not have appropriate preventive measures and file charges against individual lawyers for what are perceived to be the “bad practices” of the firm.

In fact, a violation can be charged under paragraphs (a) and (b) of Rule 5.1 even where there has been no underlying misconduct or violation of any Rule by a subordinate or other lawyer. By analogy, the Supreme Court has rejected attempts to impose liability for abstract negligence where there has been no proof of a causal nexus between the conduct and the injury—i.e., “abstract negligence” or “negligence in the air.” *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 773 (“abstract negligence,” without proof of a causal connection between the defendant’s breach and the

plaintiff’s injury, is insufficient); *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912 (classic example of abstract negligence where property owner’s security did not comport with plaintiffs’ expert’s notion of “adequacy,” but whether there was no proof of any causal connection between that negligence and the injury.) Similarly, paragraphs (a) and (b) allow the State Bar to bring disciplinary charges against lawyers for abstract negligence where there has been no underlying predicate violation of another Rule by a subordinate or other lawyer.

By failing to articulate specifically tailored regulatory standards, paragraphs (a) and (b) are unconstitutionally vague. To avoid a vagueness challenge a statute or regulation must be sufficiently clear so as to give a fair warning of the conduct prohibited, and to provide a standard against which conduct can be uniformly judged by courts. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109. To pass constitutional muster, a rule or statute must be sufficiently definite to provide adequate notice of the conduct proscribed and must provide sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107.

4. The Rule Also Fails To Give Notice As To Which Lawyers In A Law Firm Are Subject To Its Requirements Since The Phrase "Comparable Managerial Authority" Is Vague And Undefined.

Rule 5.1 is aimed at partners in a law firm, and lawyers who possess "comparable managerial authority" in a law firm, as that term is used in paragraphs (a) and (c)(2). However, this term is inherently vague and over broad.

First, because the definition of "law firm" in Rule 1.0.1 broadly includes not only private law partnerships and law corporations, but also government entities and corporate legal departments, the attempt to analogize law partnerships to government lawyers and corporate legal departments is misplaced. Government offices and corporate legal departments are not operated like partnerships. Transmuting a "partnership model" to government agencies makes no sense. This is especially true with respect to government agencies in which managerial authority may be vested in an elected official. As an elected official, the head of a public office may have greater obligations to the public at large that override the objectives of Rule 5.1. For example, if caseloads of public defenders or deputy district attorneys are excessively high due to budget cuts such that those attorneys cannot adequately perform their professional responsibilities to clients, the Rule would mandate that lawyer supervisors, including heads of public defenders' offices and elected district attorneys, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently

handled. (See ABA Formal Opinion 06-441.) It is questionable, given the separation of powers doctrine, whether the State Bar and the Supreme Court can dictate to public officials facing severe budget cuts that they must reduce work loads by hiring more attorneys, while ignoring the corresponding costs to the public and taxpayers. (Comment [6] attempts to address the issue, but raises more questions than it answers.)

Second, even as applied to private law firms, the term "comparable management authority" is hopelessly vague and reaches partners who have no management authority. The reality today is that even lawyers who have the title of "partner" frequently have no management role in the firm and are more like employees than owners of the firm. *Smith v. Diner* (7th Cir. 2006) 453 F.3d 971 ("Someone can be called a 'partner,' for example, yet in fact lack any authority to make decisions for the firm; he might be just as much at the mercy of those who really run the firm as a clerk would be."); *EEOC v. Sidley Austin Brown & Wood* (7th Cir. 2002) 315 F.3d 696 (partners may be deemed "employees" where they lack any meaningful control over the firm's affairs).

Comment [5] attempts to address this problem by suggesting that lawyers with "intermediate managerial responsibilities" "may not" be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer or a management committee. However, by stating that the Rule "may not" apply to certain lawyers, Comment [5] fails to resolve the underlying uncertainty and only serves to highlight the

fact that the term "comparable managerial authority" is vague and undefined. In fact, Comments [5] and [7] are inconsistent in that the latter states (as an exception not found in the Rule itself) that "Paragraph (a) *does not apply* to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments."

Paragraph (b) is similarly unclear as to which lawyers have "direct supervisory authority." In theory, all partners in a law firm have "direct supervisory authority" over all subordinate lawyers in the firm. The Rule fails to limit its scope to the supervision by a *specific* partner over a *specific* subordinate lawyer concerning a *specific* case.

Paragraph (b) is thus overly broad in its potential to reach innocent lawyers.

Finally, the inherent problems with this overly ambitious Rule are illustrated by the large number of comments that accompany it (15 comments, twice the number in the ABA Model Rule). Rather than adding clarity to the Rule, the comments merely expose its flaws.

In conclusion, the deficiencies in the Rule unfairly operate to impose disciplinary liability on innocent lawyers by invoking what amounts to a strict liability standard. It is an overly broad, shotgun approach to regulation.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.	(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm ~~conform to~~ <u>comply with the these Rules of Professional Conduct and the State Bar Act</u>.	<u>Paragraph (a)</u> is identical to Model Rule 5.1(a) except for replacing "conform to" with "complies with" for to clarify that the provision is mandatory. No change in meaning is intended. In addition, "these Rules" has been substituted for "the Rules of Professional Conduct" because the former is the standard term used throughout the Rules.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.	(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer ~~conforms to~~ <u>complies with the these Rules of Professional Conduct and the State Bar Act</u>.	<u>Paragraph (b)</u> is identical to Model Rule 5.1(b) with the exception of the same change as in paragraph (a). Again, no change in meaning is intended.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:	(c) A lawyer shall be responsible for another lawyer's violation of ~~the these Rules of Professional Conduct~~ <u>and the State Bar Act</u> if:	<u>Paragraph (c)</u>. The introductory clause to paragraph (c) is identical to Model Rule 5.1(c).
(1) the lawyer orders or, with [knowledge] of the specific conduct, ratifies the conduct involved; or	(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or	<u>Subparagraph (c)(1)</u> is identical to Model Rule 5.1(c)(1).

* Proposed Rule, XDraft 10 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	(2) the lawyer is a partner, or <u>individually or together with other lawyers</u> has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	<u>Subparagraph (c)(2)</u> is identical to Model Rule (c)(2) except it has been changed to conform the wording with the language in paragraph (a). This additional language clarifies that the responsibility to take reasonable remedial action under this paragraph applies when the lawyer is a partner or, individually or together with other lawyers, has comparable managerial authority.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.	<u>Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.</u> [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a <u>law</u> firm. See Rule 1.0.1 (<u>Law Firm definition</u>).	Headings have been added to separate the comments pertaining to the three paragraphs under the rule. The second sentence in Model Rule Comment [1] has been deleted because not all partners in law firms today are equity partners exercising managerial or supervisory authority over lawyers, particularly those lawyers with whom they do not regularly collaborate. The first sentence and the reference to the definition of law firm in rule 1.0.1 sufficiently identifies lawyers with managerial authority under the rule.
[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.	[2] Paragraph (a) requires lawyers with managerial authority within a <u>law</u> firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the <u>law</u> firm will <u>comply with these Rules and the State Bar Act</u>. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.	Comment [2] is based on Model Rule 5.1, Cmt. [2]. The Commission recommends several changes to conform to non-substantive language changes in paragraph (a). The word “law” has been added as a modifier of “firm” because “law firm” is a defined term in these Rules.

* Proposed Rule, XDraft 10 (9/13/2009). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).	Comment [3] is has no counterpart in the Model Rule. It clarifies that the duty of lawyers with managerial authority to make reasonable efforts to have measures in place to ensure conformity with the rules applies to internal policies and procedures affecting lawyer compensation and career development that might induce a violation of the rules.
[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.	[4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.	Comment [4] is a revised and more succinct version of Model Rule 5.1, Cmt. [3]. No change in meaning is intended.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.	Comment [5] has no counterpart in the Model Rule. It is included to clarify that paragraph(a) does not apply to every lawyer with intermediate managerial responsibilities where the organization has a designated managing lawyer or committee or other body with appropriate managerial authority and is charged with the responsibilities under paragraph (a). Comment [5] was added to address concerns raised by lawyers practicing in public offices that adopting the Model Rule without further clarification would deter mid-level managers in such offices from engaging in the kind of informal mentoring that is critical to a subordinate lawyer's development in that environment. The comment further clarifies that a lawyer with intermediate responsibilities continues to be responsible to take corrective measures if the lawyer knows or reasonably should know that the person or body with managerial authority is not complying with the requirements of the rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).	Comment [6] has no counterpart in the Model Rule. It clarifies that the duties under paragraph (a) apply to lawyers in charge of public sector legal agencies, such as a public defender, and head of corporate legal departments. Similar to Comment [5], Comment [6] was added to address concerns raised by public defenders that adoption of the Model Rule language without clarification would undermine the ability of managing lawyers in those organizations to make effective use of available resources. Of particular concern to these managing lawyers was a recently-issued ABA Ethics Opinion that conflicts with the principles set forth in the State Bar's Guidelines, cited in Comment [6]. See ABA Formal Ethics Op. 06-441 (5/13/06) ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation"). The second sentence of Comment [6] has been added to make it clear that reasonable guidelines relating to case assignments and distribution of work among lawyers in the organization will satisfy the requirements of the rule.
	[7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].	Comment [7] has no counterpart in the Model Rule. It clarifies that the conduct of a lawyer with intermediate managerial responsibilities in a public sector legal agency or law department is governed by paragraph (b) and not paragraph (a) of the rule. See also Explanation of Changes for proposed Comments [5] and [6].

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Paragraph (b) – Duties of Lawyer as Supervisor</i></u> <u>[8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.</u>	Comment [8] has no counterpart in the Model Rule. It is intended to distinguish between those lawyers in a law firm who have responsibilities as direct supervisors under paragraph (b) of the rule from those with managerial responsibilities under paragraph (a). The Comment also points out that paragraph (b) applies to supervising attorneys who are inside as well as outside of the law firm. The Model Rule does not have a separate comment on the duties of a lawyer under paragraph (b) of the rule.
	<u>[9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.</u>	Comment [9] has no counterpart in the Model Rule. It expands on the last sentence in Model Rule 5.1, Cmt. [2].
	<u>[10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.</u>	Comment [10] has no counterpart in the Model Rule. It is intended to provide further guidance on when a lawyer has direct supervisory responsibilities under paragraph (b) of the rule. The first sentence is the second sentence from Model Rule 5.1, Cmt. [5], and is included in this comment because it pertains to paragraph (b).

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).	<u>Paragraph (c) – Responsibility for Another's Lawyer's Violation</u>	Model Rule 5.1, Cmt. [4] has been replaced with the heading to the comments regarding paragraph (c) of the rule. See also proposed Comment [14].
	<u>[11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.</u>	Comment [11] is new and is intended to explain the scope of paragraph (c)(1). The Model Rule does not have a separate comment regarding paragraph (c)(1) of the rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.	[12] <u>Under paragraph</u> (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, <u>and</u> a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, <u>may be responsible</u> for the <u>conduct</u> of the <u>other lawyer, whether or not the other lawyer is a member or employee of the law firm</u>. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension <u>consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1)</u>.	Comment [12] is based on Model Rule 5.1, Cmt. [5] and is intended to capture the concept that paragraph (c)(2) applies to both partners and other lawyers with managerial authority in a law firm and lawyers who have direct supervisory authority. The comment also clarifies that the rule applies whether or not the lawyer is a member or employee of the firm. Grammatical changes have been made for clarity without changing the substance of the comment. The final sentence has been added as a reminder that corrective action required by the rule should be consistent with the lawyer's duties under Business and Professions Code section 6068(e).

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.	[13] A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.	Comment [13] is based on Model Rule 5.1, Cmt. [6]. However, it has been rewritten so that its concept is more clearly stated, i.e., even if a lawyer does not violate paragraph (c) because the lawyer neither ordered or ratified a subordinate lawyer's conduct, or failed to avoid or mitigate the known consequences of the conduct, the lawyer acting as direct supervisor may nevertheless violate paragraph (b).
[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.	[14] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.	Comment [14] is based on Model Rule 5.1, Cmt. [7]. The Model Rule comment has been expanded to make it clear that the obligations under paragraphs (a), (b) and (c) of the Rule provide independent bases for discipline and do not impose vicarious responsibility for the acts of another attorney.
[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).	~~[15]~~ This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).	Comment [15] is based on Model Rule 5.1, Cmt. [8]. No change in meaning is intended by the clarifying revisions.

Rule ~~5.1~~ 3-110 Failing to Act Competently Responsibilities of Partners, Managers, and Supervisory Lawyers

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:
- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

~~(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.~~

~~(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.~~

~~(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.~~

Discussion:

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

~~In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)~~

COMMENT

Paragraph (a) - Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.

- [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition).
- [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.
- [3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).
- [4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice , including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.
- [5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer

charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.

- [6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).
- [7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

Paragraph (b) - Duties of Lawyer as Supervisor

- [8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate

managerial responsibilities in public sector legal agencies and law departments.

- [9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.
- [10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.

Paragraph (c) - Responsibility for Another's Lawyer's Violation

- [11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.
- [12] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing

party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).

- [13] A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.
- [14] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
- [15] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(Commission's Proposed Rule – Clean Version)

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.

- [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition).
- [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.
- [3] Paragraph (a) is also applies to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).
- [4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice , including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

- [5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.
- [6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).
- [7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

Paragraph (b) – Duties of Lawyer as Supervisor

- [8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.
- [9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.
- [10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

- [11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.
- [12] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by

another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).

- [13] A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.
- [14] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
- [15] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 2**
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	A	Yes		OCTC supports the Proposed Rule as it is simply a codification of existing California law. There are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC supports Comments [7], [13], [14] and [15].	No response required. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required.
2	San Diego County Bar Association	M	Yes		In Comment [4], there is a redundant phrase that may be deleted.	Commission implemented suggested revision.
3	State Bar Law Practice Management & Technology Section (LPMT)	A	Yes		LPMT supports Proposed Rule 5.1 and its core principle that a subordinate lawyer cannot be used as a scapegoat by a law firm. The dissent is misguided in its suggestion that only the “guilty” lawyer should be responsible for negligence.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

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 counterpart to Rule 5.1.

District of Columbia: Rule 5.1 substantially tracks the Model Rule.

Illinois provides that “[e]ach” partner or lawyer shall make the reasonable efforts specified in Rule 5.1(a) and (b).

New Hampshire Rules 5.1(a) and (b) impose duties on “each” partner in a firm, “each” lawyer with comparable managerial authority, and “each” lawyer with direct supervisory authority. A New Hampshire Comment explains that the change “is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.”

New Jersey begins Rule 5.1(a) with: “Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction . . .” instead of “A partner in a law firm.” Rule 5.1(c)(2) applies only to lawyers having “direct supervisory authority”; it deletes “is a partner or has comparable managerial authority in the law firm in which the other lawyer practices.”

New York: In the rules effective April 1, 2009, Rule 5.1 provides:

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b)(1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is

reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies

it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the

consequences of the conduct could have been avoided or mitigated.

Oregon: Rule 5.1 deletes the language of ABA Model Rules 5.1(a) and (b), but adopts ABA Model Rule 5.1(c) verbatim.

Texas: The text of Texas Rule 5.01 has no equivalent to ABA Model Rules 5.1(a) and (b), but Comment 6 to Texas Rule 5.01 provides:

Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

Texas Rule 5.01(b), which is similar to ABA Model Rule 5.1(c)(2), also applies to “the general counsel of a government agency’s legal department.”

Proposed Rule 5.2 [n/a]
“Responsibilities of a Subordinate Lawyer”
(XDraft #6, 9/17/09)

Summary: Proposed Rule 5.2 confirms that a subordinate lawyer must comply with the Rules of Professional Conduct and State Bar Act notwithstanding that the subordinate is acting under the direction of a supervisory lawyer and provides guidance to subordinates in those situations.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 11

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Representatives from the California Public Defenders Association and various Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

Representatives from the California Public Defenders Association and various Public Defender offices in California expressed concerns that adoption of proposed Rule 5.2 could result in subordinate lawyers not following the direction of supervisory lawyers, even in situations where the supervisor's decision is a reasonable resolution of an arguable question of professional duty. Please see Public Comment Chart for Commission response to their concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.2* Responsibilities of a Subordinate Lawyer

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.2 addresses the responsibilities of a subordinate lawyer and is intended to work in conjunction with Rules 5.1 and 5.3. Paragraph (a) substantially follows Model Rule 5.2(a) in requiring that a subordinate lawyer comply with the rules of professional conduct and the State Bar Act when the lawyer acts under the supervision or direction of another lawyer or other person. Paragraph (b) tracks Model Rule 5.2(b) by providing that a subordinate lawyer who abides by a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility does not violate the Rules or the State Bar Act.

The comments to the Rule have been modified to conform to California rule drafting style, (See, e.g., Bryan A. Garner, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES* (1996)), and to more clearly explain a subordinate lawyer's responsibilities when a supervisor has instructed the subordinate to follow a particular course of action.

Although California does not have a comparable rule, the provisions of Rule 5.2 are consistent with existing California law.

Variations in Other Jurisdictions. Rule 5.2 has been adopted in most jurisdictions with the exception of Virginia. Connecticut has deleted paragraph (b) from its rule. New York and Ohio have made minor revisions to the rule.

* Proposed Rule 5.2, XDraft 6 (9/17/09).

<u>ABA Model Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.2 Responsibilities of a Subordinate Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.	(a) A lawyer ~~is bound by the~~ <u>shall comply with these</u> Rules ~~of Professional Conduct~~ <u>and the State Bar Act</u> notwithstanding that the lawyer ~~acted~~ <u>acts</u> at the direction of another <u>lawyer or other</u> person.	Paragraph (a) tracks the Model Rule but replaces the less mandatory phrase "is bound by the" to "shall comply with these" to underscore the affirmative obligation lawyers have to comply with the rules. The rule adds the obligation of California lawyers to also comply with the State Bar Act. The paragraph has been modified to be in the active voice in accordance with California rule drafting style and to make clear that the Rule applies whether the lawyers acts at the direction of another lawyer or other person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.	(b) A subordinate lawyer does not violate ~~the~~ <u>these</u> Rules ~~of Professional Conduct~~ <u>or the State Bar Act</u> if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.	Paragraph (b) tracks the Model Rule, but the phrase "the Rules of Professional Conduct" has been replaced with "these Rules and the State Bar Act" to conform to the wording in other rules.

* Rule 5.2, XDraft 6 (9/17/09); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.	[1] <u>The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act.</u> Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer ~~acted~~<u>acts</u> at the direction of a supervisor, that fact may be relevant in determining whether ~~a lawyer had~~ the ~~knowledge required to render conduct a violation of~~<u>lawyer has violated</u> the Rules <u>or the Act. See Rule 8.4(a).</u> For example, if a subordinate ~~filed~~<u>signs</u> a frivolous pleading at the direction of a supervisor, the subordinate would not ~~be guilty of a professional violation~~<u>violate the Rules or the Act</u> unless the subordinate ~~knew~~<u>knows</u> of the document's frivolous character.	Comment [1] is based on Model Rule 5.2, cmt. [1]. A new first sentence has been added to make clear that the fact a lawyer acts under the supervision of another lawyer does not excuse the subordinate lawyer's failure to comply with the Rules or the State Bar Act. No substantive change is intended. The second sentence tracks the first sentence in the Model Rule comment, except that it has been changed to the active voice in accordance with California rule drafting style. In addition, the sentence has been modified to point out more clearly that the fact that a lawyer acts at the direction of a supervisor may be relevant in determining if the lawyer has violated the rules or the State Bar Act, rather than "whether the lawyer had the knowledge required to render conduct a violation of the Rules." A cross reference to proposed Rule 8.4(a), which provides it is professional misconduct to "knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act" has been added. The third sentence has been revised to more clearly state the example in the active voice in accordance with California rule drafting style.

<u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.	[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ~~ethical duty~~, the ~~supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action~~ <u>lawyers' responsibilities under these Rules or position could not be taken. If the State Bar Act and</u> the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. ~~However~~ <u>Accordingly, if the subordinate lawyer must comply with his or her obligations under paragraph (a). If</u> the question ~~is reasonably arguable~~ <u>can be answered more than one way, someone has to decide upon</u> the ~~course~~ <u>supervisory lawyer may assume responsibility for determining which</u> of ~~action. That authority ordinarily reposes in the supervisor~~ <u>reasonable alternatives to select</u>, and ~~a~~ <u>the</u> subordinate may be guided accordingly. ~~For example, if a question arises whether~~ <u>If the interests of two clients conflict under Rule 1.7, subordinate lawyer believes that</u> the supervisor's ~~reasonable~~ <u>proposed</u> resolution of the ~~arguable~~ <u>question should protect</u> of professional duty would ~~result in a violation of these Rules or the State Bar Act~~, the subordinate ~~professionally if the resolution is subsequently challenged~~ <u>obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.</u>	The first three sentences in the Model Rule comment have been combined into a single sentence to more cogently state that the responsibilities of both the supervisor and the subordinate lawyer under the rule and the State Bar Act are clear and are the same when the issue can reasonably be answered only one way. A new second sentence has been added to affirmatively state that in that situation, the lawyer must comply with the requirements of paragraph (a). The third sentence is a revision of the last three sentences in the Model Rule Comment to more clearly state that where the issue can reasonably be answered in more than one way, the supervisory lawyer may assume responsibility to determine which of the reasonable alternatives to select. The sentence adds a further requirement that if the subordinate attorney believes that the resolution of the issue would result in a violation of the Rules or the State Bar Act, the subordinate must communicate that position to the supervisory lawyer.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

COMMENT

- [1] The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act. Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the Act. See Rule 8.4(a). For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document's frivolous character.
- [2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 3
Disagree = 0
Modify = 0
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC is concerned that the Comments are too long, and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC is especially concerned with the last sentence of Comment [1], which states that if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules of Professional Conduct unless the subordinate knows the document's frivolous character. This Comment is inconsistent with CCP section 128.7 and FRCP rule 11 (and the cases interpreting those rules), which hold that by signing a pleading an attorney is certifying that to the best of the signing attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the matter is not being presented for an improper purpose, that the claims, defenses and other legal contentions	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. The Commission has eliminated the last sentence in Comment [1] to avoid confusion between the application of this rule and rules of civil procedure

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					are warranted under existing law or by nonfrivolous arguments for extension, modification, or reversal of existing law, and the allegations and other factual conclusions have evidentiary support or are likely to have evidentiary support. Gross negligence would support a violation for such conduct.	
3	San Diego County Bar Association	A	Yes		Support as drafted	No response required.

Rule 5.2: Responsibilities of a Subordinate Lawyer

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 provision comparable to ABA Model Rule 5.2.

Connecticut deletes ABA Model Rule 5.2(b).

District of Columbia has adopted ABA Model Rule 5.2.

New York: In the rules effective April 1, 2009, Rule 5.2 is the same as the ABA Model Rule.

Ohio: Rule 5.2(b) omits the word “arguable” before “question of professional duty.”

Virginia omits Rule 5.2.

Proposed Rule 5.3 [RPC 1-300]

“Responsibilities Regarding Nonlawyer Assistants”

(XDraft #10, 10/18/09)

Summary: Proposed Rule 5.3 is closely based on Model Rule 5.3 and sets forth the responsibilities of managerial and supervising lawyers in their oversight of nonlawyer assistants. The Rule is consistent with current California law. See California rule 3-110, Discussion.

Comparison with ABA Counterpart

Rule

Comment

☒ ABA Model Rule substantially adopted

☐ ABA Model Rule substantially rejected

☐ Some material additions to ABA Model Rule

☐ Some material deletions from ABA Model Rule

☐ No ABA Model Rule counterpart

☒ ABA Model Rule substantially adopted

☐ ABA Model Rule substantially rejected

☐ Some material additions to ABA Model Rule

☐ Some material deletions from ABA Model Rule

☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-110, Discussion.

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3* Responsibilities Regarding Nonlawyer Assistants

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.3, which substantially tracks Model Rule 5.3, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of nonlawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of respondeat superior is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by nonlawyers under the lawyer's supervision, orders or ratifies the misconduct of a nonlawyer, or has knowledge of the nonlawyer's misconduct and fails to take steps to prevent or mitigate the consequences. The Comment to the proposed Rule largely tracks the Model Rule comment.

Current California Law and Variations in Other Jurisdictions. Model Rule 5.3 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.3's duties on "each" managing partner, in effect preventing such managerial partners from delegating responsibility to a single managing partner. New York and New Jersey both provide for discipline of a law firm, in addition to the individual lawyers in the firm, under Rule 5.3. All jurisdictions have adopted some version of Model Rule 5.3(c). California does not have a counterpart to Rule 5.3. However, the Discussion to current rule 3-110 provides that the duties set forth in the rule include the duty to supervise the work of subordinate lawyers and non-lawyer employees and agents. Proposed Rule 5.3 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

* Proposed Rule 5.3, XDraft 10 (10/18/09)

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Commission's Proposed Rule*</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Explanation of Changes to the ABA Model Rule</u>
With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;	With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner <u>in a law firm</u>, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ~~person's~~<u>nonlawyer's</u> conduct is compatible with the professional obligations of the lawyer;	The Introductory paragraph to proposed Rule 5.3 is identical to Model Rule 5.3. Paragraph (a) largely tracks Model Rule 5.3(a), except for two clarifying changes: (1) the phrase "in a law firm" has been added after the words, "a partner," to create a parallel construction with the clause that follows and also to conform to the syntax used in the related Rule 5.1; and (2) "nonlawyer" has been substituted for "person" to refer back to the word "nonlawyer" that is used in the introductory clause.
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	Paragraph (b) is identical to Model Rule 5.3(b).
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or	(c) a lawyer shall be responsible for conduct of such a person that would be a violation of ~~the~~<u>these</u> Rules ~~of Professional Conduct~~<u>or the State Bar Act</u> if engaged in by a lawyer if: (1) the lawyer orders or, with ~~the~~ knowledge of the specific conduct, ratifies the conduct involved; or	Paragraph (c) largely tracks Model Rule 5.3(c), except that the clause, "individually or together with other lawyers" has been added to subparagraph (c)(2) to parallel the language used in paragraph (a). The deletion of this language is an apparent oversight by the Model Rule drafters. The phrase, "these Rules or the State Bar Act" is a term the Commission has been using throughout the Rules in place of the Model Rules' "the Rules of Professional Conduct."

* Proposed Rule 5.3, XDraft 10 (10/18/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Commission's Proposed Rule*</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Commission's Proposed Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.	[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. <u>Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.</u> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose <u>confidential</u> information relating to representation of the client, and should be responsible for their work product. <u>(See, e.g., <i>Waysman v. State Bar</i> (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; <i>Trousil v. State Bar</i> (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; <i>Palomo v. State Bar</i> (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670]; <i>Black v. State Bar</i> (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; <i>Moore v. State Bar</i> (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].)</u> The measures employed in <u>instructing and</u> supervising nonlawyers should take account of the fact that they ~~do may~~ not have legal training ~~and are not subject to professional discipline~~.	Comment [1] largely tracks Model Rule 5.3, cmt. [1]. The word “confidential” has been added to the phrase, “information relating to the representation of the client,” because that term (“confidential information relating to the representation of the client”) is a defined term in these Rules. See proposed Rule 1.6, cmts. [3] et seq. Citations to several cases have been added for guidance. These citations are largely carried over from the Discussion to current rule 3-110 (“Competence”). The word “instructing” has been added to the last sentence of Comment [1] because instruction of nonlawyers of their responsibilities as employees of the law firm is an important component of providing assurance nonlawyers’ conduct is compatible with the lawyer’s professional obligations. The word “may” has been substituted for “do” because some nonlawyers will have had legal training. Finally, the last clause of the last sentence of Comment [1] has been deleted because whether a nonlawyer employee is personally subject to discipline is irrelevant to the care a lawyer should take in that person’s instruction and supervision.

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Commission's Proposed Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.	[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with ~~the~~<u>these</u> Rules ~~of Professional Conduct~~<u>and the State Bar Act</u>. See Comment [~~1~~<u>2</u>] to Rule 5.1. ~~Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.~~ <u>Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in</u> ~~by a lawyer~~<u>private law firms</u>. [3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of ~~the~~<u>these</u> Rules ~~of Professional Conduct or the State Bar Act~~ if engaged in by a lawyer.	The next to last sentence of Model Rule 5.3, cmt. [2] has been deleted because it simply restates paragraph (b). In its place, a sentence has been added to clarify that the obligations set forth in Rule 5.3 apply equally to lawyers with managerial authority in corporate and government legal departments and legal service organizations. The phrase, “these Rules or the State Bar Act” is a term the Commission has been using throughout the Rules in place of the Model Rules’ “the Rules of Professional Conduct.” Comment [3] is identical to the last sentence of Model Rule 5.3, cmt. [2]. The sentence, which addresses a different part of the rule than the remainder of Comment [2], has been moved to its own comment for clarification.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

(Commission's Proposed Rule – Clean Version)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and [knows] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

- [1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals.

Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

- [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.
- [3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants. [Sorted by Commenter]						TOTAL = 3 Agree = 3 Disagree = 0 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC supports this rule as it is a codification of existing California law. However, Comment [3] should be stricken.	No response required. The Commission disagrees and believes the comment provides appropriate guidance in applying the rule.
3	San Diego County Bar Association	A	Yes		Support as drafted.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

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 provision comparable to ABA Model Rule 5.3.

Georgia adds a new Rule 5.3(d) that indirectly restricts the activities of suspended or disbarred lawyers who work in a law office.

Illinois: Rule 5.3(a) applies to “[t]he lawyer, and, in a law firm, each partner,” and refers to the professional obligations of the lawyer “and the firm.” Illinois Rule 5.3(b) applies to “each” lawyer having direct supervisory authority.

New Hampshire: Rules 5.3(a) and (b) impose duties on “each” partner in a firm, “each” lawyer with comparable managerial authority, and “each” lawyer with direct supervisory authority. Separately, New Hampshire Supreme Court Rule 35 (Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct) contains nine rules for using the services of legal assistants in compliance with Rule 5.3. For example, Rule 1 provides:

It is the responsibility of the lawyer to take all steps reasonably necessary to ensure that a legal assistant for

whose work the lawyer is responsible does not provide legal advice or otherwise engage in the unauthorized practice of law; provided, however, that with adequate lawyer supervision the legal assistant may provide information concerning legal matters and otherwise act as permitted under these rules.

New Jersey: Rule 5.3(a) provides that “every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.” In addition, New Jersey has added Rule 5.3(c)(3), which provides that a lawyer is responsible for the conduct of a nonlawyer employee if “the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.”

New York: In the rules effective April 1, 2009, Rule 5.3 provides:

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules

if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Oregon: Rule 5.3(b) begins: “except as provided by Rule 8.4(b). . . .” Under Oregon Rule 8.4(b), it is generally not professional misconduct for a lawyer to give advice about or to supervise “lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights” provided the lawyer otherwise abides by the Rules of Professional Conduct.

Rhode Island: Immediately after the Comment to Rule 5.3, Rhode Island includes a lengthy set of “Guidelines” for the use of legal assistants. These Guidelines are a heavily modified version of the ABA Model Guidelines for the Utilization of Paralegal Services (see Related Materials below). For example, Rhode Island’s Guideline 3, which is closely related to Rule 5.3, provides as follows:

3. A lawyer shall direct a legal assistant to avoid any conduct which if engaged in by a lawyer would violate the Rules of Professional Conduct. In particular, the lawyer

shall instruct the legal assistant regarding the confidential nature of the attorney/client relationship, and shall direct the legal assistant to refrain from disclosing any confidential information obtained from a client or in connection with representation of a client.

Texas relegates ABA Model Rule 5.3(a) to Comment 2 after Texas Rule 5.03. The Comment applies to “[e]ach lawyer in a position of authority in a law firm or in a government agency,” including lawyers having supervisory authority or “intermediate managerial responsibilities in the law department of any enterprise or government agency.” Texas Rule 5.03(b), which is equivalent to ABA Model Rule 5.3(c), subjects a lawyer to discipline for a nonlawyer’s misconduct if (1) the lawyer orders, “encourages, or permits” the conduct involved; or (2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency’s legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person’s misconduct.

Virginia: Rule 5.3(c)(2) applies if a lawyer knows “or should have known” of the conduct in question.

Proposed Rule 5.3.1

“Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member”

(XDraft #5, 10/18/09)

Summary: Proposed Rule 5.3.1 places restrictions on the employment of disbarred, suspended, resigned or involuntarily resigned members of the State Bar. There is no ABA counterpart to this Rule. It carries forward current California rule 1-311, with changes that for the most part are not substantive and reflect adherence to the Model Rule format.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☒ No ABA Model Rule counterpart	☒ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-111

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 5
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

A Commission minority opposed adoption of the rule as unduly onerous and as restricting the possible rehabilitation of disciplined lawyers.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3.1* Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

There is no ABA Model Rule counterpart to proposed Rule 5.3.1. Proposed Rule 5.3.1 amends current California Rule 1-311 and continues the restrictions on a lawyer's employment of a disbarred, suspended, resigned, or involuntarily inactive member.

The Commission determined not to make substantive changes to the disciplinary standards in the existing rule because there is no ABA counterpart and the rule was adopted by the Board of Governors and approved by the Supreme Court relatively recently notwithstanding considerable opposition – the current rule was approved by the Supreme Court in 1996 and amended in 2008. The 2008 amendments were non-substantive changes that updated cross-references to several rules of court.

Proposed Rule 5.3.1 retains current rule 1-311 largely intact. The changes are not substantive and reflect adherence to ABA format. The only substantive change is to paragraph (d), providing that the notice served on the State Bar (whenever a lawyer employs a disbarred, suspended, resigned, or involuntarily inactive member) “may” be made available to the public.

Both the current rule and the proposed Rule are intended to foster client protection by preventing a licensed lawyer from acting as a screen behind which a disbarred, suspended, resigned, or involuntarily inactive lawyer effectively could continue practicing law. To the extent the Rule permits a disbarred, etc., lawyer to work in a law firm, it also fosters client control over the engagement by requiring the employing lawyer to notify the client of the disbarred, etc., lawyer's role.

* Proposed Rule, XDraft 5 (10/18/09).

INTRODUCTION (continued):

Minority: A minority of the Commission takes the position that this Rule inhibits legitimate efforts to rehabilitate disbarred or suspended lawyers who have to demonstrate an ability to practice. The minority further notes that the Rule does not distinguish between lawyers who have been disciplined for conduct that suggests that they are a threat to the public and those who are not, for example, a lawyer who has forgotten to pay bar dues.

The minority notes that lawyers may employ others who are not subject to the proscriptions of this Rule. For example, a lawyer may employ without restriction a convicted felon who has never been admitted to practice law. That felon may be hired as a secretary, paralegal, or law clerk, with no notice to the bar. So long as the lawyer and the former lawyer do not deceive clients, the public, or others about the status of the former lawyer, the bar should not so burden the former lawyer that he or she finds it difficult or impossible to obtain legitimate employment that permits rehabilitation.

The minority contends this Rule is not needed to prevent a former, disciplined lawyer from practicing law, from forming a partnership with a lawyer, or from being hired to perform legal services by new or former clients. Those acts are prohibited by other rules and by the State Bar Act. Former lawyers should not be treated as pariahs, who cannot perform tasks that any other nonlawyer may lawfully perform, except under restrictions that make such employment burdensome and unlikely.

No Comparable ABA Model Rule (Text provided is current California Rule 1-311)	Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(A) For purposes of this rule: (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid; (2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(c), or California Rule of Court 958(d); and (3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.	Rule ~~5.3.1-311.~~ Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member. (Aa) For ~~the~~ purposes of this ~~rule~~<u>Rule</u>: (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid; (2) <u>"Member" means a member of the State Bar of California.</u> ~~(2)~~<u>(3)</u> "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and ~~professions~~<u>Professions</u> Code sections 6007, 6203(~~ed~~)(<u>1</u>), or California Rule of Court 958(d); and ~~(3)~~<u>(4)</u> "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.	See Introduction for a general note on the changes in the proposed Rule. As noted in the Introduction, the changes for the most part are not substantive and merely reflect adherence to ABA format or correction of typographical errors in the current rule. The substitution of "6203(d)(1)" for "6203(c)" in subparagraph (a)(3) corrects a citation error in the current rule. The added language in paragraph (d) that the "State Bar may make such information available to the public" is a substantive change and is intended to obviate a possible restriction on disclosure in the interests of protecting the public. <u>Note on the use of "lawyer" vs. "member".</u> In keeping with the style of the ABA Model Rules, the Commission has, throughout its proposed rules, substituted "lawyer" for the term "member [of the State Bar]". Nevertheless, "member" and "resigned member" remain defined terms in proposed Rule 5.3.1 as those terms are applied to the former lawyer employee. As with current rule 1-311, the proposed Rule is limited to the employment of disciplined former members of the State Bar of California.

* Proposed Rule 5.3.1, XDraft 5 (10/18/09). Redline comparisons are to current rule 1-311.

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties;	(B) A ~~member~~lawyer shall not employ, associate professionally with, or aid a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the ~~member's~~lawyer's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties;	See Explanation of Changes for paragraph (a).

No Comparable ABA Model Rule (Text provided is current California Rule 1-311)	Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities which constitute the practice of law.	(5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities which constitute the practice of law.	
(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear	(C) A ~~member~~ lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active member in <u>good standing of the bar of a United States state in</u> attending a deposition or other discovery matter for the limited purpose of providing clerical assistance	See Explanation of Changes for paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
as the representative of the client.	to the ~~active member~~lawyer who will appear as the representative of the client.	
(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.	~~(D)~~(d) Prior to or at the time of employing a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph ~~(B)~~(b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The ~~member~~State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The ~~member~~lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.	See Explanation of Changes for paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.	(~~E~~e) A ~~member~~lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.	See Explanation of Changes for paragraph (a).
(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.	(~~F~~f) Upon termination of the <u>employment of a</u> disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall promptly serve upon the State Bar written notice of the termination.	See Explanation of Changes for paragraph (a).
<i>Discussion:</i> For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 P. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)	~~Discussion:~~<u>Comment</u> ~~For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 p. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 p.2d 960].)~~	The Commission recommends the deletion of Discussion paragraph 1 to current rule 1-311 as the issue of what constitutes “practice of law” is beyond the scope of these Rules of Professional Conduct.

No Comparable ABA Model Rule (Text provided is current California Rule 1-311)	Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)	<u>[1]</u> Paragraph (~~D~~) is not intended to prevent or discourage a ~~member~~lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a ~~member's lawyer's~~ client is an organization, then the written notice required by paragraph (~~D~~) shall be served upon the ~~highest~~duly authorized officer, employee, or constituent overseeing the particular engagement. (See ~~rule 3-600~~Rule 1.13.)	See Explanation of Changes for paragraph (a). The substitution of "rule 1.13" for "rule 3-600" conforms the citation to the rule number assigned to current rule 3-600 under the new rules numbering system that tracks the Model Rules. The substitution of "duly" for "highest" conforms this Rule to the language used in proposed Rule 1.13.
Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983, 983.1, 983.2, and 988 of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.	<u>[2]</u> Nothing in ~~rule 1-311~~this Rule shall be deemed to limit or preclude any activity engaged in pursuant to ~~rules 983, 983.1, 983.2, and 988~~Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel pro hac vice], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.	See Explanation of Changes for paragraph (a). The cross-references have been revised to reflect the Judicial Council's recent reorganization and renumbering of the California Rules of Court, to add references to multijurisdictional practice rules, and to provide parenthetical descriptions of the scope of the referenced rules.

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
(Commission's Proposed Rule – Clean Version)

- (a) For the purposes of this Rule:
 - (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
 - (2) "Member" means a member of the State Bar of California.
 - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and
 - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
- (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:
 - (1) Render legal consultation or advice to the client;
 - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
 - (3) Appear as a representative of the client at a deposition or other discovery matter;
 - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
 - (5) Receive, disburse or otherwise handle the client's funds; or
 - (6) Engage in activities which constitute the practice of law.
- (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:
 - (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
 - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
 - (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of

such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

- (e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

COMMENT

- [1] Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the duly

authorized officer, employee, or constituent overseeing the particular engagement. See Rule 1.13.

- [2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 3
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes	5.3.1(d)	OCTC generally supports this rule. However, OCTC recommends splitting subparagraph (d) into two parts, (d)(1) and (d)(2), to make it easier to read and understand. A Comment should also refer lawyers to section 6132 regarding the responsibilities of any lawyer or law firm that employs a suspended or disbarred attorney.	No response required. The Commission decided not to revise subparagraph (d) as suggested. An attempt was made to revise the Rule along the lines suggested. However, because the two notice requirements have different time references, the Commission concluded that it was better to keep subparagraph (d) as one paragraph. The Commission declined to make this change. The statute and the Rule are dealing with different situations. The Rule deals with employing a suspended, disbarred or resigned lawyer, while the statute deals with a lawyer who is in a firm at the time of disbarment or resignation. While the Rule could apply to a lawyer who is employed by a firm at the time of suspension or disbarment, it is not the primary focus of the Rule. Citation to the statute in the Comment would be an unnecessary tangent.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 3
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Orange County Bar Association	M	Yes	5.3.1(b)	In paragraph 5.3.1(b), the OCBA is concerned that “reasonably should know” in these circumstances requires further explanation by the Commission. The OCBA suggests that it should be presumed that a lawyer “reasonably should know” that another lawyer has been disbarred, suspended, etc., if such information appears on the State Bar website, and that it should be presumed that a lawyer should <i>not</i> reasonably know if such information does not appear on the State Bar website. The OCBA urges the Commission to clarify the standard in this manner.	The Commission did make the requested change. While the Commission agrees that today information on the State Bar website is available to lawyers to determine a lawyer’s status, over time technology may evolve and change the relevance of consulting the website. The Commission believes that Comments should not include concepts that would need to be updated over time as information and technology evolve.
				Paragraph (b)	Paragraphs (b)(1) and (b)(3) through (b)(5) refer to “ <i>the</i> client,” indicating that it means the particular client on whose behalf the suspended or disbarred lawyer is hired. Paragraph (b)(2), however, refers to “a client.” It is not clear if this is merely a typographical error, and that the Commission intended it to say “the client,” or whether the Commission intends to expand the scope of paragraph (b)(2) beyond that of the other subsections to paragraph (b). The OCBA seeks clarification.	The Commission believes that the reference to “a client” in paragraph (b)(2) is correct. The intent is to assure that the suspended, disbarred or resigned lawyer is not appearing in court for any client. The rest of (b)(2) supports the breadth of the subpart.
				Comment [1]	Comment [1] refers back to paragraph (d), and states that “Paragraph (d) is not intended to prevent or discourage a lawyer from fully	The Commission declined to make the requested change. The Comment’s purpose is to make sure that lawyers are aware that they can talk to their

**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 3
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					discussing with the client the activities that will be performed by the disbarred . . . member on the client's matter." This Comment implies that paragraph (d) otherwise could be read as preventing or limiting a lawyer's ability to discuss with his client the status of the disbarred, etc., lawyer. Paragraph (d), however, expressly requires a lawyer to provide written notice to his client of the status of the disbarred, etc, lawyer. Thus, as written, Comment [1] is confusing. We recommend that the first sentence of Comment [1] be modified to read as follows: "Paragraph (d) is not intended to provide an exhaustive description of the information to be conveyed to the client or to otherwise limit the scope of any discussions between the lawyer and the client, but rather is intended to provide a minimum description of information that must be conveyed upon the employment of a disbarred, suspended, resigned, or involuntarily inactive member."	client about the ineligible lawyer's status and role. The Commission believes the Comment is clear and does not need to be changed. The Commission does not agree that the proposed revision offered by the commenter is an accurate statement of the application of the Rule.
4	San Diego County Bar Association	A	Yes		Support as drafted.	No response required.

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

California Rule 1-311 Threatening Criminal, Administrative, or Disciplinary Charges

SELECTED STATES THAT HAVE RULES SIMILAR TO CALIFORNIA RULE 1-311

Minnesota

RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR INVOLUNTARILY INACTIVE LAWYERS

(a) For purposes of this rule “employ” means to engage the services of another, including employees, agents, independent contractors, and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of the client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer, unless the rules of the tribunal involved permit representation by nonlawyers and the client has been informed of the lawyer's suspension, disbarment, or disability inactive status;

(3) appear as a representative of the client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) receive, disburse, or otherwise handle the client's funds; or

(6) engage in activities that constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or disability inactive lawyer to perform research, drafting, clerical, or similar activities, including but not limited to:

(1) performing legal work of a preparatory nature for the active lawyer's review, such as legal research, gathering information, and drafting pleadings, briefs, and other similar documents;

(2) directly communicating with the client or third parties regarding matters such as scheduling, billing, updates, information gathering, and confirmation of receipt or sending of correspondence and messages; or

(3) accompanying an active lawyer to a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such person's current license status. The notice shall state that the suspended, disbarred, or disability inactive lawyer shall not be employed to perform any of the activities prohibited by paragraph (b).

(e) Upon terminating the employment of the disbarred, suspended, or disability inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination.

Louisiana

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW (EXCERPT)

* * * * *

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, during the period of suspension, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

SELECTED STATE ETHICS OPINIONS

Washington

Formal Opinion 184 (1990)

<http://www.wsba.org/lawyers/ethics/formalopinions/184.htm>

Massachusetts

Massachusetts Supreme Judicial Court Rule 4:01, Section 17(7)

<http://www.mass.gov/obcbbbo/rule401.htm#Actions>

Mississippi

Opinion No. 96 (1984)

http://www.msbar.org/ethic_opinions.php?id=353

South Carolina

Ethics Advisory Opinion 92-20

Q: Can a S.C. law firm/attorney hire a non-S.C. Bar member, who was formerly an attorney in another state and was disbarred from practice in that state, to do legal research and other paralegal work? [A: NO]

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=333

Ethics Advisory Opinion 82-14

A suspended lawyer may be paid a legal fee for work done in a case prior to the suspension but may not receive any compensation for work done on the case following the suspension; and cannot assist the lawyer who takes over the case on a non-paid basis.

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=86

Proposed Rule 5.4 [1-310][1-320][1-600] “Financial and Similar Arrangements With Nonlawyers”

(XDraft 10.1, 6/30/10)

Summary: Proposed Rule 5.4, which is based on Model Rule 5.4, gathers together in a single rule, concepts which are intended to promote the independence of a lawyer’s professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Comparison with ABA Counterpart	
Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☐ Existing California Law

Rules

RPC 1-310, 1-320, 1-600

Statute

Business & Professions Code § 6155.

Case law

Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 ☐

Minority/Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.4* Financial And Similar Arrangements With Nonlawyers

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.4 closely follows the black letter rule of Model Rule 5.4, which is intended to protect the independence of a lawyer's professional judgment. However, the Commission recommends revisions and additions to the black letter, as well as addition of commentary, to afford greater client protection by providing (i) broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that would pose a threat to the lawyer's exercise of independent professional judgment, and (ii) better guidance on the exceptions to these prohibitions that are permitted under the Rule. These revisions include: (1) a prohibition on sharing legal fees either "directly or indirectly" with a nonlawyer (see Explanation for paragraph (a)); (2) extending that prohibition to sharing legal fees with an organization not authorized to practice law (id.); (3) extending the prohibition on practicing law with nonlawyers in a "partnership" to practicing law with nonlawyers in any kind of "organization" (see Explanation for paragraph (b)); (4) cautioning that a lawyer must avoid interference not only with the lawyer's independence of judgment but also with the lawyer-client relationship (see Explanation for paragraph (c)); (5) carrying forward explicitly the implied prohibition in current rule 1-320(A)(4) on a lawyer accepting referrals from a lawyer referral service that does not comply with the Board of Governors Minimum Standards on lawyer referral services; and (6) adding an express provision that clarifies the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that permits third parties to interfere with a lawyer's independence of judgment. (see Explanation for paragraph (f)).

* Proposed Rule 5.4, XDraft 10.1 (6/30/10).

INTRODUCTION (Continued):

Minority. A minority of the Commission takes the position that proposed Rule 5.4 expands the monopoly granted lawyers contrary to *Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 919. The minority contends that the Rule prevents large organizations such as Target from providing low-cost legal services in the same manner as they provide other professional services.

Public Comment. Following the initial public comment period, the Commission revised the Rule extensively to provide better guidance to lawyers not only as to what conduct and relationships are prohibited under the Rule, but also as to the kinds of conduct and relationships that are expressly allowed. After the subsequent public comment period, the Commission agreed with legal services stakeholders who objected to the complete deletion of Model Rule 5.4(a)(4). See explanation of paragraph (a)(5) and Comment [8].

Current California Law and Variations in Other Jurisdictions. Proposed Rule 5.4 gathers together in a single rule concepts which are intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Every jurisdiction has adopted some version of Model Rule 5.4. Model Rule 5.4(a)(4) (sharing of court-awarded legal fees with a nonprofit organization), has been rejected or modified in numerous jurisdictions. For example, Connecticut, Illinois, Indiana, Iowa, and New York have rejected the provision. Minnesota and Rhode Island require court approval for such arrangements. Florida adds that such fees can also be shared with a "pro bono legal services organization." The District of Columbia and New Hampshire permit such sharing, whether or not court-awarded. The District of Columbia, perhaps because of the extensive government lobbying engaged in by law firms in that jurisdiction, is unique in broadly permitting a lawyer to practice in a partnership or organization with nonlawyers. See "Selected State Variations," below.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Financial and Similar Arrangements With Nonlawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:	(a) A lawyer or law firm shall not share legal fees <u>directly or indirectly</u> with a ~~nonlawyer, except~~ <u>person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:</u>	The introductory paragraph to paragraph (a) is based on Model Rule 5.4(a), but has been modified in two important respects. First, the Rule carries forward the prohibition in current California rule 1-320 against sharing fees with a nonlawyer either directly or indirectly. The inclusion of the adverbs “directly or indirectly” was originally included in rule 1-320 to preclude lawyers from avoiding application of this client-protective rule by creatively structuring relationships with nonlawyers who send them clients. Proposed Comments [1A] and [1B] elaborate on the application of that term to lawyer’s payment of nonlawyer employees and contractors. Second, paragraph (a) has been modified to add a prohibition against sharing legal fees with an organization not authorized to practice law. This same prohibition is found in current California rule 1-600, which regulates legal services programs. See also State Bar of California Minimum Standards for Lawyer Referral Services.
(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;	(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate ~~may to~~ <u>provide for the payment of money, or other consideration at once or</u> over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;	Subparagraph (a)(1) is based on Model Rule 5.4(a)(1), but with a change to clarify that the payment permitted under the provision need not be made over a period of time but can be made at once, and that consideration other than money may be paid.

* Proposed Rule 5.4, XDraft 10.1 (6/30/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Financial and Similar Arrangements With Nonlawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;	(2) ~~a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;~~ any payment authorized by Rule 1.17;	Model Rule 5.4(a)(2) has been simplified by including a reference to proposed Rule 1.17.
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and	(3) a lawyer or law firm ~~may include~~ including nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; ~~and, provided the plan does not otherwise violate these Rules or the State Bar Act; or~~	The word “including” has been substituted for “may include” to conform to the Commission's recommended syntax for the introductory clause to this Rule (“does not prohibit”). The proviso clause has been carried forward from current California rule 1-320(A)(3).
	(4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California.	Paragraph (a)(4) carries forward current California rule 1-320(A)(4). It is intended to provide an exception for lawyer's paying certain fees to lawyer referral services that are in compliance with the cited minimum standards.
(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.	~~(4)~~ ~~a lawyer may share~~ lawyer's or law firm's payment of court-awarded legal fees ~~with~~ to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.	The public comment version of the proposed rule deleted Model Rule 5.4(a)(4) due to concerns about potential abuse by lawyers who form issue-specific nonprofit organizations primarily to generate legal fees. However, input was received from legal services organizations indicating that the complete deletion of this language would detrimentally impact common practices that are consistent with existing law. In response, the Commission added, as new paragraph (a)(5), a slightly modified version of the Model

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Financial and Similar Arrangements With Nonlawyers	<u>Explanation of Changes to the ABA Model Rule</u>
		Rule language. In addition, Comment [8] was revised to state: "Paragraph (a)(5) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4]."
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.	(b) A lawyer shall not form a partnership <u>or other organization</u> with a ~~nonlawyer~~<u>person who is not a lawyer</u> if any of the activities of the partnership <u>or other organization</u> consist of the practice of law.	Paragraph (b) is based on Model Rule 5.4(b). The phrase "or other organization" has been added so a lawyer cannot avoid application of the Rule by entering into a non-partnership arrangement with a person who is not a lawyer. The phrase "person who is not a lawyer" has been substituted for "nonlawyer."
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.	(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's <u>provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship</u>, in rendering such legal services.	Paragraph (c) is based on Model Rule 5.4(c). The Model Rule provision has been revised to clarify that it is generally interference with a lawyer's decisions concerning the legal services that are being provided that interfere with the lawyer's professional judgment. In addition, to enhance client protection, a prohibition on permitting interference with the lawyer-client relationship has been added.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:	(d) A lawyer shall not practice with or in the form of a professional corporation or ~~association~~<u>organization</u> authorized to practice law for a profit; if:	The introductory clause to paragraph (d) is based on Model Rule 5.4(d). The term "organization" has been substituted for "association" because the former term is broader in scope.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Financial and Similar Arrangements With Nonlawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;	(1) a ~~nonlawyer~~person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;	Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer."
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or	(2) a ~~nonlawyer~~person who is not a lawyer is a corporate director or officer thereof or occupies ~~the~~a position of similar responsibility in any form of ~~association~~organization other than a corporation; or	Subparagraph (d)(2) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer" and "organization" for "association." See Explanation of Changes for paragraph (d). The word "a" has been substituted for "the" because it refers back to the non-specific "director or officer."
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.	(3) a ~~nonlawyer~~person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.	Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer". The word "influence" has been added to reach those situations where a nonlawyer might, by indirect means, seek to "influence" a lawyer's exercise of professional judgment.
	(e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.	Paragraph (e) has no counterpart in the Model Rule. It carries forward the implied prohibition current found in California rule 1-320(A)(4).

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Financial and Similar Arrangements With Nonlawyers	<u>Explanation of Changes to the ABA Model Rule</u>
	(f) <u>A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.</u>	Paragraph (f) has no counterpart in the Model Rule. It has been added to address the concerns raised by the California Supreme Court in <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.	[1] <u>A lawyer is required to maintain independence of professional judgment in rendering legal services.</u> The provisions of this Rule ~~express traditional limitations on sharing fees. These limitations are to~~ protect the lawyer's ~~professional~~ independence of <u>professional</u> judgment. ~~Where someone other than~~ <u>by restricting</u> the ~~client pays the lawyer's fee or salary, or recommends employment~~ <u>sharing of the</u> lawyer, ~~that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere~~ <u>fees</u> with <u>a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling</u> the lawyer's professional judgment <u>when rendering legal services to another.</u>	Comment [1] is based on Model Rule 5.4, cmt. [1]. It has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment.
[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).	~~[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).~~	The Commission recommends that Model Rule 5.4, cmt. [2], not be adopted. The Model Rule simply restates language from the black letter rule that is self-explanatory. The cross-reference to Rule 1.8(f) in the second sentence appears in Comment [4] as a reference to proposed Rule 1.8.6, the counterpart of Model Rule 1.8(f), together with references to other proposed Rules concerned with protection a lawyer's exercise of judgment. See also Explanation of Changes for Comment [4], below.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.	Comment [2] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate nonlawyer <i>employee</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.
	[3] Paragraph (a) also does not prohibit the payment to a third party who is not a lawyer for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.	Comment [3] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate <i>nonlawyer consultant and contractor</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Other rules also protect the lawyer's independence of professional judgment. (See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.)	Similar to Model Rule 5.4, cmt. [2], proposed Comment [4] provides a cross-reference to Rule 1.8.6, as well as other Rules that operate to safeguard a lawyer's independence of professional judgment.
	[5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.	Comment [5] has no counterpart in the Model Rule. It has been added to provide important guidance to lawyers in dealing with a situation involving firm ownership that often arises in estate planning.
	[6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.	Comment [6] has no counterpart in the Model Rule. It has been added to provide a cross-reference to the Rule that governs fee divisions among lawyers.
	[7] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See also Business and Professions Code section 6155.	Comment [7] has no counterpart in the Model Rule. It has been added to clarify that a lawyer is not only permitted to participate in a lawyer referral service that complies with California law, but is also encouraged to do so, as such services contribute to increase access to justice.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[8] Paragraph (a)(5) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].	Comment [8] has no counterpart in the Model Rule. Comment [8] and [9] have been added to clarify that this rule is intended to work in concert with the regulatory standards expressed by the Supreme Court in <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See Explanation of Changes for paragraph (a)(5).
	[9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.	See Explanation of Changes for Comment [9].
	[10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See <i>Gafcon, Inc. v. Ponsor Associates</i> (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)	Comment [10] has no counterpart in the Model Rule. It has been carried over from the Discussion to current California rule 1-600. It is an important clarification that the Rule does not override common arrangements between lawyers and insurers in providing legal services to insureds.

Rule 5.4—~~Duty to Avoid Interference with a Lawyer's Professional Independence;~~
Financial and Similar Arrangements With Nonlawyers
(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) any payment authorized by Rule 1.17;
 - (3) a lawyer or law firm including nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act; or
 - (4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California; or
 - (5) a lawyer's or law firm's payment of court-awarded legal fees to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.
- (b) A lawyer shall not form a partnership or other organization with a ~~nonlawyer~~ person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:
 - (1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or
 - (3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and

Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.
- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., [Rule 1.5.1](#), [Rule 1.8.6](#), and [Rule 5.1](#).
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See also Business and Professions Code section 6155.

- [8] ~~Paragraphs (a) and (b5) do not prohibit the payment of~~ Paragraph (a) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. ~~(See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221], see also Rule 6.3.)~~ Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].
- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.
- [10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. ~~(See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)~~

Rule ~~1-320~~5.4: Financial and Similar Arrangements With ~~Non-Lawyers~~Nonlawyers

(Redline Comparison of the Proposed Rule to Current California Rule)

(Aa) ~~Neither a member nor a~~A lawyer or law firm shall ~~directly or indirectly~~not share legal fees directly or indirectly with a person who is not a lawyer, ~~except or with an organization that is not authorized to practice law.~~ This paragraph does not prohibit:

(1) ~~An~~An agreement ~~between by a member and a law~~by a member and a law lawyer with the lawyer's firm, partner, or associate ~~may to~~ provide for the payment of money ~~after the member's death to the member's estate or to one~~after the lawyer's death, to the lawyer's estate or to one or more specified persons over a reasonable period of time; ~~after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~

(2) ~~A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~

(2) any payment authorized by Rule 1.17;

(3) ~~A member~~A lawyer or law firm ~~may include non-member~~may include nonlawyer employees in a compensation, profit-sharing, or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~provided the plan does not ~~circumvent~~otherwise violate these ~~rules~~Rules or ~~Business and Professions Code section 6000 et seq.~~the State Bar Act; or

(4) ~~A member may pay~~the payment of a prescribed registration, referral, or ~~participation~~other fee by a lawyer to a lawyer referral

service established, sponsored, and operated in accordance with the State Bar of California's ~~Minimum Standards~~minimum standards for a ~~Lawyer Referral Service~~lawyer referral service in California; or

(5) a lawyer's or law firm's payment of court-awarded legal fees to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.

(B) ~~A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

(C) ~~A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

Discussion:-

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

Rule 1-310 Forming a Partnership With a Non-Lawyer

- (b) A ~~member~~ lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of ~~that~~ the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.

Discussion:-

~~Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.~~

- (d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:
- (1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold

the stock or interest of the lawyer for a reasonable time during administration;

- (2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or
- (3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

Rule 1-600 Legal Service Programs

- (A) ~~f) A member~~ lawyer shall not ~~participate in a nongovernmental program, activity, practice with or organization furnishing, recommending, or paying for in the form of a non-profit legal services aid, which~~ mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the ~~member's~~ lawyer's independence of professional judgment, or with the ~~client-lawyer-client~~ relationship, or allows ~~unlicensed persons or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules~~ practice law unlawfully.

~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~

Discussion: COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party,

such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.

- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rules 1.5.1, 1.8.6, and 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] ~~The~~A lawyer's participation ~~of a member~~ in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of ~~these rules~~this Rule. See also *Business and Professions Code section 6155*.

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[8] Paragraph (a)(5) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].

[9] This Rule applies ~~to group, prepaid, and voluntary legal service programs, activities and organizations~~ and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

[10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

Rule 5.4: Financial and Similar Arrangements With Nonlawyers
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) any payment authorized by Rule 1.17;
 - (3) a lawyer or law firm including nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act; or
 - (4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California; or
 - (5) a lawyer's or law firm's payment of court-awarded legal fees to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.
- (b) A lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:
 - (1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or
 - (3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.
- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's

independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular

cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.

- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rules 1.5.1, 1.8.6, and 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See also Business and Professions Code section 6155.
- [8] Paragraph (a)(5) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].

- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.
- [10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

Rule 5.4 Financial and Similar Arrangements With Nonlawyers
[Sorted by Commenter]

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Committee on Professional Responsibility and Conduct ("COPRAC")	A	Yes		COPRAC supports the adoption of Proposed Rule 5.4 and the Comments to the Rule.	No response required.
2	Legal Aid foundation of Los Angeles (also Access to Justice Commission)	M	Yes		Model Rule 5.4(a)(4) is an important legal services exception and it should not be deleted as its omission would detrimentally impact common practices that are consistent with existing law.	The Commission agrees that the complete deletion of Model Rule 5.4(a)(4) is unnecessary to adapt the concept of this legal services exception to the general prohibition against fee sharing. Accordingly, the Commission added, as new paragraph (a)(5), a slightly modified version of the Model Rule language. In addition, Comment [8] was revised to state: "Paragraph (a)(5) makes clear that a lawyer is permitted to pay court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4]."
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		Comment [1] more appropriately belongs in a treatise, law review article, or ethics opinion.	The Commission disagrees with the commenter. Comment [1], which is based on Model Rule 5.4, cmt. [1], has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment – and thus provides guidance in applying the Rule.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 5.4 Financial and Similar Arrangements With Nonlawyers
[Sorted by Commenter]**

**TOTAL = 5 Agree = 2
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	San Diego County Bar Association (Heather L. Rosing)	A	Yes		Adopt rule in interest of uniformity	No response required.
5	Santa Clara County Bar Association	M	Yes	5.4(a)(4) & Comment [4]	We recommend adding to Comment [4] language to alert attorneys about the existence of numerous internet based "internet referral" services as well as internet sites that are only marketing sites. The Comment should point out that this rule may apply to internet based "lawyer referral" services to which a lawyer may be paying a fee for referrals. The Comment should delineate between an internet based site that simply requires the attorney to pay a fee to post a "marketing" profile where the client searches the site and chooses the attorney based on the information posted by the attorney (a marketing/advertising site) as opposed to an internet service that requires the attorney to pay a fee to the internet service which does the screening of clients and where the client contacts the service directly, not the attorney (a referral service).	The Commission did not make the requested addition to Comment [4], in part, because the determination of whether an internet based service falls under the statutory regulations of a lawyer referral service is beyond the scope of the comments to this rule. Such determination is dependent on the facts of a particular situation and involves the application of Business & Professions Code §6155.
				5.4(e)	The SCCBA recommends that this subsection be deleted. This subsection is confusing in that attorneys are not subject to the State Bar Rules and Regulations Pertaining to Lawyer Referral Services; lawyer referral services are subject to the Rules and Regulations. This	The Commission did not make the requested deletion of paragraph (e). Paragraph (e) carries forward the implied prohibition current found in California rule 1-320(A)(4). Paragraph (e) also is derived from Business & Professions Code §6155(a) which, in part, provides that no lawyer

Rule 5.4 Financial and Similar Arrangements With Nonlawyers [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					subsection would seem to suggest that all lawyers are subject to the rules.	shall accept a referral of a potential client unless the requirements of the statutory scheme are met.

Rule 5.4: Professional Independence of a Lawyer

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: Rule 1-310 forbids lawyers to form partnerships with nonlawyers if “any of the activities of that partnership consist of the practice of law.” Rule 1-320 forbids sharing legal fees with nonlawyers with exceptions, including those described in Rules 5.4(1) and (3).

Colorado: Colorado restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Colorado Rule 5.4(d) provides that a lawyer shall not practice with or in the form of a professional corporation, association, or limited liability company, authorized to practice law for a profit, “except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court.”

Connecticut: Connecticut omits ABA Model Rule 5.4(a)(4) (relating to fee sharing with nonprofit organizations).

District of Columbia: D.C. Rules 5.4(a)(4) and (b), which are unique in the United States, permit fee sharing

between lawyers and nonlawyers “in a partnership or other form of organization which meets the requirements of paragraph (b).” Paragraph (b) provides:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

In addition, D.C. Rule 5.4(a)(5) permits a lawyer to “share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

Florida: In place of ABA Model Rule 5.4(a)(2), Florida retains the language from the 1983 Model Rule providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.”

Florida Rule 4-8.6 describes the business entities through which lawyers may practice law and forbids practice other than through “officers, directors, partners, agents, or employees who are qualified to render legal services in this state.” Further, only persons who are so qualified may serve as “a partner, manager, director, or executive officer” of such an entity. Florida has substantially adopted Rule 5.4(a)(4).

Georgia adopts the pre-2002 version of ABA Model Rule 5.4 verbatim, but also restores language from the 1983 Model Rule permitting a lawyer who completes the unfinished business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total

compensation which fairly represents the services rendered by the deceased lawyer.”

Illinois: In the rules effective January 1, 2009, Illinois tracks the Model Rule. Illinois Rule 5.4(d)(2) permits a nonlawyer to serve as secretary for a professional corporation or for-profit association authorized to practice law “if such secretary performs only ministerial duties.”

Indiana deletes ABA Model Rule 5.4(a)(4).

Iowa deletes ABA Model Rule 5.4(a)(4).

Kansas: Kansas replaces ABA Model Rule 5.4(a)(2) with language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Kansas makes no reference to the purchase of a law practice or to Rule 1.17, which Kansas has not adopted.

Maryland restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased, retired, disabled, or suspended lawyer may pay to that lawyer or that lawyer’s estate the proportion of the total compensation which fairly represents the services rendered by the former lawyer.”

Massachusetts: Rule 5.4(a) allows a lawyer or law firm to share “a statutory or tribunal-approved” legal fee with “a qualified legal assistance organization that referred the

matter to the lawyer or law firm“ if the organization is not for profit and tax-exempt, the fee is made in connection with a proceeding to advance the organization’s purposes, and the client consents. The Comment to this rule explains that the “financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers.” The Comment also explains that the exception does not extend to fees generated in connection with proceedings unrelated to the organization’s tax-exempt purpose, “such as generating business income for the organization.” Massachusetts Rule 5.4(b) prohibits a lawyer from forming a partnership “or other business entity“ with a nonlawyer if any of the activities of the “entity“ consist of the practice of law.

Minnesota: Rule 5.4(a)(4) permits a lawyer to share court-awarded fees with a nonprofit organization only “subject to full disclosure and court approval,” and Rule 5.4(a)(5) restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

Missouri: Missouri restores language from the 1983 version of ABA Model Rule 5.4(a) permitting a lawyer who completes unfinished legal business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

New Hampshire: Rule 5.4(a)(4) permits a lawyer to “share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter,” whether or not the fees are “court-awarded.”

New York: In the rules effective April 1, 2009, Rule 5.4 is substantially the same as the Model Rule except New York omits Rule 5.4(a)(4).

North Carolina omits ABA Model Rule 5.4(d)(2) and adds Rule 5.4(a)(3), which permits a lawyer who undertakes to complete unfinished legal business of a deceased lawyer “or a disbarred lawyer“ may pay to the estate of the deceased lawyer “or to the disbarred lawyer“ that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer “or the disbarred lawyer.”

Ohio: Rule 5.4 permits a lawyer to “share legal fees with a non-profit organization that recommended employment of the lawyer in the matter,” whether or not the fees are court-awarded, provided that the nonprofit organization complies with Ohio’s Supreme Court Rules governing lawyer referral and information services.

Oklahoma: Rule 5.4(2A) adds language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Oklahoma Rule 5.4(d) says, in brackets: “The concept of this

subsection of the ABA Model Rule is addressed in the Comment.” Oklahoma’s Comment says that Rule 5.4(a) “does not prohibit a lawyer from *voluntarily* sharing court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. This shall not be deemed a sharing of attorneys fees.” (Emphasis added.)

Oregon adds a new Rule 5.4(e) providing that a lawyer “shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.”

Pennsylvania adds Rule 5.4(d)(4), which provides that “in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.” Rule 5.4(d) concludes by stating that subparagraphs (d)(1)-(3) “shall not apply to a lawyer employed in the legal department of a corporation or other organization.”

Rhode Island: After some uncertainty over whether Rhode Island would subscribe to the position in Rule 5.4(a)(4), as described in Selected State Variations for our 2008 edition, Rhode Island has adopted the following version of ABA Model Rule 5.4(a)(4):

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement

in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if: (i) the organization is one that is not for profit; (ii) the organization is tax-exempt under federal law; (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax-exempt; and (iv) the tribunal approves the fee-sharing arrangement.

Texas: Under Texas Rule 5.04(a)(1), either a lawyer’s agreement or a lawful court order may provide for the payment of money over time to the lawyer’s estate “to or for the benefit of the lawyer’s heirs or personal representatives, beneficiaries, or former spouse, after the lawyer’s death or as otherwise provided by law or court order.”

Proposed Rule 5.5 [RPC 1-300]
**“Unauthorized Practice of Law; Multijurisdictional
Practice of Law”**
(XDraft #8.1, 9/17/09)

Summary: Proposed Rule 5.5 amends current Rule of Professional Conduct 1-300. In substance, it continues the prohibitions in Rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the proposed rule adds from the ABA Model Rule prohibitions against a lawyer who is not admitted to practice in California maintaining an office or systematic presence in California and from holding out that he or she is admitted to practice law in California.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ ☐ Existing California Law

Rules

RPC 1-300; Rules 9.40-9.41, 9.43, 9.45-9.48, California Rules of Court

Statute

Bus. & Prof. Code, sec. 6125-6126.

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 2

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.5* Unauthorized Practice of Law; Multijurisdictional Practice of Law

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.5 amends current Rule of Professional Conduct 1-300. In substance, it continues the prohibitions in Rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the proposed rule adds from the ABA Model Rule prohibitions against a lawyer who is not admitted to practice in California maintaining an office or systematic presence in California and from holding out that he or she is admitted to practice law in California.

The proposed Rule does not adopt either paragraph (c) or (d) to Model Rule 5.5, or most of the comment to MR 5.5 because the subject matter of those Model Rule provisions are governed by decisional law and by California Rules of Court 9.47 and 9.48, both of which were promulgated by the California Supreme Court's Multijurisdictional Practice Task Force. See Explanation of Changes for paragraph (c). The Commission did not include in Rule 5.5 other temporary practice rules that are found in the California Rules of Court (e.g., Rules 9.41 – 9.44), but did include a cross-reference to them in the Comment. See Comment [2]. Finally, the Commission did not consider several Model Rules of Court that were proposed by the ABA Multijurisdictional Practice Commission that address issues such as temporary practice by foreign nationals.

* Proposed Rule, XDraft 8.1 (9/17/09).

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
	(a) <u>A lawyer admitted to practice law in California shall not:</u>	Proposed paragraph (a) is an introductory paragraph to subparagraphs (1) and (2). This provision deals with two different scenarios. The first [covered by paragraph (a)] is misconduct by a lawyer admitted to practice law in California. The second [proposed paragraph (b)] is misconduct by a lawyer who is not admitted to practice in this State. Because proposed paragraph (a) deals with two different offenses, it was given an introductory paragraph for the two different offenses that are described in the subparagraphs (1) and (2).
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.	(a1) ~~A lawyer shall not~~ practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or ~~assist another in doing so.~~	Proposed subparagraph (a)(1) is substantially the same as the first clause of ABA Model Rule 5.5(a). By drafting an introductory paragraph (a) in the proposed rule, in subparagraph (1) we were able to combine the two complementary concepts of current Rule of Professional Conduct 1-300 in one part of the proposed rule applicable to California lawyers and made the proposed rule briefer by deleting the first four words of the Model Rule. The second clause of Model Rule 5.5(a) is covered by subparagraph (a)(2). See explanation for paragraph (a)(2).
	(2) <u>knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.</u>	Current California Rule of Professional Conduct 1-300(A) is an important public protection rule. It subjects a lawyer who is admitted in California to discipline if he or she aids another person or entity in the unauthorized practice of law. Absent such a rule, a lawyer who commits that offense would not likely be subject to discipline in the State Bar Court. However, the Model Rule is not as explicit as the current California rule, and the second clause of

* Proposed Rule 5.5, XDraft 8.1 (9/17/09). Redline/strikeout showing changes to the ABA Model Rule

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
		Model Rule 5.5(a) is only a subset of the broader proscription contained in the current California rule. Therefore, the proposed rule adds current Rule 1-300(A) to Model Rule 5.5(a). Subparagraph (a)(2) is necessary to preserve the greater consumer and client protection that California residents have under current Rule 1-300(A). The California Rules of Court and the Legislature have greatly expanded what areas of the practice of law are "authorized" even though performed by a non- member of the State Bar of California. Notwithstanding these changes in the law, there are still individuals who will not comply with these new laws and thereby harm California residents. While unauthorized practice of law statutes may be enforced to regulate this unlawful behavior, they do not normally reach lawyers who aid and abet unauthorized practice. Regulation by the State Bar of California of lawyers who aid and abet such unlawful behavior is a necessary adjunct of such enforcement. Subparagraph (a)(2) adds the <i>mens rea</i> requirement of "knowingly" assisting another in the unlicensed practice of law. A lawyer should not be subject to discipline for assisting another whom the lawyer, in good faith, believes to be an active member of the State Bar or otherwise authorized to practice by statute or court rule. Model Rule 5.5 does not have a <i>mens rea</i> requirement. Model Rule 8.4(a), which prohibits assisting or inducing another to commit a violation of the Rules, does have such a requirement. In this respect, they are inconsistent. We have been unable to discover any reason for that inconsistency. Adding "knowingly" to proposed Rule 5.5 makes it consistent with both Model Rule 8.4 and the Commission's proposed Rule 8.4. However, the addition of a <i>mens rea</i> requirement causes proposed Rule 5.5 to diverge from both Model Rule 5.5 and current rule 1-300.

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:	(b) A lawyer who is not admitted to practice <u>law</u> in ~~this jurisdiction~~<u>California</u> shall not:	Proposed paragraph (b) is substantially the same as ABA Model Rule 5.5(b). The word "law" has been added to the proposed rule to make the subject matter of the lawyer's admission explicit, and the word "California" has been substituted for the phrase "this jurisdiction" for brevity, because that is the convention used in the California Rules of Court regulating multijurisdictional practice, and because the phrase "this jurisdiction" is ambiguous in that it could refer to jurisdictions or venues within the State, when the intention is to refer to admission to practice in the State of California.
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or	(1) except as authorized by these Rules or other law, establish ~~an~~ <u>or maintain a resident</u> office or other systematic ~~and~~ <u>or</u> continuous presence in ~~this jurisdiction~~ <u>California</u> for the practice of law; or	The practice of law in California by attorneys not admitted to practice in this State but who are temporarily in this State as part of litigation is governed by California Rule of Court 9.47. The phrase "an office" in Model Rule 5.5 has been changed in the proposed rule to the phrase "or maintain a resident office" to conform to the wording of California Rule of Court 9.47(d)(2). The phrase "this jurisdiction" has been changed to "California" for the reasons stated in the preceding paragraph.
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.	(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction~~ <u>California</u>.	The phrase "this jurisdiction" has been changed to "California" for the reasons stated two paragraphs above.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this	~~(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this~~	Proposed Rule 5.5 deletes paragraphs (c) and (d) of ABA Model Rule 5.5 because their subject matter is already governed by California Rules of Court 9.47 and 9.48.

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.	~~jurisdiction that:~~ ~~(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;~~ ~~(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;~~ ~~(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or~~ ~~(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.~~	Model Rule 5.5(c) speaks to the subject of when a lawyer not admitted in the jurisdiction adopting the Model Rule, but who is admitted to practice law in another United States jurisdiction, may temporarily provide legal services in the adoptingc jurisdiction. That subject is not addressed by the current Rules of Professional Conduct or by the State Bar Act. However, it is addressed by California Rules of Court 9.47 and 9.48. Because those subjects are governed by Rules of Court, it is not necessary for the Rules of Professional Conduct to do so. In addition to the Rules of Court, judicial decisions and federal law also govern this subject. Accordingly, Model Rule 5.5(c) and (d) are not needed, and may conflict with Rules of Court, statutes, or applicable decisional law. They have therefore been deleted. However, proposed Comment [2], <i>infra</i>, refers attorneys to the relevant statutes, Rules of Court, and some federal judicial decisions. Because the California Rules of Court were amended after the first batch of proposed rules were circulated for public comment, the references in proposed Comment [2] will have to be updated. The Commission concluded that attempting to restate in a Rule of Professional Conduct all of the nuances of the statutes, Rules of Court, and judicial decisions in California and in federal courts would make the proposed rule unwieldy and unnecessarily long, and, because judicial decisions on the subject of unauthorized practice of law are constantly evolving, the proposed rule could not possibly be complete, even if it attempted to do so. Therefore, the brief references in proposed Comment [2] are offered for succinct guidance.

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.	~~(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:~~ ~~(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or~~ ~~(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.~~	See Explanation of Changes for paragraph (c), above.

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~ Law; Multijurisdictional Practice ~~Of~~ Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.	[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. ~~A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis.~~ Paragraph (a) ~~applies to~~ <u>prohibits the</u> unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person <u>in the performance of activities that constitute the unauthorized practice of law.</u>	Comment [1] is substantially the same as ABA Model Rule Comment [1]. The second sentence is deleted from the proposed Comment because it is an inaccurate and incomplete statement of when a lawyer may practice law in the State of California under applicable statutes, Rules of Court, and decisional law. In the third sentence of the Comment to the Model Rule, the word "applies to" is not an accurate description of paragraph (a) of the rule. Therefore, in the proposed rule, the phrase "applies to" has been changed to the phrase "prohibits the." The phrase ". . . in the performance of activities that constitute the unauthorized practice of law" has been added to the last sentence of the Comment because it makes the last sentence of the Comment a more accurate and complete summary of the provisions of paragraph (a).
~~[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3~~	~~[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.~~	Comment [2] of ABA Model Rule 5.5 has been deleted because its first two sentences are only a generalized comment about admission to practice law throughout the United States and are irrelevant to the California Rules. The third sentence has been deleted because that subject will be covered by proposed new Rule 5.3 (addressing a lawyer's supervision of non-lawyer assistants).

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
	[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel <i>pro hac vice</i>], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and <i>Sperry v. Florida ex rel. Florida Bar</i> (1963) 373 U.S. 379 [83 S.Ct. 1322]; <i>Augustine v. Dept. of Veteran Affairs</i> (Fed. Cir. 2005) 429 F.3d 1334.)	In place of ABA Comment [2], the proposed rule substitutes a new Comment [2] that refers the public, courts, and lawyers to relevant statutes, rules of court, and federal decisions. See explanation of changes regarding paragraph (c), <i>supra</i>. The Commission endeavored to draft a definition of the practice of law in this State but does not recommend that such a definition be included in these rules. It would lengthen the Comment by at least six pages and would still not be a complete definition of what constitutes the practice of law in this State, for judicial decisions are constantly re-interpreting that concept in light of the facts of specific cases.

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~ Law; Multijurisdictional Practice ~~Of~~ Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se. [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).	~~[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.~~ ~~[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).~~	ABA Comment [3] is deleted from the proposed rule because it is an incomplete and inaccurate statement of the law in California regarding lawful practice by non-lawyers. See, for example, Bus. & Prof. Code §§ 6400, <i>et seq.</i>, dealing with Legal Document Assistants and Unlawful Detainer Assistants. This subject is best addressed in Rule 5.3. Comment [4] has been deleted from the proposed rule because it is an incomplete and inaccurate restatement of part of paragraph (b) of the proposed rule.

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~of Law; Multijurisdictional Practice ~~Of~~of Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.	~~[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.~~	Comments [5] through [21] have been deleted because they discuss paragraphs (c) and (d), both of which have been deleted from the proposed Rule because the subject matter is already governed by Rules of Court, Rules 9.47 and 9.48, and decisional law.
[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.	~~[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.	~~[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.	~~[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~of Law; Multijurisdictional Practice ~~Of~~of Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.	~~[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear,	~~[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear,~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
including taking depositions in this jurisdiction.	~~including taking depositions in this jurisdiction.~~	
[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.	~~[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court	~~[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
rules or law so require.	~~rules or law so require.~~	
[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.	~~[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that	~~[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~ Law; Multijurisdictional Practice ~~Of~~ Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide <i>pro bono</i> legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].	~~jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide <i>pro bono</i> legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].~~	
[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to	~~[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.	~~practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.~~	
[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.	~~[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.	~~[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.	~~[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).	~~[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).	~~[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.	~~[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

Rule ~~1-300~~5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(Comparison of the Current Proposed Rule to Current California Rule)

~~(a)(A)~~ A ~~member~~lawyer admitted to practice law in California shall not ~~aid~~
~~any person or entity in the unauthorized practice of law.~~

~~(1) — (B) A member shall not~~ practice law in a jurisdiction ~~where to~~
~~do so would be~~ in violation of ~~regulations~~the regulation of the
legal profession in that jurisdiction~~;~~ or

~~(2)~~ knowingly assist a person or organization in the performance of
activity that constitutes the unauthorized practice of law.

~~(b)~~ A lawyer who is not admitted to practice law in California shall not:

~~(1)~~ except as authorized by these Rules or other law, establish or
maintain a resident office or other systematic or continuous
presence in California for the practice of law; or

~~(2)~~ hold out to the public or otherwise represent that the lawyer is
admitted to practice law in California.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless
admitted to practice in this state or otherwise entitled to practice law in
this state by court rule or other law. (See, e.g., California Business and
Professions Code, sections 6125 and 6126. See also California Rules
of Court, rules 9.45 [registered legal services attorneys], 9.46
[registered in-house counsel], 9.47 [attorneys practicing law
temporarily in California as part of litigation], 9.48 [non-litigating
attorneys temporarily in California to provide legal services], 9.40
[counsel pro hac vice], rule 9.41 [appearance by military counsel], 9.42
[certified law students], rule 9.43 [out-of-state attorney arbitration
counsel program] and rule 9.44 [registered foreign legal consultant].)
A lawyer does not violate paragraph (b) to the extent the lawyer is
engaged in activities authorized by any other applicable exception.
(See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section
32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S.
379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir.
2005) 429 F.3d 1334.)

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is
authorized to practice. Paragraph (a) prohibits the unauthorized
practice of law by a lawyer, whether through the lawyer's direct action
or by the lawyer assisting another person in the performance of
activities that constitute the unauthorized practice of law.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer admitted to practice law in California shall not:
 - (1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or
 - (2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.
- (b) A lawyer who is not admitted to practice law in California shall not:
 - (1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel pro hac vice], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant]. A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.

COMMENT

- [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.
- [2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules

**Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 2
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Cohen, Norman R.	M	No		I am a retired attorney and an inactive member of the California Bar. As I understand it, the Rules now consider an attorney who does FINRA arbitrations (among others) as being engaged in the practice of law which effectively prohibits retired lawyers like myself who do not want to retain active status from sitting as an arbitrator even as being simply a "public" member of any arbitration panel. For years, the Rules were interpreted so as to permit lawyers to sit on such panels without construing it as being engaged in the practice of law but that was reversed a few years ago and organizations such as FINRA (with whose representatives I have discussed the issue at length) feel that they are helpless to fight a State Bar Rule. I ask that the current interpretation be reversed or that a new Rule be promulgated which permits inactive bar members to sit on these panels without their participation being considered as practicing law.	The Commission did not make the requested change because this rule does not expressly govern active vs. inactive membership status. Whether an arbitrator should be enrolled as an active member, in interpreting laws and rules concerning the unauthorized practice of law is a matter of policy for the Board of Governors and is not within the scope of these rules. The Commission did not make the requested addition to the rule which would define whether certain lawyer conduct by an inactive member constitutes the practice of law in California. In the Commission's initial version of proposed Rule 5.5, comments were included to give guidance on conduct that constitutes the practice of law in California. That guidance was criticized when that version of the rule was issued for public comment. Essentially, the guidance was criticized as being both over and under-inclusive and therefore more misleading than helpful. The Commission has reconsidered whether to restore comments that might give guidance on the definition of the practice of law and has reaffirmed its earlier decision, based on the earlier public comments received, to not include such guidance.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 2
Disagree = 0
Modify = 2
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 5.5 and the Comments to the Rule.	No response required.
3	Office of Chief Trial Counsel	A	Yes		OCTC supports this rule as it is a codification of existing law. Comment [1] more appropriately belongs in a treatise, law review article, or ethics opinion.	No response required. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
4	San Diego County Bar Association	M	Yes		The addition of "knowing" in 5.5(a)(2) is a good change. Rule 5.5(b) is flawed due to the practical problem of disciplining lawyers admitted outside of California, also this paragraph falls short of stating a clear prohibition that bars non California lawyers from practicing in this state and could be improved if revised to address the ambiguity of the continuous and systematic presence standard Comment [7] interpreting 5.5(a)(2) should be reworded or deleted	No response required. Commission disagreed, in part, because State Bar staff informed the Commission that the State Bar Court is able to conduct a disciplinary proceeding, such as a default proceeding, involving a lawyer licensed outside of California and that the disciplinary order resulting from such a proceeding is forwarded to the lawyer's home bar association for consideration and action. The Commission deleted Comment [7].

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

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: Alabama Rule 5.5(b) is similar to ABA Model Rule 5.5(b), but Alabama limits the activities of out-of-state lawyers to mediation services, services under authority of federal law, serving as in-house counsel in nonlitigation situations, or engaging in “transactional, counseling, or other nonlitigation services” unless they are admitted to Alabama courts pro hac vice.

Arizona augments ABA Model Rule 5.5 by adding these paragraphs:

(e) Any attorney who engages in the authorized multijurisdictional practice of law in the State of Arizona under this rule must advise the lawyer’s client that the lawyer is not admitted to practice in Arizona, and must obtain the client’s informed consent to such representation.

(f) Attorneys not admitted to practice in the State of Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the State of Arizona, must also comply with Rules of the Supreme Court of Arizona governing pro hac vice admission.

(g) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

In addition, Arizona’s lead-in language to Rule 5.5(d) requires the lawyer who relies on that paragraph to have “registered pursuant to Rule 38(i) of these rules.” That rule recognizes limited admission status for “an attorney who is employed within the State of Arizona as in-house counsel or a related position for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services.”

California: California Supreme Court Rules 9.45, 9.46, 9.47, and 9.48 give lawyers admitted in other American jurisdictions limited authority to provide legal services in California. The four rules deal with in-house counsel, legal services lawyers, lawyers involved in dispute resolution, and lawyers providing other legal services in California. The

California rules are less expansive than ABA Model Rule 5.5(c). In addition, two other rules — 9.43 and 9.44 — provide authority for lawyers who enter California to participate in arbitrations and for lawyers admitted in foreign countries to register as foreign legal consultants.

Colorado: Rule 5.5(a)(1) provides that a lawyer shall not “practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law. . . .”

Colorado Rule of Civil Procedure 220, entitled “Out-of-State Attorney-Conditions of Practice,” permits an out-of-state attorney who is not domiciled in Colorado and has not established a place for the regular practice of law in Colorado to “practice law in the state of Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with [rules] concerning pro hac vice admission.” Unlike ABA Model Rule 5.5, Colorado’s Rule 220 does not restrict out-of-state lawyers to “temporary” law practice. However, Rule 220 permits an out-of-state lawyer to practice in Colorado only if the lawyer “has not established domicile in Colorado” and “has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.”

Connecticut adopts most of ABA Model Rule 5.5 verbatim, with some additions and modifications. Rule 5.5(a) adds that the “practice of law” in Connecticut “is defined in Practice Book Section 2-44A,” a lengthy and detailed court

rule. Rule 5.5(a) also adds that conduct described in Rules 5.5(c) and (d) in another jurisdiction “shall not be deemed the unauthorized practice of law for purposes of this paragraph (a).”

Most significantly, Connecticut Rule 5.5(c) extends temporary practice privileges only to a lawyer admitted in another United States jurisdiction “which accords similar privileges to Connecticut lawyers in its jurisdiction.” Connecticut Rule 5.5(d)(1) applies only if the lawyer “is an authorized house counsel as provided in Practice Book Section 2-15A.” Section 2-15A(c)(1) authorizes an in-house lawyer to engage in the following activities in Connecticut:

- (A) the giving of legal advice to the directors, officers, employees, and agents of the organization with respect to its business and affairs;

- (B) negotiating and documenting all matters for the organization; and

- (C) representation of the organization in its dealings with any administrative agency, tribunal or commission having jurisdiction; provided, however, authorized house counsel shall not be permitted to make appearances as counsel before any state or municipal administrative tribunal, agency, or commission, and shall not be permitted to make appearances in any court of this state, unless the attorney is specially admitted to appear in a case before such tribunal, agency, commission or court.

However, §2-15(A)(c)(4) provides that an authorized house counsel “shall not express or render a legal judgment

or opinion to be relied upon by any third person or party other than legal opinions rendered in connection with commercial, financial or other business transactions to which the authorized house counsel's employer organization is a party and in which the legal opinions have been requested from the authorized house counsel by another party to the transaction."

A lawyer licensed in a "foreign jurisdiction" may qualify as an authorized house counsel.

Drawing on ABA Model Rule 8.5(a), Connecticut adds a new Rule 5.5(e), which provides: "A lawyer not admitted to practice in this jurisdiction and authorized by the provisions of this Rule to engage in providing legal services on a temporary basis in this jurisdiction is thereby subject to the disciplinary rules of this jurisdiction with respect to the activities in this jurisdiction." Finally, Connecticut adds an unusual new Rule 5.5(f), which provides:

A lawyer desirous of obtaining the privileges set forth in subparagraphs (c)(3) or (4), (1) shall notify the Statewide Bar Counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the Statewide Bar Counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware has adopted Rule 5.5 and adds lawyers "admitted . . . in a foreign jurisdiction" to the authority granted in Rule 5.5(c) and 5.5(d). Delaware Supreme Court Rule 5.55 implements the authority of Rule 5.5(d)(1).

District of Columbia retains the pre-2002 version of ABA Model Rule 5.5. In addition, D.C. has developed one of the most detailed unauthorized practice rules in the country (D.C. Rule 49). The rule contains many exceptions to the general prohibition against unauthorized practice. These include exceptions for lawyers providing legal services to the United States while employed by the United States; lawyers appearing before a "special court, department or agency of the United States" where authorized by statute; employees of the District of Columbia and lawyers practicing before "a department or agency of the District of Columbia" pursuant to statutory authorization; employed lawyers where the employer "does not reasonably expect that it is receiving advice from a person" admitted in the District; lawyers who have moved to the District for a period of 360 days while applying for admission in the District and so long as they are under "the direct supervision of an enrolled, active member" of the D.C. Bar; up to five appearances per year for lawyers coming into the district for an ADR proceeding; up to five pro hac vice applications per year; and lawyers providing pro bono services under limited circumstances. Foreign lawyers are also exempt from the UPL prohibition for "incidental and temporary" work in the District.

Florida: Rule 5.5 is based on ABA Model Rule 5.5 but has many significant differences. For example, Florida Rule 5.5(c) permits temporary practice only by lawyers who have neither been disbarred from practice in any jurisdiction "nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule." Rule 5.5(b) add a provision forbidding an outside lawyer to "(3) appear in court, before an administrative agency, or before any other tribunal unless

authorized to do so by the court, administrative agency, or tribunal pursuant to the applicable rules of the court, administrative agency, or tribunal.” Florida Rule 5.5(c)(3) adds that a lawyer may provide temporary legal services related to an alternative dispute resolution proceeding or non-litigation services “if the services are performed for a client who resides in or has an office in the lawyer’s home state” or the services arise out of or are reasonably related to the lawyer’s [home state] practice.” Florida also adds a subparagraph entitled “Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction,” which largely parallels the portions of Rule 5.5 governing temporary practice by lawyers admitted in other U.S. jurisdictions.

Georgia: Rule 5.5 generally tracks ABA Model Rule 5.5, but Georgia distinguishes between a “Domestic Lawyer” (defined in Georgia’s Terminology section as, essentially, a lawyer admitted elsewhere in the United States or its territories but not in Georgia) and a “Foreign Lawyer” (defined as “a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation” but not by Georgia). Georgia adds Rule 5.5(e) to permit temporary practice in Georgia by Foreign Lawyers on terms roughly equivalent to those that govern Domestic Lawyers, provided the foreign lawyer is “a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.”

Illinois: In the rules effective January 1, 2010, Illinois Rule 5.5 tracks ABA Model Rule 5.5. In addition, Supreme Court Rule 716, entitled “Limited Admission of House Counsel,” permits an out-of-state lawyer to receive a limited license to perform legal services in Illinois when the lawyer is “employed in Illinois as house counsel exclusively for a single . . . legal entity (as well as any parent, subsidiary or affiliate thereof). . . .” The legal services must be limited to (a) advising the directors, officers, employees and agents of the employer regarding its business and affairs, and (b) negotiating, documenting and consummating transactions to which the employer is a party. An in-house lawyer may not appear as counsel before any court, administrative tribunal, agency or commission in Illinois unless (a) that body’s rules authorize the appearance or (b) the body specially admits the lawyer for the particular matter. Lawyers licensed under the house counsel rule “shall not offer legal services or advice to the public or in any manner hold themselves out to be so engaged or authorized.”

Illinois Supreme Court Rule 717, entitled “Limited Admission of Legal Service Program Lawyers,” permits an out-of-state lawyer to receive a limited license to practice law in Illinois, for a maximum of 18 months, when the lawyer is “employed in Illinois for an organized legal service, public defender or law school clinical program providing legal assistance to indigent persons.” A lawyer holding this limited license may perform legal services “solely on behalf of such employer and the indigent clients represented by such employer,” and in felony cases the lawyer may participate in the proceedings only as “an assistant of a supervising member of the bar who shall be present and responsible for the conduct of the proceedings.”

Kansas: Kansas retains the original 1983 version of ABA Model Rule 5.5 verbatim.

Louisiana adopts Model Rule 5.5(a)-(d) with minor modifications.

Maine: In the rules effective August 1, 2009, Maine adopts Model Rule 5.5.

Minnesota: Rule 5.5(a) adds an “immunity clause” for Minnesota lawyers by providing that a Minnesota lawyer “does not violate this rule by conduct in another jurisdiction” that an out-of-state lawyer may do in Minnesota pursuant to Rules 5.5(c) and (d). Minnesota also deletes Rule 5.5(d)(1) (which governs legal services provided to a lawyer’s employer).

Missouri rennumbers paragraph (c)(4) as (c)(5) and adds as Rule 5.5(c)(4) permission for temporary legal services that “are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.” In addition, Missouri Rule 5.5(d) omits paragraph (d)(2) and substantially adopts paragraph (d)(1) but requires that the lawyer have “obtained a limited license pursuant to Rule 8.105” (quoted below). Finally, Missouri adds a new Rule 5.5(e), which prohibits the practice of law by a lawyer who has been reported to the authorities for failure to comply with Missouri’s Continuing Legal Education requirements.

Missouri Supreme Court Rule 8.105 provides:

A lawyer admitted to the practice of law in another state or territory of the United States may receive a limited license to practice law in this state if the lawyer:

(1) Is employed in Missouri as a lawyer exclusively for: a corporation, its subsidiaries or affiliates; an association; a business; or a governmental entity and the employer’s lawful business consists of activities other than the practice of law or the provision of legal services;

(2) Was conferred a professional degree in law (J.D. or L.L.B) by a law school that at the time of the lawyer’s graduation was approved by the American Bar Association;

(3) Has filed such application forms as prescribed by the board and paid the prescribed fee, which is non-refundable; and

(4) Receives the approval of the board.

New Jersey: Rule 5.5(b) permits an out-of-state lawyer to practice in New Jersey only if (among other conditions):

(2) the lawyer is an in-house counsel and complies with R. 1:27-2 [excerpted below]; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction; and

(4) not hold himself or herself out as being admitted to practice in this jurisdiction. . . .

New Jersey Rule 1:27-2(a) defines in-house counsel for purposes of its Rule 5.5(b)(2) as follows:

In-House Counsel is a lawyer who is employed in New Jersey for a corporation, a partnership, association, or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this State that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization.

New Jersey Rule 1:27-2(b)(iii) permits the in-house lawyer to provide legal services "solely for the identified employer and its constituents (employees, directors, officers, members, partners, shareholders) in respect of the same proceeding or claim as the employer, provided that the performance of such services is consistent with RPC 1.13 and RPC 1.7."

New Jersey Rule 1:21-1(e) provides:

(e) *Legal Services Organizations.* Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts . . . which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2) the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

New Jersey Rule 1:21-1(a) requires that every attorney practicing law in New Jersey maintain "a bona fide office for the practice of law" in any United States jurisdiction, not necessarily New Jersey. The rule continues as follows:

For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

New Jersey Rule 1-21-10 substantially adopts the ABA's rule permitting temporary practice of out-of-state lawyers in the event of a "major disaster" ("the Katrina Rule").

New York: In the rules effective April 1, 2009, New York Rule 5.5 adopts the language of former DR 3-101 with minor variations.

North Carolina: Rule 5.5 does not use the word "temporary" as it appears in ABA Model Rule 5.5(c), but Rule 5.5(b)(1) forbids a "systematic and continuous presence" in the jurisdiction for the practice of law. North Carolina Rule 5.5(c)(2)(E) adds an additional category that permits a lawyer admitted in another jurisdiction to practice in North Carolina if "the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction, or the law of the jurisdiction in which the lawyer is admitted to practice."

Ohio: Rule 5.5(c)(4) permits a lawyer to "provide legal services on a temporary basis" in Ohio if "the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Otherwise, the Ohio rule is substantially the same as the Model Rule.

Oregon moves Rule 5.5(d)(1) (which permits temporary legal services that are provided to the lawyer's employer or its affiliates) to Rule 5.5(c)(5), meaning that these services may be performed only on a "temporary" basis.

Pennsylvania changes the lead-in language to Rule 5.5(c) to apply to a lawyer admitted in another United States jurisdiction “or in a foreign jurisdiction.” Pennsylvania Rule 5.5(b)(2) provides that a lawyer shall not hold out “or advertise” to the public that the lawyer is admitted to practice in Pennsylvania.

Utah: The Utah Supreme Court has amended subparagraph (c)(3) of Utah State Bar Rule 14-0802 (Authorized Practice of Law) to make clear that, whether or not it constitutes the practice of law, a nonlawyer who is not claiming to be a lawyer may provide “clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.”

Washington: Rule 5.5(e) permits lawyers practicing in the state under the equivalent to Rule 5.5(d)(1) also to provide pro bono services to clients through a “qualified legal services provider.”

Wisconsin: Effective January 1, 2009, Wisconsin adopts ABA Rule 5.5 but adds a clause to the effect that the Clerk of the Wisconsin Supreme Court may accept service of process “for all actions against the lawyer or the lawyer’s firm that may arise out of the lawyer’s participation in legal matters in this jurisdiction.”

Rule 5.6 [RPC 1-500]

“Restriction on a Lawyer’s Right to Practice”

(XDraft #5, 08/07/09)

Summary: Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6 prohibiting certain agreements restricting the right of a lawyer to practice law with the exception of an agreement concerning benefits upon retirement. The Comments to Proposed Rule 5.6 adopt verbatim the language of the Comments to ABA Model Rule 5.6, except that a sentence has been added to the end of Comment [1] noting an exception to paragraph (a) under the California Supreme Court’s decision in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially 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 1-500

Statute

Business and Professions Code sections 6092.5(i), 6093

Case law

Howard v. Babcock (1993) 6 Cal.4th 409

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 1
Abstain/ 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.6* Restrictions on a Lawyer's Right To Practice

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6, as amended in February 2002.

In addition, Comments [1]-[3] to Proposed Rule 5.6 are identical to the comments to ABA Model Rule 5.6 with one addition: the Commission voted to add to Comment [1] a reference to an exception to paragraph (a) articulated by the California Supreme Court in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. The Court in *Howard* held that an agreement requiring a departing partner to forego certain benefits otherwise due, if the departing partner competes in specified geographical regions following withdrawal, is permissible and is not inconsistent with Rule 1-500 of the California Rules of Professional Conduct, if the agreement complies with Bus. & Prof. Code §§ 16600 et seq. The Commission considered the policy decision made by the Supreme Court in *Howard* and determined that this policy continues to be the appropriate policy for California and, as such, it should be explicit in the rule comments. As the Supreme Court reasoned, permitting such an exception “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment.”

* Proposed Rule 5.6, XDraft 5 (8/7/09).

<u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice	<u>Commission's Proposed Rule</u>* Rule 5.6 Restrictions on a Lawyer's Right to Practice	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	The introductory clause and paragraph (a) are identical to the Model Rule.
(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy	(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.	Paragraph (b) is identical to the Model Rule.

* Proposed Rule 5.6, Draft 5 (8/7/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice Comment	<u>Commission's Proposed Rule</u> Rule 5.6 Restrictions on a Lawyer's Right to Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.	[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for ~~restrictions incident to provisions concerning retirement benefits for service with the firm~~ <u>an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See <i>Howard v. Babcock</i> (1993) 6 Cal.4th 409, 425.</u>	Comment [1] is based on Model Rule 5.6, cmt. [1], except that the second sentence has been revised to include language and a citation to the California Supreme Court decision in <i>Howard v. Babcock</i>. The stated rationale for permitting such an exception, that it “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment,” is language taken directly from the decision. See Introduction.
[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	Comment [2] is identical to the Model Rule.
[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	Comment [3] is identical to the Model Rule.

Rule ~~1-500~~ ~~Agreements Restricting~~ 5.6 Restrictions on a Member's Lawyer's Right to Practice
(Comparison of the Current Proposed Rule to Current California Rule)

A lawyer shall not participate in offering or making:

- (a) ~~(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit~~partnership, shareholders, operating, employment, or otherwise, if the other similar type of agreement that restricts the right of a member lawyer to practice law after termination of the relationship, except that this rule shall not prohibit such an agreement which concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy
- ~~(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- ~~(2) Requires payments to a member upon the member's retirement from the practice of law; or~~
- ~~(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~
- ~~(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.~~

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the

interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.

- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Discussion:-

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)~~

Rule 5.6 Restrictions on a Lawyer's Right to Practice

(Commission's Proposed Rule – Clean Version)

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.
- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**Rule 5.6 Restrictions on a Lawyer's Right to Practice.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC supports this rule, but believes Comment [1] more appropriately belongs in a treatise, law review article, or ethics opinion.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. The Commission has determined that the reference to the California Supreme Court's decision in <i>Howard v. Babcock</i> provides a rationale for the exception to the rule that is not stated in the Comment to ABA Model Rule 5.6.
3	San Diego County Bar Association	M	Yes		Approve of new rule, except that the apparent complete deletion of RPC 1 500 (B) should be reconsidered. One committee member dissented on the basis that ethical rules should not govern internal law firm agreements relating to compensation. 5.6(b) in its current form can be used to prevent lawyers from serving clients in a specialized field once they leave a firm. "My fear is that the law firms may use the state bar mechanism to achieve their private ends rather than protecting the public from unscrupulous lawyers."	Commission agreed; however the standard in paragraph (B) of RPC 1 500 is included in proposed Rule 8.3 and not in rule 5.6. The Commission made no change. See response to Los Angeles County Bar Association.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 5.6: Restrictions on Right to 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: Rule 5.6(a) deletes references to a shareholder, operating, or other similar type of agreement, but adds a reference to “an agreement pursuant to the provisions of Rule 1.17” (which governs the sale of a law practice).

California: Rule 1-500 is essentially the same as Rule 5.6, but adds references to certain statutory exceptions.

Florida: In 1997, without amending the text of Rule 5.6, Florida added the following new paragraph to the Comment to its version of Rule 5.6:

This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes required by time-consuming quantum meruit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client's inherent right to select counsel, are prohibited. . . .

In addition, a new Florida Rule 4-5.8 prohibits a lawyer who is leaving a law firm from unilaterally notifying clients of

the anticipated departure, or soliciting representation of the firm's clients, unless bona fide negotiations between the lawyer and the law firm to draft a joint communication have failed. Similarly, a lawyer in a law firm undergoing dissolution must not unilaterally contact the firm's clients unless bona fide negotiations among authorized members of the firm have failed to produce an agreement on a method for notifying clients of the dissolution.

Georgia has adopted the pre-2002 version of ABA Model Rule 5.6 and its Comment essentially verbatim. (Georgia's previous DR 2-108(B) permitted a lawyer to agree in a settlement not to “accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.”)

New York: In the rules effective April 1, 2009, New York follows Model Rule 5.6 except New York adds that the rule “does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.”

Oregon: Rule 5.6(b) applies to a “direct or indirect” restriction on a lawyer's right to practice.

Pennsylvania: Rule 5.6(a) permits an agreement that restricts the rights of a lawyer to practice as part of “an agreement for the sale of a law practice consistent with Rule 1.17.”

Texas: Rule 5.06(b) adds that “as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.”

Virginia: Rule 5.6(b) forbids an agreement in which a restriction of the lawyer’s right to practice is part of the settlement of a controversy, “except where such a restriction is approved by a tribunal or a governmental entity.”

Proposed Rule 6.1 [n/a]

“Voluntary Pro Bono Publico Service”

(XDraft #6, 6/29/10)

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. At the May 15, 2010 meeting, the Board tentatively determined not to recommend adoption Rule 6.1. This tentative decision was included in the subsequent public comment distribution and in response over forty public comments were received urging reconsideration and adoption of the rule. The majority of these public comments were received from legal services organizations. The Commission unanimously agrees with the commenters’ recommendation to adopt the rule.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

Statute

Bus. & Prof. Code §6068(h) and §6073.

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 10

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”); and other legal services organizations. See public commenter chart.

☒ Very Controversial – Explanation:

At the May 15, 2010 meeting, the Board tentatively determined to not recommend adoption of a rule; however, a large number of legal services stakeholders are now urging reconsideration of that decision. These stakeholders assert that adoption of a rule is critical for recruitment of lawyers to provide pro bono legal services.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.1* Voluntary Pro Bono Publico Service

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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.

At the May 15, 2010 meeting, the Board tentatively determined not to recommend adoption Rule 6.1. This tentative decision was included in the subsequent public comment distribution and in response over forty public comments were received urging reconsideration and adoption of the rule. The majority of these public comments were received from legal services organizations. The Commission unanimously agrees with the recommendation of the commenters also asks that the Board consider adoption of the rule.

In follow-up to some of the discussion at the Board Committee meeting, the Commission revised the second sentence of paragraph (a) to include the Model Rule phrase “aspire to” which emphasizes the hortatory standard of the rule.

* Proposed Rule 6.1, XDraft #6 (6/29/10).

The only other change to the rule language that was previously submitted to the Board is a revision to Comment [4]. In the prior version of the rule, Comment [4] omitted the last sentence in the Model Rule counterpart comment, which permits sharing of “court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer.” However, public comment has been received from legal services organizations urging that the sentence be included because lawyer contributions are critical to organization funding. The Commission agrees and has restored that Model Rule sentence. In addition, for guidance, a new sentence has been added at the very end of Comment [4] that cross references Rule 5.4(a)(5) which addresses the issue of a lawyer’s agreement to pay awarded fees to a legal services organization. The comments to Rule 5.4 make clear that the Supreme Court’s decision in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221] should be consulted in such situations.

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.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Explanation of Changes to the ABA Model Rule</u>
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~~, <u>as</u> a <u>matter of</u> professional responsibility ~~to~~, <u>should</u> provide legal services to those unable to pay. A lawyer should aspire to ~~render~~<u>provide or enable the direct delivery of</u> at least ~~(50)~~ hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:	The first sentence of proposed Rule 6.1 is based on its Model Rule counterpart and emphasizes 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"). However, this sentence also includes the Model Rule phrase "aspire to" which signals again the hortatory standard of the rule. The next lead-in clause is identical to the Model Rule counterpart.
(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~~<u>compensation other than reimbursement of expenses</u> 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, XDraft 6 (6/29/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Explanation of Changes to the ABA Model Rule</u>
(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. <u>particularly with the goal of increasing access to justice.</u>	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.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service	<u>Explanation of Changes to the ABA Model Rule</u>
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.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 ln 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

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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~~ <u>a qualified legal services program under Business and Professions Code section 6213</u> 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 <u>under paragraph (a)(1)</u> or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means <u>under paragraph (a)(2)</u>. 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).

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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~~<u>compensation</u>, 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. <u>In addition, see Rule 5.4(a)(5) regarding a lawyer's agreement to pay court awarded fees to a legal services organization.</u>	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. In the public comment version of the rule, the last sentence of the Model Rule language, which permits sharing of "court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer," was deleted. However, public comment was received from legal services organizations urging that the sentence be included because lawyer contributions are critical to organization funding. The Commission agreed and restored that Model Rule sentence. In addition, for guidance, a new sentence has been added that cross references Rule 5.4(a)(5) which addresses the issue of a lawyer's agreement to pay awarded fees to a legal services organization. The comments to Rule 5.4 make clear that the Supreme Court's decision in <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221] should be consulted in such situations.
[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	[5] While it is ~~possible for~~<u>preferable that</u> a lawyer ~~to fulfill the~~<u>his or her</u> 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~~<u>lawyer's</u> 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	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.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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).	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).	
[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, <u>claims under the California Fair Employment and Housing Act</u>, 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~~ <u>Acceptance</u> 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.

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 system or the profession are a few examples of the many activities that fall within this paragraph.	[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, <u>particularly those designed to increase access to justice</u>. 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, <u>particularly with the goal of increasing access to justice</u> are a few examples of the many activities that fall within this paragraph.	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).
[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].

<u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Commission's Proposed Rule*</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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].
[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~~<u>enforceable</u> 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
(Redline Comparison of the Proposed Rule to the Batch 6 Public Comment Draft)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to 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. [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. In addition, see Rule 5.4\(a\)\(5\) regarding a lawyer's agreement to pay court awarded fees to a legal services organization.](#)

- [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.

Rule 6.1: Voluntary Pro Bono Publico Service

(Commission's Proposed Rule – Clean Version)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to 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. 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. In addition, see Rule 5.4(a)(5) regarding a lawyer's agreement to pay court awarded fees to a legal services organization,
- [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.

Rule 6.1 Voluntary Pro Bono Service [Sorted by Commenter]						TOTAL = 44 Agree = 1 Disagree = 43 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alameda County Bar Association	D	Yes		It is important to have a rule, in addition to a Board resolution and statutory language, because legal education and law practice focus on the Rules of Professional Conduct and pro bono is too important to leave out of the rules. The need for pro bono services is critical. All efforts to increase pro bono service and access to justice are welcome.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
2	Alex, Glenn C.	A	No		While attorneys should be encouraged to provide pro bono legal services, Rule 6.1 should not be included in the Rules of Professional Conduct. The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.	Although the commenter agrees with the Board of Governor's decision not to adopt proposed Rule 6.1, the Commission disagrees with that position and has requested that the Board reconsider its decision. In recommending the adoption of this Rule, the Commission recognized the overwhelming need to increase access to justice in California, and that proposed Rule 6.1 provides a direct means of accomplishing that goal. Although there is a Board of Governors' Resolution which 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 Chief Justice George regarding access to justice issues, and the findings of the Commission on

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Access to Justice, it is likely that the Supreme Court would look favorably upon such a rule. While e-mails to attorneys might be a way of reminding attorneys to perform pro bono work, an aspirational rule is a far more effective means to advise law students and lawyers that all attorneys should perform this important function.
3	Anaebere, Ugochi	D	Yes		I have been a lawyer for 6 years, 3 of which have been devoted to public interest law. It was through a public interest law clinic with the Legal Aid Association of Los Angeles where the reasons why I attended law school became crystallized: service to others to ensure that equal access under the law is something that is achieved for all, regardless of income. I serve as Pro Bono Coordinator for a legal aid Organization in the Central Valley, and have been shocked at what I have seen, in terms of access to legal services. While we are fortunate to have small firm attorneys and solo practitioners who generously provide pro bono legal services, the good work of this relatively small group of attorneys does not translate to a strong, widespread pro bono culture needed to begin to meet the demand of services that I knew while living in my	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					hometown. Further, unlike urban areas where legal aid programs can recruit volunteer interns from numerous law schools, there is only one law school in our service area, and a significant number of the students hold full time positions as they pursue their legal studies. Moreover, there are very few large firms in our service area that can easily provide significant amounts of pro bono services. When I heard that the State Bar was considering amending the Rules of Professional Conduct by strongly encouraging that attorneys volunteer at least 50 hours of pro bono services to a local legal aid agency, I thought to myself- finally, a real push towards encouraging lawyers (who are in a service profession) to give back to others. There are 1200 lawyers in the city where I practice, and the hours of service these individuals could provide to our clients completely doable- as they boil down to about 1 hour a week. The time spent with an individual who is unable to afford legal services, no matter how small, is invaluable, and is greatly appreciated. For many of our clients, they are looking for finality with their legal issues. They are looking for an avenue, a resource, a guide. As lawyers who have	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					been trained and have legal knowledge, it is our responsibility to give to the least among us. For to whom much is given, much is required. Passing this amendment will do much to ease our state's huge justice gap. I urge the State Bar to pass this amendment.	
4	Asian Pacific Legal Center [Karin Wang]	D	Yes		On behalf of the Asian Pacific American Legal Center (APALC), I am writing to urge the Board of Governors to adopt the rule. We believe that strong encouragement from the State Bar through the State Bars rules sends a strong message about the importance of pro bono. The proposed Rule 6.1 is similar to ABA Model Rule 6.1, and encourages attorneys to provide or enable the direct delivery of pro bono services to persons of limited means, and, in essence, to improve the access to justice in the State of California. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to be left out of the rules. Since the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. Last, but not least, the proposed rule is not mandatory, and language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono. For all the aforementioned reasons, I urge its adoption by the Board of Governors.	
5	Austin, Steven – California Commission on Access to Justice (Public Hearing)	D	Yes		We strongly urge the State Bar to recommend a pro bono Rule as part of the Rule revision process. At least 45 other states have included a similar provision in their ethics rules. According to the report of this Rules and Revision commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Bet Tzedek Legal Services & Legal Aid Association of California [Mitchell A. Kamin] (Public Hearing)	D	Yes		I echo and adopt the comments of Toby Rothschild from LAFLA concerning the value of Rule 6.1 to our ongoing ability to recruit pro bono support. The importance of 6.1 extends beyond our individual programs in Los Angeles and other parts of the state. In so many ways, California is a leader on Access to Justice Issues: the Access Commission; AB 590; a Chief Justice profoundly committed to access in general and pro bono in particular. At the same time, low-income Californians face a daunting Justice Gap, with approximately 2/3 of eligible legal aid clients being denied services due to lack of resources. The adoption of Rule 6.1 will maintain California's status as an access leader. Moreover, it will help organizations – including those in rural parts of the state – recruit help to close the Justice Gap. At Bet Tzedek, we reduced our budget by 15% while calls for assistance increased by 40%. Access to pro bono support is vital to help our organizations manage through these rough times – Indeed, we are concerned that not approving 6.1 could send exactly the wrong message – that pro bono is not a key	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					aspect of all lawyers' professional responsibility – precisely when our organizations, and clients, need pro bono the most. Adoption of 6.1 will help small and rural programs reinforce their message that pro bono matters. Many programs lack resources to get this word out, and having it come from the bar lends great credibility. Rule 6.1 is not a step toward mandatory pro bono and that I would oppose a mandatory pro bono requirement in California. We are fortunate to have firms and companies with a well founded commitment to pro bono and making it mandatory would be contradictory and counterproductive. But having 6.1 as a Rule of Professional Conduct will send a very positive message and reinforce our efforts to involve more and more private attorneys in making California a leader in access to justice for all.	
7	California Commission on Access to Justice ("CCAJ") [Hon. Ronald B. Robie]	D	Yes		On May 19th , 2010, the Access to Justice Commission voted unanimously to urge the State Bar Board of Governors to recommend a pro bono rule as part of the Rule Revision process. This is an issue of utmost concern to the	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Commission. It is imperative that our revised Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Rules Revision Commission. Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the first paragraph be amended to include the words “aspire to”, from the ABA’s Model Rule. There were several reasons for the Commission’s unwavering support for this rule. • We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono. • It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave it out of the rules. The Bar’s ethics manual, “Pub 250”, does include the board	

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[Sorted by Commenter]**

TOTAL = 44 Agree = 1
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					resolution -- but it is on page 387 of a 387-page publication. • At least 44 other states have included a similar provision in their ethics rules. • Other proposed rules are similar in nature – at least four other rules do not involve disciplinary consequences, but they permit or encourage certain behavior. • We appreciate the effort the Rules Revision Commission put into its modification of ABA Model Rule 6.1, which it recommended unanimously. We particularly appreciated the language that strengthened the emphasis on activities that promoted access to justice. With the amendment recommended above, we hope that their proposed language is ultimately adopted. • Some believe that the language describing pro bono work is too broad. However, the vast majority of work done pursuant to Rule 6.1 in other states is legal services for the poor, despite the language allowing other kinds of pro bono activity. And even if some work would be called “pro bono” that we would not consider true pro bono, that is not a reason to have NO ethics rule on the subject.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					• Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, last August, the Judicial Council, under the leadership of the Chief Justice, approved a special pro bono toolkit for judges to use to encourage lawyers to do pro bono. The toolkit can be found through the following link: http://www.courtinfo.ca.gov/programs/equalaccess/probonotoolkit.htm • The Access Commission worked hard to establish the new pilot representation project that is being launched next year, and pro bono is a key part of the delivery system anticipated for those pilot projects. This new legislation is getting national attention, and to fail to adopt a pro bono rule at this point would be perceived as a giant step backward in our efforts to implement this new legislation and otherwise to improve access to justice. The actual provisions are less important than our belief that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by this Rules	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted, and Commission representatives are available to work with any and all parties to make sure that this Rule is ultimately adopted and recommended to the Supreme Court.	
8	Carr, Martin D.	D	No		I am writing to convey a small comment in regard to Proposed Rule 6.1. The Commission for the Revision of the Rules of Professional Conduct's April 2010 Draft Following Consideration of Public Comment on the proposed rule states, "Although the Board of Governors' Resolution expresses this policy [encouraging pro bono work], many members of the bar are unaware of its existence." In my experience, this could not be more true. I have been a director of Legal Services of Northern California for 2 years and have been involved in pro bono efforts in my community since becoming an attorney nearly ten years ago. Nonetheless, I had no idea that the State Bar had any interest in encouraging pro bono service until I recently received a copy of Mary Lavery Flynn's May 25th Memorandum to the Access to Justice Commission concerning Proposed Rule 6.1. I had never	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					before heard of the Board of Governors' Resolution, and I would be amazed if many other attorneys have. On the other hand, I am very familiar with the Rules of Professional Conduct. I think most California attorneys know precisely where to find the link to the Rules on the front page of the State Bar's website. Including a statement about pro bono service in the Rules would be a meaningful statement to the members of our State Bar. The little-known Board of Governors' Resolution is not. Our Rules of Professional Conduct should reflect our values as a legal community. If we care about pro bono services, the Rules should say so.	
9	Carson, Peter H.	D	No		I am writing to urge the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1, and instead include the amended version of ABA Model Rule 6.1 with respect to voluntary pro bono legal service in its proposed revisions to the California Rules of Professional Conduct. This is an issue that directly impacts: the hugely underserved client communities of low income and disadvantaged people.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					This also is an issue in which I have a deep personal interest, as I have provided substantial direct pro bono services in a great many matters throughout this state and country. I believe that it is imperative that California, long a leader in providing pro bona legal services, encourage the provision of pro bono legal services in California by making very clear through its Rules of Professional Conduct that its lawyers are expected to make a serious pro bono commitment. I understand that the failure of the Committee on Regulation and Admissions to recommend Rule 6.1 does not reflect a lack of support for pro Bono among board committee members. Nonetheless, an affirmative failure to include a pro bono rule in the final vote of the Board of Governors will invariably be perceived as a lack of support for pro bono by the State Bar of California, which would be unfortunate and a significant step backwards, and would contrast sharply with the at least forty-four other states that have adopted ABA Model Rule 6.1 or a close variant thereof as their own home ethical rule. Why should California purposefully leave itself behind?	

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[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Pro bono simply is too important a value within the legal profession to leave it out of California's ethical rules. Please include Rule 6.1 in the proposed Rules of Professional Conduct to encourage the provision of pro bono services in California and underscore the core value of pro bono of the legal profession in California.	
10	Central California Legal Services [Chris A. Schneider]	D	Yes		I write in support of the Commission's Proposed Rule 6.1. You are no doubt aware of the tremendous "Justice Gap" (the difference between the need for legal services and the amount of services available) throughout California. The Justice Gap is particularly pronounced in areas outside of the large urban centers. The reasons for the urban/rural disparities are numerous and beyond the scope of this letter. However, the disparities very real and our staff members and client communities see them on a daily basis. Throughout California there are numerous efforts to promote pro-bono. Still, it is safe to say that a spirit of probono services does not permeate the entire legal community. There cannot be a better time to work to promote a state-wide culture of pro-bono. As the economic crisis drags on, more and more	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					applicants with meritorious cases find themselves being turned away from legal aid offices because there are insufficient resources. A true spirit of pro-bono could go a long way in alleviating this crisis. California Chief Justice Ronald M. George constantly reminds the legal community of the great need to increase access to justice and to encourage pro-bono work The State Bar has also worked to promote pro-bona and passed resolutions to encourage pro-bono work by all attorneys. Despite these efforts, there still remains large numbers of attorneys who still do not take advantage of pro-bono opportunities that are available to them. The State Bar needs to underscore the resolutions it has passed in support of pro-bono by incorporating this aspirational rule. All attorneys, and attorney applicants, refer to the Rules. The same cannot be said about resolutions passed by the State Bar, no matter how lofty those resolutions may be. By incorporating Rule 6.1 into its Rules, the State Bar would be not only be joining in with the vast majority of other state bars which have adopted similar rules but would be sending a clear message that pro-bono service should be the norm, not the exception.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					I urge adoption of Rule 6.1.	
11	Chalmers, Tiela (Public Hearing)	D	No		I would like to urge you and the Board of Governors to adopt some version of 6.1. I go to a lot of national conferences on pro bono, and California is viewed as being a leader in pro bono. I think it would be embarrassing, frankly, for California to have rejected a Rule urging people to do pro bono. 44 or 45 states in the country have such a Rule.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
12	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		COPRAC has reviewed the provisions of proposed Rule 6.1 – Voluntary Pro Bono Service. COPRAC understands that the Board intends to reconsider its decision to reject proposed Rule 6.1. We urge the Board to reconsider and to adopt the proposed rule. COPRAC previously reviewed the provisions of proposed Rule 6.1 and offered comments to the Commission for the Revision of the Rules of Professional Conduct. Attached hereto are the comments we offered in support of the proposed Rule. As we commented to the Commission, COPRAC believes that the importance of our professional obligation to improve access to justice, as embodied in this rule, outweighs the objection that the rule is aspirational, and thus different from other rules that mandate or prohibit certain conduct.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					COPRAC has suggested some minor language changes that would address some of the concerns that have been raised with proposed Rule 6.1. We ask that the Board consider those suggestions, found in the attached letter, when it reconsiders the proposed Rule. The need for legal assistance for persons of limited means is enormous and well documented. COPRAC asks the Board to reconsider proposed Rule 6.1 which, if adopted, will imbed in our Rules the importance of our duty as attorneys to work to meet this need.	
13	Disability Rights Legal Center ("DRLC") [Paula Pearlman]	D	Yes		The Disability Rights Legal Center respectfully requests that proposed Rule 6.1 be submitted to the full State Bar Board of Governors for approval and adoption. Much of DRLC's work is accomplished through partnering with pro bono lawyers. Proposed Rule 6.1 would not require that lawyers do pro bono work. Nonetheless, DRLC makes this request for the following reasons: 1. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					version of Model Rule 6.1. 2. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. 3. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. 4. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. Proposed Rule 6.1 would encourage California lawyers to do more.	
14	Fadenrecht, Anne	D	No		Agree with proposed Rule 6.1 to encourage pro bono work... Support comments of Central California Legal Services as submitted by its Director.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
15	Golden State University School of Law [Dean Drucilla Stender Ramey]	D	Yes		We request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
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					This issue is of the highest importance to pro bono supporters across the state, and, given California's historic leadership on public service and pro bono legal services, across the nation. Golden Gate believes it is vital that the revised California Rules of Professional Conduct include a rule addressing the integral role of pro bono. Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to" from the ABA's Model Rule, be added to the first paragraph, which would then read, "...A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono public legal services per year-" We recognize that the decision of the Board Committee not to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the members of the California State Bar. To have the maximum impact on the lawyers in our community, it is crucial to have a pro	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					bono rule, in addition to a Board resolution and statutory language. Pro bono is too essential a value within the legal profession to leave it out of the rules. At least 44 other states have included a similar provision in their ethics rules. While the exact wording of the new rule is important, it is even more important that a meaningful rule in this area be passed in the first instance. Whether you choose the ABA's Model Rule, or the rule as modified by the Rules Revision Commission, or a modification of either that achieves our shared goal, we in the progressive law school community believe that adoption of a rule promoting pro bono work is absolutely critical to our efforts to ensure access to justice for all,	
16	Goodman, Karen M.	D	No		I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend to the Supreme Court the adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. Rule 6.1 promotes access to justice for all California citizens by explicitly making pro bono services a commitment for all California lawyers.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					In enacting Rule 6.1, California will join 45 other states in expressly encompassing a commitment to pro bono services in its ethical rules. ABA Model Rule 6.1 is an essential foundation to a lawyer's commitment to the public. A lawyer's commitment to pro bono service is too important to leave out of the rules. Providing pro Bono services is a fundamental component of providing a fair and accessible justice system. Adopting 6.1 which expressly make a commitment to pro bono services an ethical requirement is a step in the right direction. I urge the Board of Governors to reconsider its Committee's recommendation and approve 6.1.	
17	Hathaway, Christina Skaf	D	No		I agree with the comments made on behalf of CCLS to support recommendation for adoption of RULE 6.1 for PRO BONO work. On a personal level, I also urge the recommendation for adoption of RULE 6.1. The need for Pro Bono work is immense and will continue to grow. The adoption of RULE 6.1 will give greater opportunities for those in need to receive legal assistance. By coming together, the legal community can make a difference in their communities. RULE 6.1 furthers this goal. I urge adoption of RULE	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
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TOTAL = 44 **Agree = 1**
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					6.1.	
18	Herr, Leonard	D	No		For the most part, the legal profession is highly regarded by the public as a whole. The practice of law is very time consuming and it is easy to lose sight of the importance of providing pro bono assistance to the public. Encouraging members of our profession to provide pro bono assistance to the public is helpful to our members and a positive image of lawyers.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
19	HIV & AIDS Legal Services Alliance [Margaret Brewer]	D	Yes		Almost 88% of other states have adopted a similar provision in their Rules of Professional Conduct, and it seems a glaring omission for California to leave out this important value from the rules.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
20	Hurley, Russ	D	No		I join in the comments submitted on behalf of Central California Legal Services.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
21	Kim, Linda – Public Interest Clearinghouse (Public Hearing)	D	Yes		The Public Interest Clearinghouse strongly supports the inclusion of an aspirational rule on pro bono in the Rules of Professional Conduct. We believe that even an aspirational rule not intended to be the basis for discipline would be valuable, because it would provide formal recognition in California that all lawyers have a professional responsibility to do pro bono work.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					It is unthinkable that a leadership state like California would not have an aspirational rule, and we urge the State Bar Board of Governors to adopt Proposed Rule 6.1.	
22	Legal Aid of Marin [Paul S. Cohen]	D	Yes		Our agency is the beneficiary of over \$1.5 million each year in pro bono or in kind services. Our volunteer attorneys make the difference between clients receiving services or going without. Many of our volunteers serve each year with distinction and receive the Wiley M. Manuel Award. A rule encouraging a favorable pro bono commitment should be the mandate of the State Bar of California and I urge its full consideration and adoption. It is long overdue.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
23	Legal Services for Prisoners with Children ("LSPC") [Carol Strickman]	D	Yes		LSPC urges the adoption of Model Rule 6.1. We are acutely aware of the lack of legal representation for low income people in our society. In particular, we hear every day from prisoners who have received inadequate medical care, who have been sexually harrassed by correctional officers, or have other actionable claims. We are contacted by prisoners and formerly incarcerated people who need legal assistance in establishing visitation rights with their children. Federally funded legal aid programs are prohibited by law from representing incarcerated people.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

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					Yet these people retain certain civil and constitutional rights. California has over 170,000 people incarcerated in state prison, and many more in our county jails. This is a significant underserved population. Our courts and our laws offer the possibility of justice, but without legal representation, this possibility is slim. Model Rule 6.1 would encourage attorneys to perform pro bono legal services to individuals such as them. For these reasons, we urge the adoption of this rule.	
24	Legal Services of Northern California [W.H. Whitaker]	D	Yes		I request the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend the adoption of Rule 6.1. The Rural Task Force of the Access To Justice Commission contains a thorough discussion of this issue in its report, Improving Civil Justice in Rural California, and recommends that California lawyers, including urban lawyers, consider ways to provide pro bono services to under-served rural Californians. The report includes the following language among its core recommendations: "Because rural areas have fewer lawyers, law schools, and economic resources, urban bar associations and lawyers should consider partnering with rural	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
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Disagree = 43
Modify = 0
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					organizations, of course being mindful that impoverished urban Californians are also underrepresented and need pro bono help as well. Attorneys who are precluded by ethics rules from representing some individuals should be made aware of all of the options for meeting the recommendation, such as devoting time or money to legal aid programs or otherwise furthering access to justice. " The Proposed Rule 6.1 fits perfectly with the Rural Task Force recommendations. It would be an essential tool for judges, law schools, court self-help centers, local bar associations and referral services, legal services programs, and many others in their pro bongQ recruitment efforts.	
25	Los Angeles Center for Law and Justice [Hellen Hong]	D	Yes		As a free legal services provider to low income residents of Los Angeles County, we see the importance of having a model rule to encourage pro bono service in our legal community. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, at least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1. A message from the Board of Governors to make a statement to encourage attorneys to provide pro bono is a powerful statement of the importance of pro bono in our profession. Language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono. Therefore we ask the subcommittee to reconsider proposed Rule 6.1 and urge the Board of Governors to adopt Model Rule 6.1.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
26	Los Angeles County Bar Association Access to Justice Committee [Toby Rothschild]	D	Yes		The Access to Justice Committee (AJC) of the Los Angeles County Bar (LACBA) greatly appreciates the work of the Rule Revision Commission in recommending the adoption of Rule 6.1. We are extremely disappointed that the Board of Governors failed to send the rule out for comment. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it. While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided. Business and Professions Code section 6068 (h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a revision of the Rules of Professional Conduct that does not include this provision.	
27	Mental Health Advocacy Services, Inc. (Pamela Marx)	D	Yes		Mental Health Advocacy Services, Inc. (MHAS) writes to request reconsideration of the Board's decision not to adopt proposed Rule 6.1. MHAS is a nonprofit legal services agency serving adults and children with mental health disabilities in the greater Los Angeles area. Our clients are low-income individuals with disabilities; many of them survive on limited government benefits incomes. When they have legal problems, they must rely on legal services agencies and the pro bono resources those agencies are able to access. Rule 6.1 is an aspirational, not mandatory, rule concerning attorneys' annual provision of pro bono legal services. As an aspirational rule, which would be included within the rules of professional responsibility, it provides guidance to attorneys that the provision of pro bono services and the financial support of legal services organizations and programs is consistent with the obligations of those	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					licensed to practice law in California. Equal access to the law is a foundational concept in our constitutional society. Non-profit legal services providers meet only a fraction of the need for legal representation. Only with the provision of pro bono services by attorneys with expertise in much needed areas of representation such as litigation, real property transactions and family law can the legal profession hope to meet more of the need for services that exists. The "Pro Bono Opportunities" page of the State Bar website notes that, while California has made gains, our state's legal services programs are unable to provide even minimal legal assistance to as much as 67 percent of the legal needs of California's poor residents. The Brennan Center for Justice in a 2010 white paper supporting federal funding of legal services noted that the economic crisis has only increased the need for legal services for the poor. In light of the continuing and rising need for legal services for the poor, including those with disabilities, MHAS respectfully requests that the State Bar Board of Governors adopt Rule 6.1 Voluntary Pro Bono Publico Service.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
28	Mills, Michael N.	D	No		I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend the Supreme Court adoption of Proposed Rule 6.1. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues. Rule 6.1 sets out the professional responsibility of lawyers to provide pro bono public^o services to those otherwise unable to obtain access to the legal system and the courts. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it. While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided. Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice. The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board should not send the Supreme Court a revision of the Rules of Professional Conduct that does include this important provision.	
29	Neighborhood Legal Services of Los Angeles County ("NLS-LA") [Derek Milosavljevic]	D	Yes		I encourage the Board of Governors to adopt the proposed Rule 6.1 in the Rules of Professional Conduct and ask that it be submitted to the Supreme Court. NLS-LA continues to have a great unmet need for private attorneys to provide pro bono services to those otherwise unable to obtain access to the legal system and the courts. While Rule 6.1 will not enforceable by discipline, it will be a compelling tool in the ability of our Private Attorney Involvement (PAI) programs to successfully recruit volunteers willing to provide such services. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Professional Responsibility diminishes the status of our state and our legal community as leaders in the efforts to provide access for those unable to afford it. Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 complements and reaffirms that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless. The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a recommendation that we substantially adopt the ABA Model Rules, while omitting such an important rule on one of the topics the Chief Justice most ardently supports.	
30	Neighborhood Legal Services of Los Angeles County ("NLS-LA") [Neal S. Dudovitz]	D	Yes		I am writing to express my strong support for including proposed Rule 6.1 in the Rules of Professional Conduct that will be recommended for adoption to the California Supreme Court. Neighborhood Legal Services has worked	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					tirelessly for more than 45 years to improve access to justice for low income communities in Los Angeles County. With a staff of 100+, including 45 lawyers and an annual operating budget of \$12 million, NLS-LA provides legal assistance through offices in El Monte, Pacoima and Glendale, as well as 10 courthouse-based Self-Help Centers and 4 domestic violence clinics spread throughout Los Angeles County. In 2009, NLS-LA provided assistance on a variety of legal matters to more than 70,000 LA residents. Although Neighborhood Legal Services ("NLS-LA") is one of California's largest legal services programs, with well over 1 million people financially eligible for our assistance, there is little doubt that we can only meet a small fraction of the legal needs of the communities we serve. We need the full support and assistance of the private bar - law firms, partnerships and sole practioners. To that end, in 2009 the NLS-LA Board of Directors renewed its commitment to expand the availability of legal services to our clients through new and improved partnerships with the private bar. We are seeking additional help from private attorneys in Los Angeles on a broad array of new, innovative projects.	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Undoubtedly, Rule 6.1 will play an important role in making our pro bono campaign a success by helping to develop a renewed culture of pro bono commitment within the legal community. If California continues to be one of only a handful of states without a directive encouraging pro bono assistance in its Rules of Professional Responsibility, it will diminish the status of California as a national leader in providing access to justice for low income communities. While Rule 6.1 is not enforceable by discipline, it will nevertheless be a compelling tool in the ability of legislative pro bono programs to increase the number of volunteers and to expand the numbers and types of cases for which help is provided. In sum, Rule 6.1 is essential for access to justice to become a reality for California's poor.	
31	Odgers, Richard	D	No		I am writing to urge that the Board include the amended version of ABA Model Rule 6.1 with respect to voluntary pro Bono service in its proposed revisions to the Rules of Professional Conduct, The version I support is the one unanimously recommended by the Rules Revision Commission, with the addition	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of the words "aspire to" in the first sentence of the Rule. The Rules Revision Commission unanimously recommended that an amended version of ABA Model Rule 6.1 be adopted in California as it has been in almost every other state. And my experience has taught me that in today's world, where the profession of law is in danger of becoming the business of law, it is vital that California, long a leader in providing pro bono legal services, make very clear that every one of its lawyers is expected to make a serious pro bona commitment. The current crisis in the provision of legal services to those who can't afford them cries out for California's State Bar to take a strong stand to make clear that all California lawyers are expected to do their part to provide and financially to support pro bono services. If my understanding is correct, one of the reasons that the Committee on Regulation and Admissions did not recommend inclusion of Proposed Rule 6.1 is that the rule is hortatory but would not carry disciplinary sanctions, whereas the other rules that aren't supported by sanctions are permissive. If I am correct, this is a very thin basis on which to	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					refuse strongly to encourage California lawyers to step up to what all acknowledge is a desperate need. We need to do whatever we can to encourage the provision of pro bona services in California, Please include Rule 6.1 in the proposed Rules of Professional Conduct.	
32	Pastore, Claire	D	No		As a member of the faculty at USC and as the co-chair of the Right to Counsel Task Committee of the California Commission on Access to Justice and a former longtime legal services attorney, I am well aware of the growing and urgent need for pro bono counsel for litigants who cannot afford to hire attorneys. I urge you to reconsider your decision not to recommend adoption of proposed rule 6.1. According to the published materials explaining the decision, there appears to be no substantive opposition to the concept that providing pro bono services should be part of the professional duties of every lawyer in California and that the goal of providing 50 hours per year per attorney is a worthy one. Instead, the explanatory materials cite the opposition of one membership group (the California Young Lawyers Association) which felt that the proposed rule was duplicative of statements contained in statute and a Board	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of Governor's Resolution, and that rules which are aspirational rather than mandatory should not be included in the Rules of Professional Conduct. Neither is a sufficient reason to reject Rule 6.1. First, the fact that proposed rule 6.1 reiterates an aspirational goal of 50 pro bono hours per year per attorney that is also contained in Business and Professions Code 6073 and a 1989 Resolution is a reason to include the rule, not to reject it. Just as statutes (like section 6073) can make important statements about the goals or values of our profession, so too can and should the Rules of Professional Conduct. Moreover, one need not look far to find Rules of Conduct which duplicate statutory measures. (See, for just one example, the rules implementing Business and Professions Code § 6068(e)'s exceptions to the duty of confidentiality). As a practical matter, including Rule 6.1 in the Rules of Professional Conduct will bring more attention to its concededly worthwhile goal. For example, I have never attended a training at which Resolutions were covered, but I regularly attend trainings which cover changes to the conduct rules. Including 6.1 will inevitably bring more attention to this important topic and elevate the importance of	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the bar's commitment to pro bono services. Moreover, nearly every state has included some version of Rule 6.1 in its state rules of conduct. There is no reason for California to take a contrary position, which risks giving the impression that Rule 6.1 was unimportant to our bar leadership, or, worse yet, contrary to the ideals of the profession in this state. Finally, it is simply not the case that all rules of conduct serve a disciplinary function and that there is no place for aspirational or hortatory rules. The same argument could have been made for statutes such as section 6073, and yet the Legislature chose to include this measure expressing the commitment and values of the profession. The Bar should do the same.	
33	Public Advocates, Inc. (Jamienne Studley)	D	Yes		Adoption of Rule 6.1 would be consistent with adoption in the great majority of states. The central professional responsibility of pro bono service and the value of giving as many people as possible the chance for legal representation in should be embedded formally in the core statement of values and rules, the California Rules of Professional Conduct. The legal profession needs every possible reinforcement of our profession's and state's commitment to filling the serious legal	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					services gap. This would be consistent with the Chief Justice's leadership on pro bono and legal services. While the statement would not create a specific requirement for any individual attorney, it would be completely appropriate to state the responsibility and aspiration in every appropriate setting.	
34	Public Counsel (Elizabeth Bluestein)	D	Yes		Public Counsel supports the adoption of the Commission's proposed Rule 6.1, and urges the Board of Governors to reconsider the adoption of Rule 6.1. Public Counsel is the largest public interest law firm specializing in delivering pro bono legal services to low-income communities. Public Counsel is dedicated to advancing equal justice under law by delivering pro bono legal services to indigent and underrepresented children and adults, ensuring that communitybased organizations serving this population have legal support, mobilizing the volunteer resources of the private bar, and providing technical assistance to pro bono attorneys and projects throughout California. Public Counsel is also the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers Committee for Civil	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Rights Under Law. It is very important for California to adopt an aspirational rule on pro bono to provide formal recognition that all attorneys should aspire to perform pro bono work. It is important to have a Rule that addresses pro bono, in addition to the existing Board resolution, because legal education and law practice routinely focus on the Rules of Professional Conduct. Pro bono is an important value within the legal profession, and should be included in the Rules. This is especially true because California is currently one of only six states that have not adopted some version of the ABA Model Rule on pro bono. Declining to do so sends the wrong message to the bar as well as to the general public. Pro bono participation by attorneys is needed now more than ever - the need for legal services for those with limited means continues to expand in these challenging economic times.	
35	Public Interest Clearinghouse [Julia R. Wilson]	D	Yes		The Public Interest Clearinghouse (PIC) is a statewide nonprofit that increases access to legal help for underserved Californians by building infrastructure and partnerships in the legal community. PIC serves as the IOLTA-	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					funded support center on pro bono efforts throughout the state, and its Pro Bono Initiative incubates and supports statewide and local pro bono projects in California. PIC administers the statewide pro bono website - www.CAProBono.org - and supports the Southern California legal services community in running www.SoCalProBono.org. PIC's REAL (Rural Education & Access to the Law) Project works to expand the pro bono resources available in rural areas of the state, including through our Justice Bus(TM) service learning trips that involve law students, firms, and lawyers in urban areas in pro bono legal assistance clinics for rural residents. Tens of thousands of California attorneys volunteer each year to bring much-needed legal help to our most vulnerable residents. And yet, even with that level of commitment by our profession, there remains a terrible "justice gap" between the overwhelming need for legal assistance and the limited resources to meet that need. There will never be sufficient state, federal or private funding to provide a nonprofit legal services attorney for all the lowincome seniors, families and persons with disabilities who require legal help. Therefore, innovative partnerships between the private and nonprofit sectors are	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the only viable way to build a bridge across the justice gap. Based on PIC's statewide expertise in working with both the nonprofit and for-profit segments of the legal profession, we strongly disagree with the recommendation to not adopt proposed Rule 6.1. A failure to adopt some version of an aspirational rule relating to pro bono would leave California on the outskirts of the national commitment in this area, exactly at the time when funding for legal services delivery is dropping dramatically. At least 44 other states have included a similar provision in their rules, and according to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1. In our opinion, it is essential to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession for our rules to be completely silent on the issue. We are also deeply concerned about the unintentional but possible message if the rules are ultimately approved by the Supreme Court include most of the ABA	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Model Rules, but leave out the rule on pro bono entirely. If necessary for adoption, PIC would support the idea of adding language to emphasize that the rule's aspirational nature. Based on the reasons above, the Public Interest Clearinghouse respectfully urges the recommendation that the Board of Governors adopt Proposed Rule 6.1.	
36	Public Interest Law Project	D	Yes		At least 44 other states have included a similar provision in their rules. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
37	San Diego County Bar Association Legal Ethics Committee	D	Yes		We approve the new rule in its entirety.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
38	State Bar's Standing Committee on the Delivery of Legal Services (SCDLS)	D	Yes		It is absolutely critical that CA adopt an aspirational rule on pro bono to provide formal recognition that all attorneys have a professional responsibility to perform pro bono work. As one of only 6 states not having a pro bono rule, declining to adopt one would send to wrong message to the bar as well as the general public. A pro bono rule will have more far-reaching and sustained attention than a Board resolution as Rules are studied and referred to by lawyers and law students. SCDLS voted unanimously to urge Board to reconsider adoption of rule and would also support insertion of the word "aspire to" in second sentence of introductory clause to emphasize the aspirational nature of the rule. Would also support adoption of ABA Model Rule 6.1 or combination of RRC proposal and ABA Model Rule.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Specific language is not as crucial as the adoption of a pro bono rule in some form.	
39	Talia, M. Sue	D	No		The Rules Revision Commission got it right and unanimously recommended an aspirational rule. I travel all over the United States and Canada speaking to groups of lawyers on the subject of limited scope representation and know firsthand how behind some of our professional colleagues are on access issues. Please don't allow California to join them. I urge reconsideration of the failure to recommend this rule.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
40	UC Hastings School of Law [Dean Shauna Marshall]	D	Yes		We write to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1. This is an issue of utmost concern to pro bono supporters across the state and particularly to law schools who are uniquely situated to instill, foster and promote a commitment to pro bona in future lawyers. In order to ensure greater involvement in pro bona throughout the legal profession, it is imperative that the revised California Rules of Professional Conduct include a rule directly addressing the important role of pro bono. The Commission agrees in substance that there should be a	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule. We understand that there were concerns that the rule was not clearly aspirational in nature, therefore, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We also understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include an aspirational pro bono rule in the final vote of the Board of Governors undermines .the. efforts of the State Bar of California, County Bar Associations, the judiciary, law schools and others to engage all members of the legal profession in :pro bono. As legal educators, the inclusion of a formal pro bono rule communicates to students and the next generation of lawyers. Despite the current Board resolution and statutory language encouraging pro bono, the need for pro bono services continues to outpace the number of attorneys seeking to meet it. The addition of a formal rule would further state unequivocally that pro bono is	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					too important a value within the legal profession to leave it out of the rules. At least 44 other states have included a similar provision in their ethics rules; the absence of such a provision in California sends the wrong message to current and future Bar members. The actual language of the provision is less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.	
41	UC-Irvine School of Law [Dean Erwin Chemerinsky]	D	Yes		I strongly recommend the approval of Proposed Rule 6.1. As the dean of a California law school, I think it is essential that the Rules of Professional Conduct clearly communicate the importance of lawyers doing pro bono work. The proposed Rule would not require pro bono work, but it would express the view that this is something all lawyers should aspire to do. Forty-four other states have adopted this Rule. Because of its aspirational nature, it has posed no problems.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					There is an urgent need for lawyers to do more pro bono work to help fulfill the great unmet needs for legal services. Proposed Rule 6.1 sends a message to law students and lawyers that this is every attorney's responsibility.	
42	University of San Francisco School of Law [Dean Jeffrey S. Brand]	D	Yes		I request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1. This is an issue of utmost concern to pro bono supporters across the state. It is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono. Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]**

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the State Bar of California. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules. At least 44 other states have included a similar provision in their ethics rules. The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted,	
43	University of the Pacific, McGeorge School of Law [Dean Elizabeth Rindskopf Parker]	D	Yes		I am writing to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1. This is an issue of utmost concern to pro bono supporters across the state. We believe that it is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Board of Governors to do everything in its power to ensure passage of this rule.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the State bar of California. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules. At least 44 other states have included a similar provision in their ethics rules. The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some	

Rule 6.1 Voluntary Pro Bono Service
[Sorted by Commenter]

TOTAL = 44 **Agree = 1**
Disagree = 43
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					combination. The critical point is that we believe a pro bono rule MUST be adopted.	
44	Zeffer, Ophelia	D	No		I urge the Board of Governors to reconsider the recent action of the Committee of Regulation and Admissions not to recommend the Supreme Court adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues raised by the proposed rule. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it. While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided. Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

Rule 6.1 Voluntary Pro Bono Service [Sorted by Commenter]						TOTAL = 44 Agree = 1 Disagree = 43 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice. The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send the Supreme Court a revision of the Rules of Professional Conduct that does not include this extremely important provision.	

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.)

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:

(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 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:

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 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) 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."

Proposed Rule 6.2 [n/a]

“Accepting Appointments”

(XDraft #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 8
Opposed Rule as Recommended for Adoption 4
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (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

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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 address 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.

* Proposed Rule 6.2, XDraft #4 (3/31/10).

<u>ABA Model Rule</u> Rule 6.2 Accepting Appointments	<u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments	<u>Explanation of Changes to the ABA Model Rule</u>
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~~<u>these</u> Rules ~~of Professional Conduct,~~ <u>the State Bar Act,</u> 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 <u>-client</u> 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, XDraft 4 (3/31/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comment	<u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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. <u>See Business & Professions Code section 6068(h). All lawyers have</u> Every lawyer, as a <u>matter of professional</u> responsibility ~~to~~, <u>should</u> 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 <u>without expectation of compensation other than reimbursement of expenses</u>. A lawyer may also be subject to appointment by a ~~court~~ <u>tribunal</u> 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

<u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comment	<u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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, <u>and competence</u>, and is subject to the same limitations on the ~~client-lawyer~~ <u>client</u> relationship, such as the obligation to refrain from assisting the client in violation of ~~the~~ <u>these</u> Rules <u>or the State Bar Act. See Rule 1.2(d).</u>	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.
	<u>[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].</u>	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 Version)

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.

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].

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.

Rule 6.2 Accepting Appointments [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	M	Yes	Comments [1] & [2] Comment [1]	1. OCTC appreciates the intent of this rule, but is concerned that it is not enforceable. By allowing attorneys to avoid appointments by claiming that the representation or cause is repugnant to them it would appear to be impossible to enforce this rule. 2. OCTC finds Comments 1 and 2 more appropriately belongs in a treatise, law review article, or ethics opinion. Further, Comment 1 cites to proposed rule 6.1, which was deleted by the Board of Governors and is, thus, not currently part of the proposed rules.	1. The Commission disagrees. The repugnant standard is not a subjective one, but rather is objective and thus enforceable in that the claimed repugnancy must "be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client." 2. As the Commission has noted with respect to other rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. That is true of these comments as well. As to the commenter's observation concerning the reference to Rule 6.1, see response to OCBA, below.
3	Orange County Bar Association (OCBA)	M	Yes		OCBA notes that Comment [1] to Proposed Rule 6.2 contains reference to Rule 6.1, but we understand that Rule 6.1 has not been	The Commission appreciates the commenter's careful review of the Rule. Because representatives of numerous organizations and law firms that

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 6.2 Accepting Appointments [Sorted by Commenter]						TOTAL = 4 Agree = 2 Disagree = 0 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					adopted. We simply express the concern that the Commission should revisit this citation in Comment [1], to conform, when a final decision has been made regarding the adoption of Proposed Rule 6.1.	provide pro bono representation and promote access to justice have requested reconsideration of the Boar of Governor's decision not to adopt Rule 6.1, the Commission has not made the change. If the Board's rejection of the Rule stands, however, the cross-reference to Rule 6.1 in Comment [1] will be deleted.
4	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	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.”

Proposed Rule 6.3 [N/A]

“Membership in Legal Services Organization”

(XDraft #3, 6/8/09)

Summary: Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. The Commission has added a reference to a lawyer’s duty of confidentiality in order to emphasize that a lawyer’s membership in a legal services organization is subject to both the lawyer’s duty to avoid conflicts of interest and the duty to protect confidential client information.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rules

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 2

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Commission on Access to Justice

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.3* Membership in Legal Services Organization

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. However, the Commission recommends adding to the Rule a reference to California's statutory duty of confidentiality in order to emphasize that a lawyer's membership in a legal services organization is subject both to the lawyer's duty to avoid conflicts of interest and the duty to protect confidential client information. The Commission does not recommend any further changes following public comment. See Public Comment Chart, below.

Minority. A minority of the Commission believes subparagraphs (a) and (b) of this Rule will create disciplinary risks for lawyers and thereby discourage them from participating in legal services organizations. Virtually every aspect of the normal duties of a director or officer of the organization may violate both subparagraphs. This Rule does not give guidance about what will or will not lead to discipline. See the minority statement, which is provided in these materials after the Comment Comparison Chart. A second minority believes that the subject of this Rule is not an appropriate topic for Rules of Professional Conduct. This minority notes that the main purpose of the Rule is motivational and, although the minority concurs in the noble motive which the Rule expresses, the minority believes that the Rule, like all aspirational principles, has no place in a disciplinary rule. Moreover, the minority considers the limitations on lawyers' social action expressed in proposed paragraphs (a) and (b) to be mistaken, and probably unconstitutional limitations on a lawyer's freedom of speech and political action. The minority takes the position that lawyers' duties to clients are comprehensive; but they should not and cannot limit the lawyer's freedom to advocate and support social actions and objectives that the lawyer wishes to support outside the scope of the engagement and on the lawyer's own time.

* Proposed Rule 6.3, XDraft 3 (6/8/09, MTY edit).

Rule 6.3: Membership in Legal Services Organization

Rules Revision Commission – Minority Dissent

The beginning of this rule is laudable. Lawyers should be encouraged to participate in legal services organizations. But subparagraphs (a) and (b) will create disciplinary risks for lawyers and thereby discourage them from doing so. Rule 6.3 will be a disciplinary rule, binding on all members of the State Bar. A breach may expose a lawyer to discipline. Bus. & Prof. Code § 6077. However, this rule does not tell lawyers what will be permitted or prohibited. For example, if the lawyer has a client whose interests are adverse to the interests of a client of the legal services organization, will the lawyer voting on the budget of the legal services organization violate paragraph (a) or not? If the lawyer participates in a decision whether to hire or fire an employee of the organization, will that violate paragraph (a) or not? Conversely, paragraph Rule 6.3 (b) will also expose lawyers to discipline for good faith participation in decisions of the legal services organization. Participating in discussions about or votes on a budget for, or to hire or fire an employee, “could have a material adverse effect on the representation of a client of the organization.” Virtually every aspect of the normal duties of a director or officer of the organization may violate both paragraphs (a) and (b). Under what circumstances will the lawyer have to obtain the informed written consent of the lawyer’s clients before participating in a decision affecting a legal services organization? Neither Rule 6.3 nor Rule 1.7 gives any guidance about what will or will not lead to discipline. A Rule of Professional

Conduct ought to give clear indication of what conduct is or is not permissible under it. Rule 6.3 does not. If it is adopted, a lawyer who participates in a legal services organization that has a client adverse to the lawyer’s firm’s own client will do so at considerable risk. This will have a chilling effect on lawyers’ decisions whether to participate in a legal services organization. Neither the State Bar nor a Rule of Professional discipline should discourage lawyers from doing so. Therefore, this rule should not be adopted as proposed.

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Commission's Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	The introductory clause to proposed Rule 6.3 is identical to that of the Model Rule.
(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or	(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 <u>or Business and Professions Code § 6068(e)(1)</u>; or	The reference to B & P Code § 6068(e)(1) has been added to emphasize the importance of maintaining client confidences and secrets.
(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.	(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.	Paragraph (b) is identical to Model Rule 6.3(b).

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Commissions Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	Comment [1] is identical to Model Rule 6.3, cmt. [1].
[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.	[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, <u>including assurances that confidential client information will be protected.</u>	Comment [2] is based on Model Rule 6.3, cmt. [2]. The added clause at the end of this Comment is intended to emphasize the importance of maintaining client confidences and secrets.

Rule 6.3: Membership in Legal Services Organization (Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code section 6068(e)(1); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

**Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 2**
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 6.3 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel ("OCTC")	A	Yes		OCTC supports this rule, but the Comments are more appropriate for treatises, law review articles, and ethics opinions.	Concerning the comment on the Rule itself, no response is required. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
3	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes		The proposed rule does not define "legal service organization(s)". Could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. Also, the term is confusingly similar to other terms of art such as "legal service corporations" governed by federal law to provide legal services to the poor, qualified employer sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501(c) 20, and lawyer referral services, which are not intended to be included in the	The Commission disagrees. As the commenter noted, there is no readily available definition of "legal services organization." No other jurisdiction has seen the need to create such a definition. An attempt to define the term would run the risk of excluding from the Rule's <i>permissive</i> coverage activities that should be encouraged.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					proposed rule. The proposed rule should be modified to include the intended definition of "legal service organization" by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows: "(c) The term "legal service organization" means those defined in section(s) _____ of _____ [and/or the case of _____]." OR "(c) The term "legal service organization" means . . . "	

Rule 6.3: Membership in Legal Services Organization

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 equivalent provision in its Rules of Professional Conduct.

Georgia adds that there is “no disciplinary penalty for a violation of this Rule.”

Illinois: In the rules effective January 1, 2010, Rule 6.3 applies to a “not-for-profit” legal services organization.

Michigan: Rule 6.3 adds extensive rules governing lawyer participation in “not-for-profit referral service[s] that recommend legal services to the public.”

New Jersey: Rule 6.3 requires that the organization comply with Rule 5.4 and states the limitation in (b) to include adverse effect on the interest of “a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.”

New York: In the rules effective April 1, 2009, Rule 6.3(a) extends the restriction to any conflict that would arise “under Rule 1.7 through Rule 1.13.”

Ohio omits ABA Model Rule 6.3 because the Supreme Court of Ohio believes the substance of Rule 6.3 is addressed by other rules governing conflicts of interest, including Rule 1.7(a).

Texas: Rule 1.13 (entitled “Conflicts: Public Interest Activities”) is similar to ABA Model Rule 6.3, but the Texas rule also governs a lawyer’s activities in a “civic, charitable or law reform organization.” Texas Rule 1.13 omits the clause “notwithstanding that the organization serves persons having interests adverse to a client of the lawyer.”

Proposed Rule 6.4 [N/A]

“Law Reform Activities Affecting Client Interests”

(Draft #4, 12/13/09)

Summary: Proposed Rule 6.4, which concerns lawyers’ participation in law reform activities, is based on Model Rule 6.4. However, that part of the Rule that requires disclosures by lawyers participating in law reform activities has been deleted in response to public comment. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
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- ☐ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☐ Existing California Law

Rules

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 3

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Commission on Access to Justice. See also Public Comment Chart.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

There were several negative comments urging that this Rule not be adopted, or if it were adopted, that it be amended by deleting the second sentence that imposes disclosure requirements. See Public Comment Chart for details. The Commission rejected the suggestions that the Rule not be adopted in the belief that its rejection would send a negative message relating to the encouragement of lawyers to participate in law reform activities. It should be noted, however, that the California Access to Justice Commission strongly supported the public comment version of the Rule.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.4* Law Reform Activities Affecting Client Interests

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 6.4 is based on Model Rule 6.4. The Commission recommends the adoption of the first sentence of the Model Rule but not the second sentence. After consideration of several comments received during the public comment period, the Commission determined that including the second sentence would impose on lawyers who participate in law reform activities burdensome disclosure requirements to non-clients, thereby countering the positive effect of the first sentence, which is intended to encourage participation in such activities. See Public Comment Chart, below. In addition, the Commission also concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. See Explanation of Changes to the Rule.

Minority. A minority of the Commission agrees with the California Commission on Access to Justice and the Legal Aid Association of California that Model Rule 6.4 is as an important addition to the California Rules as is Model Rule 6.3, which the majority has recommended be adopted without material modification. Deleting the requirement to disclose the fact that the lawyer knows that the interests of the lawyer's client may be materially affected by a decision in which the lawyer participates sends the wrong message to the public and to the profession. As Model Rule 6.4, Comment [1] correctly states, a lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure. The minority also notes that there are no reported decisions of a lawyer being disciplined under the second sentence of Rule 6.4. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, RULE 6.4, at page 508 (6th Ed. 2008).

* Proposed Rule 6.4, Draft 4 (12/13/09).

A separate minority takes the position that, while the proposed Rule has laudable, aspirational goals, it has no place in a set of disciplinary rules. See full Dissent, below.

Variations in Other Jurisdictions. Nearly every state, including New York (effective 4/1/2009), has adopted Model Rule 6.4 verbatim or nearly verbatim. See Selected State Variations, below.

Proposed Rule 6.4 Law Reform Activities Affecting Client Interests

Minority Dissent

Proposed Rule 6.4 has lofty aspirational goals. All lawyers should be encouraged to serve their communities by serving on boards and commissions. Their legal education and training could be helpful in the deliberations of boards and commissions. They should, in all candor, disclose to such boards and commissions whenever they have a conflict, i.e., having a client who may be affected by any decision they make on such boards and commissions. However, the requirements should be part of law school education where students should learn what it means to be a lawyer and how lawyers should conduct themselves so as to promote the integrity of the profession. In no way should such service be the subject of discipline.

The Commission was not asked by the State Bar to write a practice guide, but to review and rewrite rules of discipline and conform, wherever possible, the California rules to the ABA rules. In these situations where the lawyer is not in a lawyer-client relationship and, therefore, owes no particular duty to a board or commission except ones created by, and agreed to by the board or commission.

<u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Commission's Proposed Rule*</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.	A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. ~~When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.~~	The Commission recommends the adoption of the first sentence of Model Rule 6.4. The Commission recommends that the second sentence of Model Rule 6.4 not be adopted. The Commission concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. A minority of the Commission disagrees with this position. See Introduction.

* Proposed Rule 6.4, XDraft 4 (12/13/09). Strikeouts and underlines reflect changes to the Model Rule.

<u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment	<u>Commission's Proposed Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.	[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b).~~For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.~~	The Commission recommends adoption of only the first two sentences of the Model Rule comment. The Commission determined that the third and fourth sentences are unnecessary exposition. The Commission also recommends that the last sentence not be adopted in light of its recommendation that the second sentence of the black letter not be adopted. See Explanation of Changes for Rule.

Rule 6.4 Law Reform Activities Affecting Client Interests

(Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.

COMMENT

- [1] Lawyers involved in organizations seeking law reform generally do not have a lawyer-client relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b).

**Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC supports encouraging law reform activities but is concerned that there is no requirement to advise the lawyer's clients when the reform may affect the interests of the clients.	Law reform activities would likely only indirectly affect a client thus not requiring advising clients of such indirectly adverse effects. If a significant development should arise, then the duty to communicate under the rules and the State Bar Act would control.
3	San Diego County Bar Association Legal Ethics Committee	M	Yes		It is foreseeable that a lawyer involved in law reform will not always be able to disclose that a client's interests may be materially benefitted or adversely affected without disclosing client confidences. The fact that a client need not be identified does not solve the problem. Hiding the client's identity does not permit the lawyer to reveal the client's confidences. For instance, a lawyer's record of representing certain clients may be enough in some instances for others to correctly infer the client whose interests would be materially benefitted or adversely affected. In such instances when the lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences,	The Commenter's concerns are all addressed by the deletion of the second sentence of the originally proposed Rule and the deletion of most of the originally proposed Comment.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					an option must be permitted. Proposed Rule 6.4 should explicitly provide that option, either in the text of the rule or in a comment, by stating that, if disclosure is not permitted by the lawyer's obligations to clients under other Rules and statutes, the lawyer should instead recuse himself or herself from participating in the decision that may materially benefit or adversely affect the client. Have the last two sentences of Rule 6.4 read: "When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact, <u>if not prohibited by the lawyer's obligations to clients under other Rules and statutes</u>, but need not identify the client. <u>If disclosure is prohibited, the lawyer shall not participate in any decision that may materially benefit or adversely affect the interests of his or her client.</u>" In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows: "If disclosure is prohibited by the lawyer's obligations to any client under other Rules or	

**Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					statutes, then a lawyer cannot provide the disclosure the disclosure required. If disclosure is prohibited, or if the lawyer chooses not to disclose in accordance with Rule 6.4 for any other reason, the lawyer shall not participate in any decision that the lawyer knows may materially benefit or adversely affect the interests of a client.” Concerned about the impact the rule will have on members who participate in organizations such as the California Conference of delegates. The addition of another Comment to address this issue is encouraged. It is hard to imagine that the drafters intended all the delegates to make such disclosures to the Conference but including “members” within the ambit or the proposed, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.	

Rule 6.4: Law Reform Activities Affecting Client Interests

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.

District of Columbia: Rule 6.4 adds the following paragraph (a): “A lawyer should assist in improving the administration of justice. A lawyer may discharge this requirement by rendering services in activities for improving the law, the legal system, or the legal profession.”

Florida replaces “materially benefited” with “materially affected” in the second sentence of Rule 6.4.

Georgia adds that “[t]here is no disciplinary penalty for a violation of this Rule.”

New Hampshire: New Hampshire substitutes the word “affected” for the word “benefitted” in the second sentence of Rule 6.4. A special New Hampshire Comment explains the reasoning: “Since situations may arise in which law reform activities may materially impinge on a client’s interest in an adverse, as well as beneficial manner, the change was made to reflect that possibility.”

New York: In the rules effective April 1, 2009, Rule 6.4 imposes a disclosure obligation only when the lawyer

“actively” participates in the matter. The Rule also adds: “When the lawyer knows that the interests of a client may be adversely affected by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the client.”

Ohio omits ABA Model Rule 6.4 because the Supreme Court of Ohio believes that the “substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest.”

Proposed Rule 6.5 [1-650]

“Limited Legal Services Programs”

(XDraft #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 2

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:

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

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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.

* Proposed Rule 6.5, XDraft 5 (04/15/10).

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	<u>Commission's Proposed Rule*</u> Rule 6.5 Limited Legal Services Programs	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>court, government agency, bar association, law school, or</u> nonprofit organization ~~or court~~, provides short-term limited legal services to a client without <u>reasonable</u> 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., <i>Zenith Insurance v. Cozen O'Connor</i> (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~~<u>has an imputed conflict of interest</u> only if the lawyer knows that another lawyer associated with the lawyer in a law firm is ~~disqualified~~ <u>prohibited from representation</u> 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, XDraft 5 (04/01/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	<u>Commission's Proposed Rule*</u> Rule 6.5 Limited Legal Services Programs	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>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.</u>	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.
	<u>(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.</u>	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).

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	<u>Commission's Proposed Rule*</u> Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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~~<u>Courts, courts, government agencies, bar associations, law schools</u> 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~~<u>in addressing</u> 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, <u>whenever</u> a ~~client-lawyer-client~~ relationship is established, ~~but~~ there <u>usually</u> is no expectation that the lawyer's representation of the client will continue beyond ~~the~~<u>that</u> limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically ~~screen~~<u>check</u> for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, ~~1.9~~ and ~~1.10~~<u>1.9</u>.	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

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	<u>Commission's Proposed Rule*</u> Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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~~<u>these</u> Rules of ~~Professional Conduct~~<u>and the State Bar Act</u>, including ~~Rules~~<u>the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9(e)</u>, 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~~<u>A</u> lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. <u>Therefore</u>, paragraph (a)(~~1~~) requires compliance with Rules 1.7 ~~or~~<u>and</u> 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. <u>In addition, and with Rule 1.10 paragraph (a)(2) imputes conflicts of interest to the lawyer</u> only if the lawyer knows that another lawyer in the lawyer's <u>law firm is</u>~~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.

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	<u>Commission's Proposed Rule*</u> Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 <u>law</u> firm, paragraph (b) provides that ~~Rule 1.10 is~~<u>imputed conflicts of interest are</u> 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 <u>any lawyer in</u> the lawyer's firm is ~~disqualified~~<u>prohibited from representation</u> by Rules 1.7 or 1.9(a). By virtue of paragraph (b), ~~however~~<u>moreover</u>, a lawyer's participation in a short-term limited legal services program will not <u>be imputed to the lawyer's law firm or</u> preclude the lawyer's <u>law</u> 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. <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	<u>Commission's Proposed Rule*</u> Rule 6.5 ~~Nonprofit And Court-Annexed~~ Limited Legal Services Programs Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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, <u>and</u> 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 ~~1-650~~6.5: Limited Legal Services Programs

(Comparison of the Current Proposed Rule to Current California Rule)

~~(A)~~(a) A ~~member~~memberlawyer 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 ~~member~~memberlawyer or the client that the ~~member~~memberlawyer will provide continuing representation in the matter:

- (1) is subject to ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~memberlawyer knows that the representation of the client involves a conflict of interest; and
- (2) has an imputed conflict of interest only if the ~~member~~memberlawyer knows that another lawyer associated with the ~~member~~memberlawyer in a law firm ~~would have~~is prohibited from representation by Rule 1.7 or 1.9(a-conflict of interest under rule 3-310) with respect to the matter.

~~(B)~~(b) Except as provided in paragraph ~~(Aa)~~(a)(2), a conflict of interest that arises from a ~~member's~~memberlawyer's participation in a program under paragraph ~~(Aa)~~(a) will not be imputed to the ~~member's~~memberlawyer's law firm.

~~(C)~~(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion: 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 ~~screen~~check for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7 and 1.9.

- [2] A ~~member~~memberlawyer who provides short-term limited legal services pursuant to ~~rule 1-650~~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 ~~member~~memberlawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~ Except as provided in this ~~rule 1-650~~Rule, ~~the~~these ~~Rules of Professional Conduct~~ and the State Bar Act, including the ~~member's~~memberlawyer'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 ~~member~~memberlawyer who is representing a client in the circumstances addressed by ~~rule 1-650~~this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph ~~(Aa)~~(a)(1) requires compliance with ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~memberlawyer knows that the representation presents a conflict of interest for the ~~member~~memberlawyer. In addition, paragraph ~~(Aa)~~(a)(2)

imputes conflicts of interest to the ~~member~~lawyer only if the ~~member~~lawyer knows that another lawyer in the ~~member's~~lawyer's law firm would be disqualified ~~under rule 3-310~~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 ~~member's~~lawyer's law firm, paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this ~~rule~~Rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) ~~imputes conflicts of interest to~~requires the participating ~~member~~lawyer to comply with Rule 1.10 when the ~~member~~lawyer knows that any lawyer in the ~~member's~~lawyer's firm ~~would be disqualified under rule 3-310~~is prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (Bb), moreover, a ~~member's~~lawyer's participation in a short-term limited legal services program will not be imputed to the ~~member's~~lawyer's law firm or preclude the ~~member's~~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 ~~rule 1-650~~this Rule, a ~~member~~lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310~~Rules 1.7 and ~~all other rules~~1.9(a) become applicable. ~~(Added by order of the Supreme Court, operative August 28, 2009.)~~

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 = 3 Agree = 2 Disagree = 0 Modify = 1 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alex, Glenn C.	M	No		Subdivisions (a)(2) and (b), and Comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.	Proposed Rule 1.10 was not approved by the Board of Governors, but that decision may be reconsidered. If Rule 1.10 is not adopted, the references will be deleted.
2	Office of Chief Trial Counsel	A	Yes		OCTC finds Comments [1] – [4] more appropriate for treatises, law review articles, and ethics opinions. It supports Comment [5].	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.

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 Programs

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].

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.”

Proposed Rule 7.1 [RPC 1-400]
**“Communications Concerning Availability
of Legal Services”**
(XDraft #8, 06/16/10)

Summary: Proposed Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services and largely carries forward the definition of “communication” in current rule 1-400(A). It also carries forward several Standards from rule 1-400 that create a presumption that the rules in the 7 series have been violated.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-400

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 2
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed* Rule 7.1 Communications Concerning the Availability of Legal Services

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. **Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services.** Rule 7.2 specifically addresses advertising, a subset of communication. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule, XDraft 8 (06/16/10)

INTRODUCTION (continued):

3. Proposed Rule 7.1 entails the basic concept addressed in Model Rule 7.1: the prohibition on a lawyer making false and misleading communications concerning the availability of legal services.
4. However, proposed Rule 7.1 diverges from the Model Rule in a number of ways, including:
 - (i) it retains a definition of “communication” from current rule 1-400, updated to recognize changes occasioned by Internet usage (see paragraph (a));
 - (ii) it expands on the Model Rule’s definition of “false and misleading” communication (see paragraph (c));
 - (iii) it prohibits “any” misrepresentation of fact or law, and not just material misrepresentations (see paragraph (c)(2));
 - (iv) it retains a provision authorizing the Board to formulate and adopt standards designating certain communications that will be presumed violations of the Rule, and retains some of the standards presently found in current rule 1-400 (see paragraph (d)). The Office of the Chief Trial Counsel requested retention of these standards, and the Commission agrees.
5. The Commission recommends retaining for the most part the Comment to Model Rule 7.1, revised to conform to proposed changes to the Rule.
6. *Other Definitions.* The Commission does not recommend carrying forward other definitions from current rule 1-400 (e.g., “solicitation”) or including definitions currently found in the Business & Professions Code (e.g., “advertisement,” found in § 6157(c)). The regulation of advertising is now relatively well-settled and these definitions, originally drafted in the early stages of the regulation of lawyer advertising and solicitation to provide guidance to lawyers on precisely what kinds of communication were regulated, are no longer necessary.

INTRODUCTION:

7. *Retention of Marketing Materials.* Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years, a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement “has become increasingly burdensome, and such records are seldom used for disciplinary purposes,” (ABA Ethics 2000 Reporters Explanation of Changes, Rule 7.2), and so recommends that the retention requirement not be retained. However, the Commission notes that if this recommendation is accepted, Bus. & Prof. Code § 6159.1, which requires the retention of advertisements for a period of one year, should be repealed. Because it is necessary for Rule 7.1 and Bus. & Prof. Code § 6159.1 to be consistent, the potential alternative to a change in the statute would be for Rule 7.1 to require a one-year period of retention, but the Commission does not favor that alternative.
8. *Variations in Other Jurisdictions.* There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape, and to obviate potential constitutional infirmities.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(a) <u>For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:</u> (1) <u>Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or</u> (2) <u>Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or</u> (3) <u>Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or</u>	Title of Rule. The substitution in the title of the phrase "the Availability of Legal Services" for "a Lawyer's Services" is intended to convey that proposed Rule 7.1 regulates only those instances when a lawyer or law firm communicates to prospective clients their availability to provide legal services. Paragraph (a). Paragraph (a) defines the term "communication," and imports paragraph (A) of current rule 1-400 into Rule 7.1, with some revisions. The Commission determined that a definition of communication, updated to address new forms of communication, is warranted in order to enhance client protection by reducing the risk of uncertainty as to what this Rule covers; the Model Rule has no such definition. The listing in subparagraphs (a)(1) – (4) of the kinds of communication covered by the Rule is not exclusive. Subparagraph (a)(1). Is identical to current rule 1-400(A)(1), except that "lawyer" is substituted for "member." Subparagraph (a)(2). The phrase, "domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission," has been substituted for "or other comparable written material" in rule 1-400(A)(2) in order to provide guidance on the kinds of communication, including those commonly found on the Internet, that are regulated under Chapter 7 of the Proposed Rules. Subparagraph (a)(3) is identical to current rule 1-400(A)(3), except that "lawyer" is substituted for "member."

* Proposed Rule, XDraft 8 (06/16/10). Redline/strikeout showing changes to the ABA Model Rule
RRC_-_1-400_[7-1]_-_Compare_-_Rule_&_Comment_Explanaton_-_XDFT3_(7-1-10)KEM-LM-RD-ML

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.</u>	<i>Subparagraph (a)(4).</i> The phrase “electronic transmission, or other writing” has been added to subparagraph (4) to conform its construction to revised subparagraph (2).
		<i>Paragraphs (b) and (c) – Introduction.</i> The two sentences that comprise Model Rule 7.1 have been divided into two separate paragraphs. Because the concepts contained in those two sentences are distinct, the Commission believes that readers of the Rule will more easily grasp their different meanings by placing them in different paragraphs: The first sentence contains the operative prohibition and states generally what kind of conduct is prohibited (making “a false or misleading communication”); the second sentence defines with specificity the prohibited conduct.
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.	<u>(b)</u> A lawyer shall not make a false or misleading communication ~~about the lawyer or the lawyer's services~~ <u>as defined herein.</u>	<u>Paragraph (b).</u> Paragraph (b) largely tracks the first sentence of Model Rule 7.1. However, the phrase “about a lawyer's or the lawyer's services” in Model Rule 7.1 has been replaced by the phrase “as defined herein,” as that limitation is now contained in paragraph (a), which defines the term “communication.”
A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.	<u>(c)</u> A communication is false or misleading if it:	<u>Paragraph (c).</u> Paragraph (c) is largely derived from current rule 1-400(D) and identifies with greater specificity than the second sentence of Model Rule 7.1 when a communication is false or misleading.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(1) Contains any untrue statement; or</u>	<i>Subparagraphs (c)(1), (3) and (4)</i> are identical to subparagraphs (1), (2) and (3) of current rule 1-400(D), respectively.¹ Subparagraphs (c)(1), (3) and (4) add clarity as to precisely what is prohibited by the operative language of proposed Rule 7.1(b).
	<u>(2) Contains a material misrepresentation of fact or law; or</u>	<i>Subparagraph (c)(2)</i> adopts verbatim part of the second sentence to Model Rule 7.1.
	<u>(3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or</u>	<i>Subparagraph (c)(3)</i> is identical to current rule 1-400(D)(2).
	<u>(4) Omits to state any a</u>-fact necessary to make the statements <u>made, considered as a whole in the light of circumstances under which they are made,</u> not materially misleading.	<i>Subparagraph (c)(4)</i> is identical to current rule 1-400(D)(3). It is similar in concept to the second sentence of Model Rule 7.1.

¹ The concepts found in subsections (4), (5) and (6) of rule 1-400(D) have been moved to other rules in the Chapter 7 series of proposed Rules. The concepts now found in rule 1-400(D)(4) and (5) may now be found in proposed Rules 7.3(c) and 7.3(b)(2), respectively. See proposed Rule 7.3 for a further discussion of these concepts. The language formerly appearing in rule 1-400(D)(6) may now be found in proposed Rule 7.4(d).

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule</u>[*] Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.</u>	Paragraph (d) retains, with minor revisions, current rule 1-400(E), which authorizes the Board of Governors of the State Bar of California to promulgate standards that may be used as presumptions affecting which party has the burden of proof in disciplinary proceedings. The word "shall" in current rule 1-400(E) has been changed to "may," as the Board's authority to promulgate any standards beyond those already extant is discretionary.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.	[1] This Rule governs all communications about ~~a lawyer's~~<u>the availability of legal</u> services <u>from lawyers and law firms</u>, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. <u>The requirement of truthfulness in a communication under this Rule includes representations about the law.</u>	Comment [1] is based on Model Rule 7.1, cmt. [1]. Similar to the title, comment [1] emphasizes that proposed Rule 7.1 governs all communications "about the availability of legal services from lawyers and law firms." The Commission added the last sentence of the comment to stress that the Rule also governs representations about the law in covered communications. See Explanation of Changes, paragraph (c)(2).
[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.	[2] ~~Truthful~~<u>This Rule prohibits truthful</u> statements that are misleading~~are also prohibited by this Rule.~~ A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.	Comment [2] is based on Model Rule 7.1, cmt. [2]. The changes to the first sentence are made to conform to California Rule style. See, e.g., Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996). No change in substance is intended. The second and third sentences of comment [2] are identical to the second and third sentences of Model Rule 7.1, cmt. [2].
[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference	[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference	Comment [3] is nearly identical to Model Rule 7.1, cmt. [3]. The only change to the Model Rule comment entails revising the last sentence as follows: "The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client." The foregoing revision is intended to address the concern that the language in

* Proposed Rule, Draft 7 (5/30/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.	to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may ~~preclude a finding that a statement is likely to create~~<u>avoid creating</u> unjustified expectations or otherwise ~~mislead~~<u>misleading</u> a prospective client.	comment [3] might be construed to suggest that a disclaimer is a panacea for any misstatement or misrepresentation, intended or otherwise.
	<u>[3A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.</u>	Comment [5] has no counterpart in Model Rule 7.1. Comment [5] is intended to avoid the misapprehension that the list of communications in subparagraphs (a)(1) – (4) was intended to be exclusive, and gives an example of a type of communication not expressly listed (metatag) that nevertheless would be regulated under the Rule.
[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.	[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law.	Comment [6] is identical to Model Rule 7.1, cmt. [4], which provides a cross-reference to Rule 8.4(e). Placing the prohibition against such statements in Rule 8.4(e) emphasizes that the prohibition is not limited to statements made in connection with the marketing of legal services. See ABA Ethics 2000 Reporter's Explanation of Changes.
	<u>Standards</u> <u>Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:</u>	Pursuant to proposed Rule 7.1(d), the Board of Governors has authority to “formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5.” This provision is a carryover from current rule 1-400(E). The Commission recommends that current standards (1), (2), (13),

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		(14), (15) and (16) be retained in paragraph (e) as standards (1), (2), (3), (4), (5) and (6), respectively. The Commission has made this recommendation on the advice of the Office of Chief Trial Counsel of the State Bar of California ("OCTC") that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing these current standards, the Commission concluded that no such dilution of the effect of the Rule would be appropriate, and it therefore recommends their retention. In addition, on the recommendation of OCTC, several of the current standards have been deleted. They are current standards (3), (4), (7) and (9). OCTC's position is that they simply set forth conduct which is untruthful, deceptive or misleading in and of itself, and that a violation of the Rule can still be shown because the conduct violates proscriptions set out in Rule 7.1(b), 7.3(a) or 7.3(b). Further, the concepts in several of the current standards have been retained either as part of another rule or as part of the Discussion to another rule. They are: (i) current standard (5), which has been retained as proposed Rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c); (ii) current standard (6), which has been retained, with modifications, as proposed Rule 7.5(a); (iii) current standard (8), which has been retained largely intact as proposed Rule 7.5(d) and the second sentence of proposed Rule 7.5, cmt. [2]; (iv) current standard (10), which has been retained, with

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		slight modifications, as proposed Rule 7.2(b)(2); and (v) current standard (12), which has been retained as proposed Rule 7.2(c), with modifications to conform it to the language of Model Rule 7.2(c). Finally, note that standard (11) previously had been repealed, effective June 1, 1997. Its operative language was inserted as current rule 1-400(D)(6), and that language may now be found in proposed Rule 7.4(d).
	(1) <u>A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.</u>	Current rule 1-400, Standard (1).
	(2) <u>A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."</u>	Current rule 1-400, Standard (2), with "lawyer" substituted for "member."
	(3) <u>A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.</u>	Current rule 1-400, Standard (13).

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	(4) <u>A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.</u>	Current rule 1-400, Standard (14).
	(5) <u>A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.</u>	Current rule 1-400, Standard (15), with "lawyer" substituted for "member."
	(6) <u>An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in</u>	Current rule 1-400, Standard (16).

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.	

Rule 7.1 Communications Concerning the Availability of Legal Services

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) For purposes of Rules 7.1 through 7.5, “communication” means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
 - (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
 - (1) Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

- [1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

~~[4] —As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.~~

[53A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's **intentionally** misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[64] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.
- (4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b)

that the person is not a member of the State Bar of California, if that is the case.

- (6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule ~~1-400 Advertising and Solicitation~~ 7.1 Communications Concerning the Availability of Legal Services

(Comparison of the Current Proposed Rule to Current California Rule)

- (Aa) For purposes of ~~this rule~~ Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a ~~member~~ lawyer concerning the availability for professional employment of a ~~member~~ lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such ~~member~~ lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other ~~comparable written material~~ writing describing such ~~member, lawyer or~~ law firm, ~~or lawyers~~; or
 - (3) Any advertisement (regardless of medium) of such ~~member~~ lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a ~~member~~ lawyer or law firm directed to any person or entity.
- (Bb) ~~For purposes of this rule, A lawyer shall not make a "solicitation" means any false or misleading communication: as defined herein.~~
- (1) ~~Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~
- (2) Which is:
- (a) ~~delivered in person or by telephone, or~~
 - (b) ~~directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~
- (G) ~~A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~
- (Dc) A communication is false or ~~a solicitation (as defined herein) shall not~~ misleading if it:
- (1) ~~Contain~~ Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or
- (23) ~~Contain~~ Contains any matter, or ~~present~~ presents or ~~arrange~~ arranges any matter in a manner or format ~~which~~ that is false, deceptive, or ~~which tends to confuse~~ that confuses, ~~deceive~~ deceives, or ~~mislead~~ misleads the public; or

~~(34)~~ ~~Omit~~Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading ~~to the public; or.~~

~~(4)~~ ~~Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or~~

~~(5)~~ ~~Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.~~

~~(6)~~ ~~State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.~~

~~(E)~~ (D) The Board of Governors of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400~~Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

~~(F)~~ ~~A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or~~

~~recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.~~

COMMENT

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying

language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[3A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards:

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" ~~which~~that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" ~~which~~that contains testimonials about or endorsements of a ~~member~~lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

~~(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~

~~(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.~~

- (8) ~~A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~
- (9) ~~A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~
- (10) ~~A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.~~
- (11) ~~(Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~
- (12) ~~A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~
- (13) A "communication" ~~which~~that contains a dramatization unless such communication contains a disclaimer ~~which~~that states "this is a dramatization" or words of similar import.
- (14) A "communication" ~~which~~that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (15) A "communication" ~~which~~that states or implies that a ~~member~~lawyer is able to provide legal services in a language other than English unless the ~~member~~lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.
- (16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain ~~which~~that sets forth a specific fee or range of fees for a particular service where, in fact, the ~~member~~lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the ~~member~~lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 7.1 Communications Concerning the Availability of Legal Services

(Commission's Proposed Rule – Clean Version)

- (a) For purposes of Rules 7.1 through 7.5, “communication” means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
 - (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
 - (1) Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or

(3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or

(4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.

- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead

a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[3A] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

(1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.

(4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial

publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

**Rule 7.1. Communications Concerning the Availability of Legal Services.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 1
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.1 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC supports this rule, but finds many of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the first sentence of comment [2]. We believe Comment [4] should be in the rule. We would strike the second sentence of Comment [5]. OCTC supports the Standards attached to this rule.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required. The Commission agrees in principle that the definition of "writing" should be in a rule, but it is found in proposed Rule 1.0.1(n). The Comment has been deleted. The Commission disagrees with the suggested deletion of the second sentence, which concerns the misleading use of metatag technology. The Commission believes that it provides an important example of the use of technology to mislead the public. No response required.
3	Orange County Bar Association ("OCBA")	M	Yes	Comments [2] and [3]	Comments [2] and [3] should be re-numbered to [2] and [2](a) in order to provide internal	The Commission disagrees with the suggested renumbering, which would diverge from the Model

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 7.1. Communications Concerning the Availability of Legal Services.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					consistency, as Comment [3] is really an explanation of Comment [2]. The OCBA also recommends that more examples of truthful statements that are misleading be provided, as that term by its very nature is confusing. The portion of Comment [3] which states, “[t]he inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client” is vague and ambiguous and could be perceived as a safety net and permission to misstate all manner of things to a prospective client, provided the disclaimer is given. The OCBA believes the problem may be solved by changing the language to the following (or similar language): “The inclusion of an appropriate disclaimer or qualifying language <i>may be used in an attempt to</i> avoid creating unjustified expectations or otherwise misleading a prospective client, <i>but such inclusion shall not be determinative on the issue of whether the Communication, as a whole, is misleading.</i>” Comment [5] In Comment [5], the word “intentionally” should be removed as redundant, internally inconsistent, and confusing. It might be read as requiring an intent to mislead whereas the	Rule numbering. The Commission also does not agree that the concept of a “truthful statements that are misleading” is “confusing” or that more examples are necessary. The Commission does not agree that any further change to the identified sentence is necessary to convey the idea that the use of a disclaimer is not a panacea for a misstatement or misrepresentation, intended or otherwise. The Commission agrees with the commenter’s observation and has removed the word “intentionally.”

Rule 7.1. Communications Concerning the Availability of Legal Services. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					rules have been construed to require only that the act be intentional. The OCBA further recommends that the “Standards” be made part of the new rule itself so that the difficulty in navigating Rule 1-400 that now exists can and will be avoided. The reasons for including a separate “Standards” section in Rule 1-400 simply do not exist in this re-written rule.	The Commission disagrees that the Standards that have been retained in this Rule should be made a part of the Rule. The Commission has made its recommendation to retain the Standards on the advice of the Office of Chief Trial Counsel of the State Bar of California (“OCTC”) that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing the current Standards, the Commission concluded that diluting the effect of the Standards would not be appropriate, and it therefore recommends their retention.
4	San Diego County Bar Association	M	Yes	(c)(3)	Revise (c)(3) as follows: “(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, or deceptive, or which <u>tends to</u> confuses, deceives, or misleads the public.” Rationale: Would return (c)(3) to language in current rule 1-400(D)(2); removing “tends to” would “heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide.”	The Commission did not make the change. The phrase “tends to” is imprecise. Either the ad confuses, deceives or misleads the public or it does not. Retaining the proposed language creates an objective standard.

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 7.1: Communications Concerning a Lawyer's Services

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: Rule 1-400 provides, in pertinent part, as follows:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity. . . .

(C) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. . . .

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The

standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. . . . Such standards . . . shall be effective and binding on all members.

The Standards adopted by the State Bar's Board of Governors pursuant to rule 1-400(E) are long and detailed. For example, Standards 1 and 2 provide that the following forms of communication "are presumed to be in violation of rule 1-400":

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

See also Business & Professions Code §§6157-6159.2 (generally prohibiting "any false, misleading, or deceptive statement" in a lawyer advertisement; imposing detailed restrictions on advertisements containing dramatizations, impersonations, and spokespersons; and prohibiting various specific claims and techniques); California Labor Code §139.45 ("the Industrial Medical Council and the administrative director shall take particular care to preclude any advertisements with respect to industrial injuries or illnesses that are false or mislead the public with respect to workers' compensation. In promulgating rules with respect to advertising, the State Bar . . . shall also take particular care

to achieve the same goal"); and California Labor Code §5432 (requiring every advertisement soliciting workers' compensation clients to state conspicuously: "Making a false or fraudulent workers' compensation claim is a felony subject to up to 5 years in prison or a fine of up to \$50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine").

Colorado: Colorado retains the pre-2002 version of ABA Model Rule 7.1(a) and adds the following paragraphs:

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

District of Columbia: Rule 7.1(a) adds that a communication is false or misleading if it “[c]ontains an assertion about the lawyer or the lawyer’s services that cannot be substantiated.”

Florida: Florida’s lawyer advertising rules are more comprehensive and detailed than the ABA Model Rules of Professional Conduct or those in any other American jurisdiction. They are often revised and defy easy summary or comparison with the ABA rules. They address in depth the content of advertisements, electronic and computer advertising, referral services, and filing requirements. Some of the more noteworthy Florida advertising and solicitation provisions appear in Selected State Variations under other rules in Article 7.

Georgia generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds special subparagraphs requiring that all advertisements mentioning contingent fees or stating “no fee unless you win or collect” or any similar phrase must also conspicuously present a disclaimer stating: “Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.”

Iowa has many rules on lawyer advertising. Its version of Rule 7.1 adds the following:

(b) A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer’s legal services.

Louisiana: In the rules effective October 1, 2009, Rule 7.1(a) identifies a non-exclusive list of advertising methods that lawyers may use. Among other variations, Rule 7.1(c) explicitly exempts from the rules any advertising that is not “motivated by pecuniary gain.”

Mississippi: Rule 7.5(a) requires that a copy or recording of any lawyer advertisement to be published must be submitted to the Office of the General Counsel of the Mississippi Bar “prior to its first dissemination” unless exempted under an extensive list in Rule 7.5(b). If a lawyer submits a proposed advertisement 45 days before its dissemination, the lawyer may request an “advisory opinion.” If the Office of the General Counsel does not respond within 45 days, the advertisement will be “deemed approved,” but if the Office of General Counsel determines within the 45-day period that there is “reasonable doubt” that the advertisement complies with the rules, it may extend the 45-day period.

Missouri: Rule 7.1 adds that a communication is false or misleading if it:

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation. . . .

Nevada: Among many other variations, Rule 7.1(d) adds that a communication is false or misleading if it "contains a testimonial or endorsement which violates any portion of this Rule."

In addition, Rule 1.4(c) requires every lawyer or law firm to "have available" a "Lawyer's Biographical Data Form" that must "be provided upon request of the State Bar or a client or prospective client. . . ." Rule 1.4(c) also specifies information that must be included in the form and included

with every written advertisement, and it specifies other detailed information that must be provided to a client or prospective client upon request (such as a "good faith estimate of the number of jury trials tried to a verdict by the lawyer to the present date, identifying the court or courts"). These requirements are also reinforced in Rule 1.18(g) (relating to prospective clients).

New Jersey: Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer, the lawyer's services, or "any matter in which the lawyer has or seeks professional involvement." A communication is false or misleading under New Jersey Rule 7.1(a) if (among other things) it "(2) is likely to create an unjustified expectation about results the lawyer can achieve," or "(3) compares the lawyer's service with other lawyers' services" or "(4) relates to legal fees other than" a specified list of permitted statements, including "the fee for an initial consultation," "fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or deceptive," and "specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter. . . ." Rule 7.1(b) makes it "unethical" for a lawyer to use an advertisement "known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee. . . ."

However, in *In re Opinion 39 of the Committee on Attorney Advertising*, 197 N.J. 66, 961 A.2d 722 (2008), the New Jersey Supreme Court vacated an opinion by its Committee on Attorney Advertising that had prohibited lawyers from using advertisements describing attorneys as “Super Lawyers,” “Best Lawyers in America,” or similar comparative titles, and the court referred the matter jointly to the Advisory Committee on Attorney Advertising, the Advisory Committee on Professional Ethics, and the Professional Responsibility Rules Committee for “expedited” review and modification of RPC 7.1(a)(2) and (3). When we went to press in September of 2009, the review was still in progress.

New York: New York adds the following definitions to Rule 1.0 (terminology):

(a) “Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(c) “Computer-accessed communication” means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

Rule 7.1 varies considerably from the Model Rule and contains many unique prohibitions, requirements, and comments. For example, Rule 7.1(b) lists numerous items (e.g., “legal and nonlegal education,” “foreign language fluency,” “fees for initial consultation,” and “bona fide professional ratings”) that may be included in an advertisement. Rule 7.1(c) forbids endorsements by current clients; paid endorsements without indicating the fact of compensation; portrayal of a judge; use of a “fictitious” law firm or firm name; use of actors or depictions of fictionalized events without disclosure; “techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence”; advertisements “made to resemble legal documents”; and use of “a nickname, moniker, motto, or trade name that implies an ability to obtain results in a matter.” Rule 7.1(e) and (f) mandate various disclosures and disclaimers.

Several provisions of Rule 7.1(c) were held unconstitutional in *Alexander v. Catalano*, 2007 WL 2120024 (N.D.N.Y. 2007), and the district court enjoined the enforcement of those provisions. The district court’s decision was appealed to the Second Circuit, but the appeal was still pending when we went to press in September 2009. (Although New York adopted new rules of professional conduct after the district court’s ruling, the amendments did not alter the provisions that are the subject of the appeal.)

North Carolina retains the subparagraphs that were deleted from the pre-2002 version of ABA Model Rule 7.1. North Carolina also adds a Rule 7.1(b) providing that a

“dramatization depicting a fictional situation is misleading unless it . . . contains a conspicuous written or oral statement at the beginning and end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.”

Ohio: Rule 7.1 also prohibits a lawyer from making or using a “nonverifiable” communication about the lawyer or the lawyer’s services.

Oregon: Rule 7.1(a) contains a list of 12 specific items that may not appear in advertisements or may only appear under particular circumstances. Actors may be used if the communication “clearly and conspicuously discloses” that status.

Pennsylvania: Rule 7.1 tracks ABA Model Rule 7.1 verbatim — but Pennsylvania Rule 7.2 contains numerous restrictions designed to prevent false or misleading communications. For example, Rule 7.2 prohibits endorsements by any celebrity or public figure; prohibits lawyers from stating or implying that they are associated together in a law firm if that is not the case; prohibits any portrayal of a client by a non-client; and prohibits the use of “pictures, or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.” An unusual Rule 7.2(k) provides that “[i]f a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers.”

South Carolina: Rule 7.2(f) prohibits lawyer advertisements that are “merely self-laudatory” or that “describe or characterize the quality of the lawyer’s services;” but the provision does not apply to “information furnished to a prospective client at that person’s request or to information supplied to existing clients.”

Virginia has divided the substance of ABA Model Rule 7.1 into two separate rules. Rule 7.1 applies to all “public communication,” defined as “all communication other than ‘in-person’ communication,” while Rule 7.2 applies only to “advertising.” Rule 7.1 generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds that a communication is improper if it “states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits.” Rule 7.2 governs various specific types and styles of lawyer advertising. For example, Rule 7.2(a) provides that an advertisement violates Rule 7.1 if it “(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement,” or “(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization,” or:

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. . . .

Proposed Rule 7.2 [RPC 1-400]

“Advertising”

(XDraft #8, 10/1/09)

Summary: Proposed Rule 7.2 is the second of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.2 specifically addresses advertising, a subset of communication, that typically involves communications directed at the general public.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

Lawyers who advertise in various media and legal advertising consultants participated in the deliberations concerning this Rule.

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.2* Advertising

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. **Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public.** Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.2, XDraft 8 (10/1/09).

INTRODUCTION:

3. Proposed Rule 7.2 includes the basic concepts contained in Model Rule 7.2: a provision expressly sanctioning the use of advertising by lawyers, (see paragraph (a)); a provision identifying exceptions to the general prohibition on paying a person to recommend the lawyer's services, (see paragraph (b)); and a provision requiring identifying information in any legal advertisement to facilitate the Bar's enforcement of the rules, (see paragraph (c)).
4. Proposed Rule 7.2 diverges from the Model Rule by broadening the kinds of media in which advertising is permitted (paragraph (a)); addressing specifics of the California statutes or regulations (paragraph (b)(2)); and including provisions currently found in the California Rules (paragraph (b)(5)).
5. The Model Rule Comment has been revised to remove purely expository language, (e.g., Comment [2]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Variation in Other Jurisdictions.* There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape, and to obviate potential constitutional infirmities.

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.	(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through <u>any</u> written, recorded or electronic ~~communication~~ <u>media</u>, including public media.	<u>Paragraph (a)</u> is based on Model Rule 7.2(a). Model Rule 7.2(a) was revised by the ABA Ethics 2000 Commission through the deletion of references to specific types of public media (e.g., telephone directory, newspaper) and the addition of a reference to "electronic communications". The Commission recommends substituting "media" for Model Rule word, "communication." The reference to "electronic" media has been added in recognition that much of modern advertising is accomplished through such means. Specific examples of the kinds of communications contemplated by paragraph (a), including types of electronic communications, have been added to Comment [2], with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may	(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may	<u>Paragraph (b)</u> is based on Model Rule 7.2(b) and provides five (as opposed to the Model Rule's four) exceptions to the general prohibition against a lawyer giving anything of value to a person to recommend the lawyer's services. Paragraph (b) is intended to strike a balance between loyalty to the client, which could be adversely affected by the payment of referral fees, and a lawyer's need to pay for the legitimate costs of marketing the lawyer's legal services.

* Proposed Rule 7.2, XDraft 8 (10/1/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;	(1) pay the reasonable costs of advertisements or communications permitted by this Rule;	<i>Subparagraph (b)(1)</i> is identical to Model Rule 7.2(b)(1) and permits payment of the "reasonable costs" of advertisements. Comment [5] gives examples of kinds of costs that may be expended. A similar exception may be found in current rule 1-320, Discussion.
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;	(2) pay the usual charges of a legal ~~service~~<u>services</u> plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority~~<u>established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;</u>	<i>Subparagraph (b)(2)</i> is based on Model Rule 7.2(b)(2), with modifications to conform the Rule to the current regulatory landscape in California. See Bus. & Prof. Code § 6155 and associated regulations. The phrase "legal services" has been added to modify the word "plan" for clarity. The phrase "not-for-profit or" has been deleted because in California, a "qualified lawyer referral service" may be "not-for-profit" or "for-profit." The clause "established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California" has been substituted to identify the specific regulatory mechanism in California.
(3) pay for a law practice in accordance with Rule 1.17; and	(3) pay for a law practice in accordance with Rule 1.17; and	<i>Subparagraph (b)(3)</i> is identical to Model Rule 7.2(b)(3).

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.	(4) refer clients to another lawyer or ~~a nonlawyer~~ ~~professional~~ <u>non-lawyer</u> pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.	<i>Subparagraph (b)(4)</i> is nearly identical to Model Rule 7.2(b)(4), except that the word “professional” has been deleted, with the intention that subparagraph (b)(4)'s exception for reciprocal referral agreements should apply not only to other lawyers and non-lawyer “professionals,” but also to arrangements with any non-lawyer. The two qualifications to the exception in subparagraph (4)(i) and (ii) – that the reciprocal referral arrangement is non-exclusive and that the client is informed of the arrangement – remain the same as in the Model Rule.
	<u>(5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.</u>	<i>Subparagraph (b)(5)</i> has no counterpart in Model Rule 7.2. It is a carryover from the current California Rules and incorporates the concepts found in current rules 1-320(B) and 2-200(B). These latter rules address fee division or sharing with lawyers or non-lawyers. The Commission determined that this exception to the conditional prohibition on dividing fees with lawyers and the general prohibition on sharing fees with non-lawyers should be retained as a reasonable compromise between maintaining loyalty to the client and making a reasonable payment for marketing services provided the lawyer.

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.	(c) Any communication made pursuant to this ~~rule~~Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.	Paragraph (c) is identical to paragraph (c) of Model Rule 7.2. Model Rule 7.2(c) itself was revised by the ABA Ethics 2000 Commission through the addition of the phrase “law firm” and the requirement that the advertisement include the “office address” of the lawyer or law firm responsible for the advertisement. A lawyer’s name and office address should be sufficient to enable the State Bar disciplinary authorities to take action necessary to protect the public from false or misleading advertising. The requirement that the “office address” of the responsible lawyer or law firm be included in the advertisement was added because lawyers frequently use trade names and advertise in areas in which they do not maintain offices (e.g., providing an 800 number in local telephone directories throughout a state.) Notwithstanding the burden this requirement may place on lawyers or law firms that engage in cooperative advertising, it was believed that this information was necessary not only to enable the State Bar disciplinary authorities to track down those responsible for an advertisement, but also to provide prospective clients with information about where the lawyer or law firm is located, which may be an important factor in the prospective client’s decision to retain counsel. Comment [9], which has no counterpart in the Model Rule, specifically provides that paragraph (c) applies to lawyers who engage in group advertising. See Explanation of Changes, Comment [9].

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.	[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through ~~organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the~~ The public's need to know about legal services ~~can be fulfilled in part through advertising. This need~~ is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. ~~The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless~~ <u>Lawyers must be aware, however, that</u> advertising by ~~lawyers~~ <u>them</u> entails the risk of practices that are misleading or overreaching.	The Commission recommends that Model Rule 7.2, cmt. [1], be revised to remove the Model Rule's expository language, which provides no guidance beyond that provided by the language the Commission recommends.
[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.	[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.	Proposed Comment [1] is identical to Model Rule 7.2, cmt. [2].

* Proposed Rule 7.2, Draft 8 (10/1/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.	~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.~~ <u>This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.</u>	Comment [3], addresses the same general subject matter as Comment [3] to Model Rule 7.2, but has been significantly truncated to delete the purely expository language in the Model Rule. Proposed comment [2] is limited to providing specific examples of electronic communications that are permitted, including the Internet, with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.	[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as ~~notice to members of a class in~~<u>court-approved</u> class action ~~litigation~~<u>notices</u>.	Comment [4] is identical to Model Rule 7.2, cmt. [4], except that the Model Rule's reference to class action notices has been revised to clarify that only court-approved notices fall outside this Rule.
<i>Paying Others to Recommend a Lawyer</i> [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.	<i>Paying Others to Recommend a Lawyer</i> [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may <u>also</u> compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.	Comment [5] is based on Model Rule 7.2, cmt. [5], which provides examples of advertising and communications for which payment is permitted under subparagraph (b)(1). Comment [5] is nearly identical to the Model Rule comment except that the word "also" has been added to emphasize that not only may lawyers engage the services of advertisers, but may also retain intermediaries to help them obtain those services. The Commission recommends not carrying forward current rule 1-320(C), because the substance of that provision is already contained in paragraph (b) and this comment. Current rule 1-320(C) provides: (C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective	~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective~~	Comment [6] addresses the same substantive concepts as does Model Rule 7.2, cmt. [6], which elaborates on the exception contained in subparagraph (b)(2). However, the language of Model Rule 7.2, cmt. [6] has been replaced with a specific reference to the applicable California statutes that regulate lawyer referral services in this state.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)	~~clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)~~ Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).	

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.	[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See ~~Rule~~Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.	Comment [7] is identical to Model Rule 7.2, cmt. [7], except for the addition of a reference to proposed Rule 5.4. Among other things, Rule 5.4 prohibits a lawyer sharing fees or entering into partnerships with non-lawyers, concerns that are evident in the regulatory framework of lawyer referral services.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.	[8] ~~A~~Paragraph (b)(4) permits a lawyer ~~also may agree to refer clients~~make referrals to another ~~lawyer or a nonlawyer professional~~, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See ~~Rules 2.1 and Rule 5.4 (c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the A~~ lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients ~~to the other lawyer or nonlawyer professional~~customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by ~~such~~ arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within ~~firms~~a law firm comprised of multiple entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.	Comment [8] is based on Model Rule 7.2, cmt. [8]. It elaborates on the exception to payment for referrals in subparagraph (b)(4), which permits reciprocal referral arrangements with lawyers and non-lawyers so long as those arrangements are not exclusive and the client or customer is informed of the arrangement. A cross-reference to proposed Rule 5.4(c), which is the counterpart to Model Rule 5.4(c), has been included to emphasize that a lawyer may not permit the referring person to interfere with the lawyer's independent judgment.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<i>Required information in advertisements</i> [9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code section 6155(h). See also Business & Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.	Comment [9] has no counterpart in Model Rule 7.2. The two sentences of Comment [8] emphasize that paragraph (c)'s requirement of including the name of a lawyer or law firm and the lawyer's or law firm's office address in any advertisement also applies to a group of lawyers that engages in cooperative advertising. Comment [8] includes a reference to California Business & Professions Code § 6155(h), which relates to lawyers jointly advertising their services. Comment [9] also includes a cross-reference to California Business & Professions Code § 6159.1, concerning the requirement to retain any advertisement for a period of one year. Notwithstanding the inclusion of this cross-reference, the Commission has followed the ABA in recommending the removal of the requirement to retain for a period of two years a copy of "any communication made by written or electronic media," currently found in CRPC 1-400(F). The Commission has also voted to recommend that the State Bar seek the repeal of section 6159.1 and, if the Legislature agrees, the cross-reference to section 6159.1 will be removed. See proposed Rule 7.1, Introduction.

Rule 7.2 Advertising
(Commission's Proposed Rule – Clean Version)

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic media, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

- [1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.
- [2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly

represented; and other information that might invite the attention of those seeking legal assistance.

- [3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.
- [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

- [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.
- [6] Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business and Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar

of California's minimum standards for a lawyer referral service in California. See Business and Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).

- [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
- [8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 5.4(c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple

entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

- [9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business and Professions Code section 6155(h). See also Business and Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 7.2. Advertising
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Berman, Myles L.	M	No	7.2(c)	I am opposed to the language that requires an office address. While it is extremely important for the responsible advertising attorney to be identified in any advertisement, this goal can be accomplished by requiring the naming of one lawyer or law firm with a telephone number instead of an address who is responsible for the ads content. Mass advertising in print media such as newspapers is read by millions of California consumers in hundreds of different cities and numerous counties. The same is true for radio and TV ads. Print advertising space and radio/TV ads are often times limited in space and time. In addition, many law practices have more than one location. Once a potential contacts an attorney, the client will then automatically know the exact office location of the attorney called. Clients often times are looking for good quality attorneys who advertise. Requiring an office address to be included in legal ads serves no legitimate consumer protection. I have not heard of any case where a client was harmed because the client did not know the address of the attorney or attorneys hired.	The suggested change was not made. The requirement that the "office address" of the responsible lawyer or law firm be included in the advertisement is a verbatim adoption of the Model Rule language. It was added because lawyers frequently use trade names and advertise in areas in which they do not maintain offices (e.g., providing an 800 number in local telephone directories throughout a state.) The Commission determined that this information was necessary not only to enable the State Bar disciplinary authorities to track down those responsible for an advertisement, but also to provide prospective clients with information about where the lawyer or law firm is located, which may be an important factor in the prospective client's decision to retain counsel. As noted in other jurisdictions, "[t]he absence of a street address in a widely disseminated advertisement could be misleading by suggesting a physical proximity to the recipient that does not in fact exist and by suggesting the ability to serve in jurisdictions in which the advertising firm or lawyer is not qualified to practice." See, e.g., N.Y. State Ethics Op. 756 (3/13/02), available at: http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=18770&TEMPLATE=/CM/ContentDisplay.cfm [last visited 5/22/10]

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 7.2. Advertising
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.2 and the Comments to the Rule.	No response necessary.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC supports this rule, but many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. It supports Comments [6], [9], and the first two sentences of Comment [7] and the last sentence of Comment [7].	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
4	San Diego Co. Bar Ass'n	M	Yes	Cmt. [6]	Requests that the ABA Model Rule definitions in Comment [6] for "legal services plan" and "lawyer referral service" be retained. The proposed retention would result in keeping the second, third and fourth sentences of Comment [6] to the ABA Model Rule 7.2.	The Commission did not make the change. Comment [6] was revised to reflect the specific regulatory framework governing lawyer referral services in California. The definitions are not accurate within the California framework. See Bus. & Prof. Code § 6155.

Rule 7.2: Advertising

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 omits Rule 7.2(b)(4) (governing reciprocal referral agreements), and adds Rule 7.2(d), which sets forth detailed requirements for all advertisements containing information about legal fees. Arizona also adds Rule 7.2(e), which provides:

(e) . . . If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.

Finally, Arizona adds Rule 7.2(f), which requires that certain information be “clear and conspicuous.”

Arkansas permits actors to be used in advertisements so long as they are identified by name and relationship to the advertising lawyer. Dramatizations are forbidden. Clients and former clients “shall not be used in any manner whatsoever in advertisements.”

California: Rule 1-320 provides, in pertinent part, as follows:

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that . . .

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California’s Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member’s law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member’s law firm by a client. A member’s offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member’s law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any

promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Rule 1-400(F) provides:

(D) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

The Standards adopted by the State Bar pursuant to Rule 1-400 provide that a communication is “presumed to be in violation of rule 1-400” if it “implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.” Rule 1-600(B) provides that the State Bar’s Board of Governors “shall formulate and adopt Minimum Standards for Lawyer Referral Services, which . . . shall be binding on members.” Those standards are found after California Business & Professions Code §6155, which governs lawyer referral services.

Also relevant to ABA Model Rule 7.2 are Business & Professions Code §6129 (prohibiting lawyers from purchasing claims) and §§ 6157.1-6159.2 (governing lawyer advertising, especially in the electronic media).

Connecticut adds many paragraphs with no counterpart in ABA Model Rule 7.2 but omits ABA Model Rule 7.2(b)(4) (regarding reciprocal referral agreements).

District of Columbia omits ABA Model Rule 7.2, but D.C. Rule 7.1(c) provides that a lawyer “shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services . . . as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.”

Florida: Rule 4-7.1 permits attorneys to advertise through “computer-accessed communications” and through “recorded messages the public may access by dialing a telephone number.” Rule 4-7.4(b)(2) provides that “[e]very written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.” Rule 4-7.10 sets forth elaborate requirements for lawyer referral services. In addition, Chapter 8 of the Rules Regulating the Florida Bar sets forth extensive requirements for the operation of lawyer referral services by local bar associations, and no local bar association may operate a referral service absent express approval from the state bar.

Georgia moves Rule 7.2(b) and its Comment to Georgia Rule 7.3(c), and modifies and expands the exceptions in ABA Model Rule 7.2(c) regarding lawyer referral services.

Iowa: Rule 7.2 does not govern communications between lawyers, but prohibits any “visual display” on television unless the same display would be “allowed in print”; prohibits “background sound” in electronic media; and expressly permits lawyers to communicate 14 items to the public provided if it is done “in a dignified style.” Rule 7.2 also imposes extensive limitations on advertising fee information; and requires any communication advising the institution of litigation to “disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.” In addition, borrowing from the ABA Model Code of Professional Responsibility, Iowa has a detailed rule (Rule 7.7) called “Recommendation of Professional Employment” and another (Rule 7.8) on “Suggestion of Need of Legal Services.”

Louisiana: In the rules effective October 1, 2009, Louisiana Rule 7.2 is considerably more detailed than Model Rule 7.2. Among other variations, 7.2(c) prohibits any advertising that could be “false, misleading or deceptive” and includes a lengthy list of advertising methods that would violate the rule. The rule also contains many other restrictions, such as provisions related to how long a lawyer must honor an advertised fee and an unusual provision concerning the use of dual language advertisements. Finally, subject to some exceptions in Rule 7.8, Rule 7.7 requires

lawyers to file their advertising with the Louisiana State Bar Association, which is charged with ensuring that advertising complies with the advertising rules.

Maine: In the rules effective August 1, 2009, Maine Rule 7.2-A offers a variety of aspirational goals for lawyer advertising, including that lawyers use “dignified” advertisements and avoid “crass” marketing that “undermines the serious purpose of legal services and the judicial system.”

Maryland: Among other variations, Maryland adds Rule 7.2(e), which provides that “[a]n advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses,” and Rule 7.2(f), which requires lawyers, including those participating in an advertising group or lawyer referral service, to be “personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5.”

Massachusetts: Rule 7.2(a) adds that lawyers may advertise in “an electronic or computer accessed directory.” Comment 3A provides, in part, as follows:

The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. . . .

Michigan: Rule 6.3(b) permits a lawyer to “participate in and pay the usual charges of a not-for-profit lawyer referral service that recommends legal services to the public” only if the referral service meets detailed requirements, including that the service:

(3) is open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who:

(i) meet reasonable and objective requirements of experience . . . ;

(ii) pay reasonable registration and membership fees not to exceed an amount established by the State Bar to encourage widespread lawyer participation; and

(iii) maintain a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the State Bar.

(4) ensures that the combined fees and expenses charged a prospective client by a qualified service and a lawyer to whom the client is referred not exceed the total charges the client would have incurred had no referral service been involved. . . .

Under Rule 6.3(d), the State Bar or “any aggrieved person” may seek an injunction against violations of Rule 6.3(b), and if the injunction is granted, the petitioner shall be entitled to reasonable costs and attorney fees.

Missouri: Rule 7.2(a) adds permission to advertise “through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.” Missouri omits ABA Model Rule 7.2(b)(4). Rule 7.2(d) provides that a lawyer may not “pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.” In addition, Rules 7.2(f) and (g) require all advertisements (except targeted letters and emails and advertisements limited to specified basic information such as name, address, and fields of practice) to state the following: “The choice of a lawyer is an important decision and should not be based solely upon advertisements.”

Nevada: Rule 7.2(b) provides, in part, as follows:

If a person appears as a lawyer in an advertisement for legal services . . . such person must be a member of the State Bar of Nevada . . . and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm that is advertising. If a person appears in an advertisement as an employee of a lawyer or law firm, such person must be an actual employee of the lawyer or law firm whose services are advertised unless the advertisement discloses that such person is an actor. If an actor appears in any other role not prohibited by these Rules, the advertisement must disclose that such person is an actor.

Among other variations, Nevada Rule 7.2A requires lawyers to file all advertisements with the State Bar “within 15 days of first dissemination. . . .” Rule 7.2B(a) commands the State Bar to create “Standing Lawyer Advertising Advisory Committees . . . to review filings submitted under Rule 7.2A and to respond to written requests from an advertising lawyer or law firm voluntarily seeking an advance opinion regarding that lawyer’s compliance with the advertising rules.” Rule 7.2B(c) permits a lawyer or law firm to “file a written request with the state bar seeking an advance opinion on whether a proposed advertisement complies with these Rules.”

New Hampshire: Rule 7.2(b)(2) permits payment only to “an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.” New Hampshire omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

New Jersey: Rule 7.3(c) adds that a lawyer in private practice “shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services” if the organization’s promotional activity (1) uses false or misleading statements or claims, or (2) uses “coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-reaching, or vexatious or harassing conduct.” New Jersey regulates lawyer referral services in a lengthy Rule 7.3(e). New Jersey omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

To regulate broadcast advertising, New Jersey Rule 7.2(a) incorporates the following language taken verbatim from the New Jersey Supreme Court’s opinion in *Felmeister & Isaacs*, 518 A.2d 188, 208 (1986):

. . . All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

New York: In the rules effective April 1, 2009, Rule 7.2(a) is substantially similar to DR 2-103(B) of the old Model Code, but it adds an exception that permits lawyers to refer clients to a nonlegal professional pursuant to a contractual agreement under New York Rule 5.8, which has no Model Rule equivalent. Rule 5.8 provides that a lawyer or law firm “may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a),” when certain requirements are satisfied.

New York Rule 7.2(b) is substantially similar to DR 2-103(D) of the old Model Code. Notably, rather than adopting ABA Model Rule 7.6 (prohibiting pay-to-play arrangements),

New York has added two new Comments to Rule 7.2 explaining the pay-to-play prohibition as a logical consequence of Rule 7.2(b) – see the New York entry in the Selected State Variations following Rule 7.6 below.

North Carolina omits ABA Model Rule 7.2(b)(4) and adds an unusual Rule 7.2(d) that permits a lawyer to participate in a lawyer referral service only if the lawyer and the referral service satisfy seven specific conditions.

Ohio: Rule 7.2(b) deletes the ABA reference to a “qualified lawyer referral service” and substitutes a reference to the Ohio Supreme Court Rules governing lawyer referral services. Ohio also deletes ABA Model Rule 7.2(b)(4), thus effectively prohibiting reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Ohio adds Rule 7.2(d), which prohibits a lawyer from soliciting employment if the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

Pennsylvania: Rule 7.2 differs significantly from ABA Model Rule 7.2. For example, Pennsylvania omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements). Pennsylvania Rule 7.2(j) provides that a lawyer shall not pay “any part of the costs of an advertisement by a lawyer not in the same firm” unless the advertisement discloses the name and principal office address of each lawyer paying for the advertisement and, “if any lawyer or law firm will receive referrals from the advertisement, the circumstances under which referrals will be made and the basis and criteria on which the referral system operates.”

Pennsylvania also adds Rule 7.7, which forbids lawyers to accept referrals from a “lawyer referral service” (a defined term) “if the service engaged in communication with the public or direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.”

Rhode Island: Among other variations, Rhode Island has adopted Rule 7.2(f), which provides as follows:

(f) Any lawyer or law firm who advertises that his or her practice includes or concentrates in particular fields of law and then refers the majority of cases in those fields of law or of that type to another lawyer, law firm or group of lawyers shall clearly state the following disclaimer:

(1) “Most cases of this type are not handled by this firm, but are referred to other attorneys,” or if applicable:

(2) “While this firm maintains joint responsibility, most cases of this type are referred to other attorneys for principal responsibility.”

Tennessee adds Rule 7.6 (Intermediary Organizations), which provides that a lawyer shall not seek or accept a referral of a client or compensation for representing a client from an “intermediary organization” (a defined term) if the lawyer knows or reasonably should know that the organization (i) is owned or controlled by the lawyer or by a lawyer or law firm with which the lawyer is associated; (ii) is engaged in the unauthorized practice of law; or (iii) engages in marketing activities that are false,

misleading, or otherwise prohibited; or (iv) has failed to register with the Board of Professional Responsibility or comply with the Board's requirements. In addition, Supreme Court Rule 44, entitled "Regulation of Lawyer Intermediary Organizations," sets forth the requirements that lawyer intermediary organizations must meet in order to do business in Tennessee under Rule 7.6.

Texas: Rule 7.02 forbids "false or misleading communication about the qualifications or the services of any lawyer or firm." In addition, Texas has adopted guidelines for advertising on the Internet, including a requirement that "homepages" be submitted for review.

Virginia: Rule 7.2(d) requires targeted written or e-mail communications to display the statement "ADVERTISING MATERIAL" on the first page in a specified type size. Registered mail and other forms of restricted delivery are forbidden. Lawyers who advertise or solicit by e-mail must tell recipients how to "notify the sender that they wish not to receive such communications in the future." But Rule 7.2(d) does not apply to any communication that is "directed to be sent by a court or tribunal, or otherwise required by law."

Wisconsin: Rule 7.2(b)(4) permits referrals pursuant to a nonexclusive reciprocal referral agreement between a lawyer and another lawyer or nonlawyer professional if "(ii) the client gives informed consent; (iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (iv) information relating to representation of a client is protected. . . ."

Proposed Rule 7.3 [RPC 1-400]
“Direct Contact with Prospective Clients”
(XDraft #8, 10/2/09)

Summary: Proposed Rule 7.3 is the third of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client, such as by live, telephonic or real-time electronic communication, or by targeted marketing.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 3

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

A number of legal professionals believe that the restrictions on direct marketing in Rule 7.3 run afoul of lawyers' First Amendment rights, citing to Supreme Court precedent. See Explanation of Changes for paragraph (a).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.3* Direct Contact with Prospective Clients

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. **Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client.** Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.3, XDraft 8 (10/2/09)

INTRODUCTION (Continued):

3. Proposed Rule 7.3 includes the basic concepts contained in Model Rule 7.3: a prohibition on any form of real-time communication to solicit legal business unless the person being targeted is related to the lawyer or is also a lawyer (paragraph (a)); a prohibition on *any* kind of communication with prospective clients under certain circumstances (paragraph (b)); a provision imposing labeling requirements on written marketing materials to avoid confusing the recipient (paragraph (c)); and an exception permitting a lawyer to engage the services of a group legal services plan that does utilize real-time communication in its marketing (paragraph (d)).
4. Proposed Rule 7.3 diverges from the Model Rule by including a savings clause to avoid potential Constitutional problems, (paragraph (a)); prohibiting a broader range of overreaching conduct, (paragraph (b)(2)); and prohibiting the solicitation of a person known to be already represented, (paragraph (b)(3)).
5. The Model Rule comment has been revised to remove purely expository language, (e.g., Comments [3] and [6]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Definition.* Commission considered whether to include a definition of “solicitation” in Rule 7.3, as found in current rule 1-400 (B). It determined that there was no need to for a separate definition as the subject of the prohibited conduct is sufficiently described in the Rule.
7. *Cooling-off Period.* A State Bar member suggested that the Commission consider a provision establishing a “cooling off” period after the occurrence of an event that gives rise to a need for legal services before a lawyer or a representative of the lawyer could communicate with a prospective client by targeted mail. See, e.g., *Fla. Bar v. Went for It, Inc.* (1995) 515 U.S. 618. The Commission does not believe such a provision is necessary because the concerns inherent in such a prohibition are adequately addressed in paragraph (b).
8. *Variation in Other Jurisdictions.* Despite the fact that advertising of legal services and the solicitation of prospective clients should be an area of lawyer regulation where national uniformity is warranted, there is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California regulatory landscape.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:	(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for ~~the lawyer's~~ doing so is the lawyer's pecuniary gain, <u>unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or</u> unless the person contacted:	<u>Paragraph (a)</u> tracks the language of paragraph (a) of Model Rule 7.3(a) in prohibiting in-person, live telephone or real-time electronic contact to solicit fee-paying employment from a prospective client. The phrase "real-time electronic contact" was added by the ABA Ethics 2000 Commission to extend the prohibition on solicitation to electronic communications with prospective clients in real time, for example, communications in Internet chat rooms or by instant messaging. The interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in real-time telephone contact. Paragraph (a) also adds the savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, has arguably rendered prohibitions such as those found in Rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the Rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an "all or nothing" invalidation of the Rule avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).

* Proposed Rule 7.3, XDraft 8 (10/2/09); redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
		<i>Minority.</i> A minority of the Commission objects to paragraph (a) on the ground that a lawyer should be able to solicit sophisticated clients by a live, telephonic or real-time electronic communication as was sanctioned for accountants in <i>Edenfield</i>. The minority adds that unless the lawyer is willing to risk of discipline by appealing his or her case to the Supreme Court, the lawyer is prohibited from making such solicitations.
(1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.	(1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.	<i>Subparagraphs (a)(1) and (a)(2)</i> are identical to MR 7.1(a)(1), and recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer, or has a family, close personal or prior professional relationship with the soliciting lawyer. See also comment [4].
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:	(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:	<u>Paragraph (b).</u> Paragraph (b) is intended to prohibit otherwise permitted forms of solicitation which, under particular circumstances, offer an opportunity for abuse by a lawyer. The introductory paragraph of paragraph (b) is identical to that of Model Rule 7.3 and describes the kind of conduct that ordinarily is permitted under Rules 7.1, 7.2 or 7.3(a).
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or	(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or	<i>Subparagraph (b)(1)</i> is identical to Model Rule 7.3(b)(1).

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the solicitation involves coercion, duress or harassment.	(2) the solicitation <u>is transmitted in any manner which</u> involves <u>intrusion, coercion, duress</u>~~—or—harassment,~~ <u>compulsion, intimidation, threats, or vexatious or harassing conduct; or</u>	<i>Subparagraph (b)(2)</i> addresses the same concept as Model Rule 7.3(b)(2), i.e., overreaching by a lawyer in the manner in which the solicitation is made. Subparagraph (b)(2) uses language currently found in CRPC 1-400(D)(5). The Commission believes that by providing a broader range of conduct that is prohibited, the language provides better protection for susceptible persons in need of legal services and better notice to lawyers than does the Model Rule's language. Subparagraph (b)(2) adds the concept of "intrusion". A minority of the Commission was concerned that prohibiting "intrusion" might result in a prospective client losing rights after being contacted by a non-lawyer defense representative (e.g., an insurance adjuster). The majority, however, believes that the prohibition's protection of privacy rights outweighed that concern. The minority also suggests that any communication to a prospective client is an "intrusion," making the rule overbroad and requiring lawyers to risk discipline for even non-objectionable communications.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).	(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" <u>or words of similar import</u> on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), <u>or unless it is apparent from the context that the communication is an advertisement.</u>	<u>Paragraph (c)</u> is based on Model Rule 7.3(c). The phrase "or words of similar import" has been added following "Advertising Material." That phrase is currently found in Standard (5) to CRPC 1-400. It provides lawyers with some flexibility in how they identify marketing materials they send to prospective clients. Regardless of the specific language used, the recipient must be made aware that the communication is an advertisement. Paragraph (c) also adds the clause: "or unless it is apparent from the context that the communication is an advertisement." That clause has been added in recognition that it is usually apparent from the communication itself that the communication is an advertisement.
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.	(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.	<u>Paragraph (d)</u> is identical to Model Rule 7.3(d). Paragraph (d) permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal services plan, so long as paragraph (d)'s conditions are satisfied. See also comment [8].

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.	[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.	Comment [1] is identical to Model Rule 7.3, cmt. [1]. Comment [1] explains the rationale for prohibitions on solicitations made by lawyers in real-time.
[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available	[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available	Comment [2] is identical to Model Rule 7.3, cmt. [1]. Comment [2] explains the rationale for regulating "real-time" communications.

* Proposed Rule 7.3, Draft 8 (10/2/09).

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.	lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.	
[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.	[3] The use of general advertising and written, recorded or electronic communications to transmit information from <u>a</u> lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. ~~The contents of direct in person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~	Comment [3] is based on Model Rule 7.3, cmt. [3]. The last two sentences of Model Rule 7.3, cmt. [3], have been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.	[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has <u>a</u> close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there ~~a~~ serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in ~~Rule 7.3~~<u>paragraph</u> (a) and the requirements of ~~Rule 7.3~~<u>paragraph</u> (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of <u>bona fide</u> public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.	Comment [4] is identical to Model Rule 7.3, cmt. [4], except that changes have been made to conform the comment to California Rule style and also to insert an "a" that is missing in the Model Rule. Comment [4] clarifies subparagraphs (a)(1) and (a)(2), which recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer or has a family, close personal or prior professional relationship with the soliciting lawyer. The phrase "bona fide" has been added to "public or charitable legal-service organizations" to create a parallel construction with the following clause.
[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2	[5] ~~But even~~<u>Even</u> permitted forms of solicitation can be abused. Thus, any solicitation which <u>(i)</u> contains information which is false or misleading within the meaning of Rule 7.1, <u>(ii) is transmitted in any manner</u> which involves <u>intrusion, coercion, duress, compulsion, intimidation, threats, or harassment</u>~~vexatious or harassing conduct~~ within the meaning of ~~Rule 7.3~~<u>paragraph</u> (b)(2), or ~~which~~<u>(iii)</u> involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ~~Rule~~	Comment [5] is based on Model Rule 7.3, cmt. [5]. Comment [5] clarifies subparagraphs (b)(1)-(2), which prohibit otherwise permitted forms of solicitation that, under the particular circumstances identified, present an opportunity for abuse by a lawyer. Changes from Model Rule 7.3, cmt. [5] are intended to conform the comment to the revised language in subparagraph (b)(2). See Explanation of Changes for subparagraph (b)(2). The last sentence of Model Rule 7.3, cmt. [5], has been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)..	~~7.3 paragraph (b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).~~	
[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.	[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a <u>bona fide</u> group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. ~~This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~	The first sentence of Comment [6] is identical to Model Rule 7.3, cmt. [6], except that the phrase "bona fide" has been included to modify "group or prepaid legal plan." The remainder of Model Rule 7.3, cmt. [6] has been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.	[7] The requirement in ~~Rule 7.3(c)~~ <u>this Rule</u> that certain communications be marked "Advertising Material" <u>or with words of similar import</u> does not apply to communications sent in response to requests of potential clients or their ~~spokespersons or sponsors~~ <u>representatives</u>. <u>Paragraph (c) does not apply to</u> general announcements by lawyers, including <u>but not limited to</u> changes in personnel or office location, ~~do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule, nor does it apply where it is apparent from the context that the communication is an advertisement.~~	Comment [7] is based on Model Rule 7.3, cmt. [7]. The changes conform the Comment to the revisions made to paragraph (c). The word "representatives," a more general term, has been substituted for the phrase "spokespersons and sponsors." The last clause of the last sentence of the Model Rule comment has been deleted in favor of the more concise, "does not apply to."
[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these	[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. <u>The</u> organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. <u>For example,</u> paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these	Comment [8] is identical to Model Rule 7.3, cmt. [8], except that it adds a cross-reference to Rule 5.4, which regulates lawyer's activities with non-lawyers.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).	organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).	

Rule 7.3 Direct Contact with Prospective Clients **(Commission's Proposed Rule – Clean Version)**

- (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or

electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

- [1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.
- [2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and

recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

- [3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.
- [4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide

political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

- [5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).
- [6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.
- [7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.
- [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact

is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Law Practice Management Section ("LPMT") [William E. Hoffman]	M	Yes		The Commenter believes that paragraph (a) indicates the State Bar "wants to muzzle lawyers from telling the truth directly to potential clients and from explaining how a lawyer's services might be of value to a particular member of the public." The commenter argues that the rule will have a chilling effect on First Amendment rights of lawyers and that Rule 7.3's savings clause "saves nothing." The commenter urges the State Bar to go beyond what is minimally required by the First Amendment. The Commenter also asserts that the provision overreaches and is "superfluous," using language that is hyperbolic and unnecessary. The Commenter proposes two alternative provisions: 1. <u>Alternative #1</u> ("Preferred"): (a) A lawyer may by in person, live telephone or real time electronic contact solicit professional employment from a prospective client when a significant motive	The Commission declines to make either of the requested changes. The purported overreaching language the commenter complains of either closely tracks the language of the Model Rule or is carried forward from current rule 1-400. The Commission notes that this issue was squarely before the Commission during its deliberations. The Commission deliberated this issue extensively in e-mails and in a live meeting, and voted 7 to 2 (w/ one abstention) not to delete paragraph (a). The savings clause, "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California," was added expressly to address the constitutional concerns. Finally, the Commission notes that the United States Supreme Court in <i>Edenfield v. Fane</i>, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) stressed that lawyers, because of their special training and persuasive skills, cannot be compared to other professionals who are permitted to make in person solicitations of prospective clients. Absent further guidance from the Court, the Commission does not recommend diverging from the Model Rule standard.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					for doing so is the lawyer's pecuniary gain, unless the communication is dishonest or misleading, or it involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. 2. <u>Alternative #2</u> ("Much less desirable") (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted: (1) is a lawyer; (2) has a family, close personal, or prior professional relationship with the lawyer; (3) has first contacted the lawyer; or (4) is an executive or senior manager of a prospective client.	

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the last two sentences of Comment [8].	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required.
3	Orange County Bar Association	M	Yes	(b)(2)	Proposed Rule 7.3(b)(2) prohibits a lawyer from soliciting professional employment from a prospective client where the solicitation "is transmitted in any manner which involves <i>intrusion</i> , compulsion intimidation, threats, or vexatious or harassing conduct" (emphasis added). The OCBA concurs with the minority comments of the Commission that the word "intrusion," which is not included in the corresponding ABA Model Rule, should be stricken from the rule because arguably any manner in which a lawyer solicits professional employment from a prospective client may be perceived as intrusive, and thus unfairly may subject that lawyer to unnecessary and unwarranted discipline.	The Commission believes that the prohibition on intrusive conduct by a lawyer in soliciting legal business provides important protection of the solicited client's privacy rights. This protection outweighs the commenter's concerns.
4	San Diego County Bar Association	M	Yes	(c)	The commenter believes that the revisions to paragraph (c), i.e., adding the phrase "or words of similar import" and the clause, "or unless it is apparent from the context that the	The Commission did not make the requested change. Paragraph (c) is identical to Model Rule 7.3(c), except for the addition of the phrase, "or words of similar import," and the concluding clause:

**Rule 7.3. Direct Contact with Prospective Clients.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					communication is an advertisement,” and deleting CRPC 1-400, standard (5)’s reference to “12-point print” together “may promote misleading advertisements” because it no longer requires the word “Advertisement” or words of similar import to be on the first page of the document that is sent/communicated to the prospective client. The result may be that the recipient will be unable to distinguish between an official document and an advertisement. SDCBA is also concerned that this will leave open what is an “apparent” advertising communication. The commenter believes the changes in the Rule regarding streamlining and modernizing the standards will result in greater clarity.	“or unless it is apparent from the context that the communication is an advertisement.” The Commission believes the Model Rule language, as revised, provides sufficient public protection. The phrase “or words of similar import” is from Standard (5) to current rule 1-400 and the concluding clause simply recognizes that it is usually apparent from the communication itself that the communication is an advertisement. No response required.

Rule 7.3: Direct Contact with Prospective Clients

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 adds a subparagraph (b)(3) prohibiting solicitation relating to a personal injury or wrongful death within 30 days after the occurrence, and Arizona adds detailed requirements regarding targeted mail.

California: Rule 1-400 provides, in pertinent part, as follows:

(B) For purposes of this rule, a “solicitation” means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is . . .

(b) delivered in person or by telephone, or

(c) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom

the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited. . . .

In addition, California Business & Professions Code §6152(a)(1) provides, in part, that it is unlawful for any person “to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever. . . .”

Colorado: Rule 7.3(c) imposes a waiting period of 30 days after an event causing personal injury or death before a lawyer may solicit professional employment in connection with the event unless the lawyer has “a family or prior professional relationship with the prospective client.” The

rule also prohibits solicitation if the sending lawyer “knows or reasonably should know” that the recipient is represented by a lawyer in the matter, and requires the sending lawyer to say whether that lawyer will “actually handle the case or matter” or if it “will be referred to another lawyer or firm.” Rule 7.3(d) prohibits the envelope from revealing “the nature of the prospective client’s legal problem.”

Connecticut: Rule 7.3 differs significantly from ABA Model Rule 7.3. For example, Rule 7.3(a)(4) does not prohibit personal, live telephone, or real-time electronic contact with a prospective client that is “a business organization, a notfor-profit organization or governmental body and the lawyer seeks to provide services related to the organization.” Rule 7.3(b)(b) forbids a lawyer to “contact, or send, a written or electronic communication to, a prospective client” if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; . . .

(3) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; [or]

(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. . . .

Connecticut Rule 7.3(b)(5) prohibits written solicitation in personal injury or wrongful death matters for 40 days after

an accident or disaster. Rule 7.3(c) requires every written communication used by a lawyer “for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter” to say “Advertising Material” on the envelope and first page “in red ink.” Rule 7.3(d) requires the first sentence of a written communication about a specific matter to say: “If you have already retained a lawyer for this matter, please disregard this letter.”

District of Columbia omits Rule 7.3, but D.C. Rule 7.1(b) generally permits in-person solicitation by providing as follows:

(1) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

(A) The solicitation involves use of a statement or claim that is false or misleading . . . ;

(B) The solicitation involves the use of coercion, duress or harassment; or

(C) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(2) A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact.

D.C. also has adopted an unusual Rule 7.1(e) that provides, in part, as follows:

Any lawyer . . . who solicits . . . any person incarcerated at the District of Columbia Jail . . . for the purpose of representing that person for a fee paid by or on behalf of that person . . . in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

Florida: Rule 4-7.4(a) defines the term “solicit” to include (among other things) contact by fax. Rule 4-7.4(b)(1), which is essentially the rule upheld in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), prohibits a lawyer from soliciting prospective clients in writing if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. . . .

Rule 4-7.4(b)(2) imposes stringent, detailed requirements on all written communications to prospective clients, including that the first sentence of every written

communication prompted by a specific occurrence must be: “If you have already retained a lawyer for this matter, please disregard this letter.”

Florida Rule 4-7.6, entitled “Computer-Accessed Communications,” provides that all web sites controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services “(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law.” A lawyer shall not send an “unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment” unless it complies with a host of requirements, including that the subject line of the communication must state “legal advertisement.”

Georgia: Rule 7.3(a)(3) prohibits a written communication relating to an accident or disaster involving the person to whom the communication is sent for 30 days after the accident or disaster. Georgia omits ABA Model Rule 7.3(c), but adds Rule 7.3(e), which provides that a lawyer “shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under” these rules. Georgia’s rule also adds detailed provisions regarding a lawyer’s participation in referral services.

Kentucky: In the rules effective July 15, 2009, an elaborate Rule 7.60 (Kentucky Disaster Response Plan) addresses problems that occur when lawyers and nonlawyers who are not subject to disciplinary jurisdiction in

Kentucky “engage in the provision of legal services, legal advice, and outright solicitation of persons and their families affected by a disastrous event.” The policy of Rule 7.60 is to “[m]onitor the conduct of all attorneys, both members and non-members of the Kentucky Bar Association, and thereby deter violations of the rules of ethical conduct. . . .”

Kentucky has also enacted a criminal statute, Ky. Rev. Stat. §21A.300, providing that for 30 days after “the filing of a criminal or civil action, or claim for damages, or a traffic citation, injury, accident, or disaster,” an attorney “shall not directly solicit . . . a victim of the accident or disaster, or a relative of the victim, for the purpose of obtaining professional employment,” and “shall not knowingly accept a referral from an attorney referral service” if the referral service has violated that prohibition. Ky. Rev. Stat. §21A.310 makes violation of the 30-day blackout law a Class A misdemeanor, and may subject an attorney to professional discipline in addition to any criminal penalty. Kentucky Supreme Court Rule 3.130 provides:

If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. A civil action for recovery of such fees may be brought in a court of competent jurisdiction.

Louisiana: In the rules effective October 1, 2009, Louisiana deletes Rule 7.3 and addresses solicitation in Rule 7.4. Among other variations, Rule 7.4(b)(1)(A) contains a provision that prohibits any solicitation (including letters) that concern “an action for personal injury or wrongful death . . .

unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.” Rule 7.4(b)(2) also requires lawyers to include a variety of information in letters to potential clients.

Maine: In the rules effective August 1, 2009, the restrictions on in-person solicitation apply only to “non-commercial” clients. Moreover, the Rule provides that a variety of factors are relevant when determining the permissibility of a solicitation, including “the prospective client’s sophistication regarding legal matters; the physical, emotional state of the prospective non-commercial client; and the circumstances in which the solicitation is made”

Massachusetts: Rule 7.3(b)(1) prohibits solicitation if “the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer,” unless the solicitation is “not for a fee.” Rule 7.3(d) prohibits solicitation in person “or by personal communication by telephone, electronic device, or otherwise,” but Rule 7.3(e) exempts: (1) communications with “members of the bar of any state or jurisdiction”; (2)(A) “grandparents of the lawyer or the lawyer’s spouse, (B) descendants of the grandparents of the lawyer or the lawyer’s spouse, or (C) the spouse of any of the foregoing persons”; (3) “prospective clients with whom the lawyer had a prior attorney-client relationship”; (4)(i) “non-profit and governmental entities” regarding their activities, and (ii) “persons engaged in trade or commerce” in connection with their trade or commerce.

Mississippi: Rule 7.2(a) defines an “advertisement” as “an active quest for clients involving a public or non-public communication.” Rule 7.5(a) requires a lawyer to submit a “copy or recording of any advertisement” to the Office of the General Counsel of the Mississippi Bar (OGCMB) “prior to its first dissemination,” but Rule 7.5(b) exempts 13 categories of advertisements from the filing requirement, such as telephone directory advertisements, business cards, web pages, and “scholarly writings.” Under Rule 7.5(d), a lawyer may request an “advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication,” provided the advertisement is submitted at least 45 days in advance. The OGCMB must “render its advisory opinion within forty-five days of receipt of a request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period. . . .” In that event, “the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.” Under Rule 7.5(d)(2), a “finding by the OGCMB of either compliance or non-compliance shall not be binding in disciplinary proceedings, but may be offered as evidence.”

Missouri: Rule 7.3(a) provides that a lawyer may not “initiate” in-person, telephone, or real-time electronic solicitation of legal business “under any circumstance, other than with an existing or former client, lawyer, close friend or

relative.” Regarding written communications to “others,” Rules 7.3(b) and (c) provide as follows:

(b)(3) each written solicitation must include the following:

“Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri.” . . .

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) a lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

(c) A lawyer shall not send, nor knowingly permit to be sent . . . a written solicitation to any prospective client . . . if:

(4) the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation . . . ; or

(5) the written solicitation vilifies, denounces or disparages any other potential party.

Montana: Rule 7.3(b)(4) prohibits a lawyer from contacting a prospective client if “the lawyer reasonably should know that the person is already represented by another lawyer.”

Nevada: Rule 7.3(d) provides, in part: “Written communication directed to a specific prospective client who may need legal services due to a particular transaction or occurrence is prohibited in Nevada within 45 days of the transaction or occurrence giving rise to the communication.”

New Hampshire: Rule 7.3(a) does not use the words “solicit” or “pecuniary gain” but provides that a lawyer “shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment,” unless the person contacted fits the exemptions in ABA Model Rule 7.3(a)(1)-(2) or:

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

New Hampshire Rule 7.3(d)(iii) exempts contact with “those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others.”

New Jersey omits Rule 7.3(c) and Rule 7.3(d). In addition, to control solicitation after mass disasters, New Jersey adds Rule 7.3(b)(4), which provides that a lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if “the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event.” To prevent out-of-state attorneys from improperly soliciting New Jersey victims and their families after mass disasters, the Court’s Clerk has issued a statement saying that it “has jurisdiction over out-of-state attorneys who make such solicitations to prospective claimants in New Jersey.”

Regarding events other than mass disasters, New Jersey adds Rule 7.3(b)(5)(iii), which generally permits targeted mail if (among other things) it contains an additional notice that “the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.”

New York: In the rules effective April 1, 2009, Rule 7.3(b) defines “solicitation” to mean “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.”

Rule 7.3(a) provides as follows: “A lawyer shall not engage in solicitation . . . by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client. . . .” Solicitation by any means is forbidden if (among other things) “the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.” Rule 7.3(c) imposes detailed filing requirements for most solicitations, including “a transcript of the audio portion of any radio or television solicitation” and “if the solicitation is in a language other than English, an accurate English-language translation.”

Rule 7.3(e) restricts solicitation in personal injury and wrongful death cases as follows: “No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the

particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.” New York addresses a similar issue in Rule 4.5, which has no Model Rule equivalent. That Rule restricts defense lawyers from engaging in unsolicited communications with prospective claimants in personal injury or wrongful death cases during the same time period described in Rule 7.3(e), unless the communication is with the claimant’s counsel.

Rule 7.3(i) provides that New York’s solicitation rules apply to lawyers from out of state who solicit clients in New York.

Also, under 22 NYCRR §130-1.1a, an attorney filing an “initiating pleading” must certify that “(i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom” and “(ii) the matter was not obtained in violation of [the rules of professional conduct].”

North Carolina: Rule 7.3(d)(1) defines the phrase “prepaid or group legal services plan,” and Rule 7.3(d)(2) sets forth detailed conditions that a lawyer must satisfy before participating in such a plan.

Ohio: Rule 7.3(c) requires targeted direct mail solicitation to: “(1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee” and “(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee’s case.” Rule 7.3(d) provides

that before soliciting professional employment from a defendant in a civil action, a lawyer “shall verify that the party has been served with notice of the action filed against that party.” Service shall be verified by “consulting the docket of the court in which the action was filed. . . .”

Ohio Rule 7.3(e) provides that if a communication solicits professional employment in a potential claim for personal injury or wrongful death within 30 days of an accident or disaster, the communication must include a lengthy text headed “Understanding Your Rights,” which provides, in relevant part, as follows:

2. *You do not have to sign anything* — You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. *Your interests versus interests of insurance company* — Your interests and those of the other person’s insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage. . . .

8. *Check a lawyer’s qualifications* — Before hiring any lawyer, you have the right to know the lawyer’s background, training, and experience in dealing with cases similar to yours.

9. *How much will it cost?* — In deciding whether to hire a particular lawyer, you should discuss, and the lawyer’s written fee agreement should reflect:

a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

Furthermore, a footnote to “Understanding Your Rights” says, in part: “THE SUPREME COURT OF OHIO . . . NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS.”

Pennsylvania omits Rules 7.3(c) and (d).

Rhode Island: Rule 7.3(a)(3) permits “in-person, live telephone or real-time electronic contact” solicitation for profit if the prospective client is “a business organization, a

not-for-profit organization, or governmental body and the lawyer seeks to provide services related to the organization.”

South Carolina: Rule 7.3(d) provides:

(2) Each written or recorded solicitation must include the following statements:

(A) “You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer” and

(B) “The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.”

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each written or recorded solicitation must include the following statement:

“ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION

ON LAWYER CONDUCT, POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211 TELEPHONE NUMBER 803-734-2038.” Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

See more discussion of South Carolina Rule 418 in Selected State Variations under Rule 8.5.

Texas: Rule 7.06 provides that a lawyer “shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these Rules.” In addition, under §38.12 of the Texas Penal Code it is a crime if a lawyer, “with intent to obtain an economic benefit . . . (2) solicits employment, either in person or by telephone, for himself or for another.” Section 38.01(11) of the Texas Penal Code defines the phrase “solicit employment” as follows:

(11) “Solicit employment” means to communicate in person or by telephone with a prospective client or a member of the prospective client’s family concerning professional employment . . . arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing problem of the prospective client . . . for the purpose of providing professional services to the prospective client, when neither the person receiving the communication nor anyone acting on that person’s behalf has requested the communication. The term does not include a communication initiated by a family member of the person receiving a communication. . . .

Virginia: Rule 7.3 prohibits “in-person” communications to a “non-lawyer” if the communication “has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.” Rule 7.3(c) prohibits a lawyer from assisting a “nonprofit organization” that engages in such communications, or in communications on the lawyer’s behalf that are “false, fraudulent, misleading, or deceptive,” and Rule 7.3(f) provides that in no event may a lawyer “initiate” in-person solicitation “for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship.”

Wisconsin: Rule 7.3(b)(1) adds that solicitation is prohibited if “(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.” Rule 7.3(e) (e) provides that ordinarily a lawyer “shall not draft legal documents, such as wills, trust instruments or contracts, which require or imply that the lawyer’s services be used in relation to that document.”

Proposed Rule 7.4 [RPC]

“Communication of Fields of Practice and Specialization”

(XDraft #7, 5/31/09)

Summary: Proposed Rule 7.4 is the fourth of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

- ☒ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Montana Rule 7.4(a). See language added to proposed Rule 7.4(a).

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(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 ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.4* Communication of Fields of Practice and Specialization

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. **Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization.** Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.4, XDraft 7 (5/31/09).

INTRODUCTION (Continued):

Proposed Rule 7.4 includes the basic concepts contained in Model Rule 7.4, with minor revisions: a provision permitting the communication of a lawyer's field of practice, (paragraph (a)); provisions permitting patent and admiralty lawyers to communicate the fact that they practice in those areas, (paragraphs (b) and (c)); and a provision limiting a claim of specialization, (paragraph (d)). The latter provision has been substantially revised to conform to the specifics of the California regulatory landscape.

The Commission does not recommend the adoption of the comments to Model Rule 7.4 because the provisions of proposed Rule 7.4 are self-explanatory and do not require comment to clarify them further.

Variation in Other Jurisdictions. There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape.

<u>ABA Model Rule</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Commission's Proposed Rule*</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.	(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. <u>A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.</u>	<u>Paragraph (a)</u> is based on Model Rule 7.4(a), which provides that a lawyer may communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability – communicating that the lawyer's practice is limited to or concentrated in a particular field of law – so long as the communication does not imply an expertise in the field so as to be false or misleading under Rule 7.1.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.	(b) A lawyer ~~admitted~~<u>registered</u> to ~~engage in patent~~ practice <u>patent law</u> before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.	<u>Paragraph (b)</u> is based on Model Rule 7.4(b). The language has been modified to reflect accurately that a lawyer who is authorized to practice patent law before the Patent and Trademark Office is "registered to practice patent law" there, and is not "admitted" to practice there.
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.	(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.	<u>Paragraph (c)</u> is identical to Model Rule 7.4(c), which recognizes a long historical tradition of maritime law in federal courts and permits a lawyer to communicate that the lawyer is engaged in Admiralty practice.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has	(d) A lawyer shall not state or imply that ~~a~~<u>the</u> lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer ~~has been~~<u>is</u> certified as a specialist by ~~an organization that has~~	<u>Paragraph (d)</u> is based on Model Rule 7.4(c), but subparagraph (d)(1) has been revised to state the specific regulatory framework for specialization in California. Similar language may be found in current rule 1-400(D)(6). The language of the Model Rule was never intended as "model language" to be adopted by all jurisdictions, but simply as a template. The Model Rule language

* Proposed Rule, XDraft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Commission's Proposed Rule*</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Explanation of Changes to the ABA Model Rule</u>
been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.	~~been approved by an appropriate state authority~~<u>the Board of Legal Specialization, or that has been any other entity</u> accredited by the ~~American~~<u>State Bar Association</u><u>to designate specialists pursuant to standards adopted by the Board of Governors</u>; and (2) the name of the certifying organization is clearly identified in the communication.	recognizes that some jurisdictions' specialization "authority" resides with a state supreme court entity, while other jurisdictions' specialization "authority" is delegated to that jurisdiction's bar or an independent specialization body. The revision in the introductory paragraph of paragraph (d) – changing "a lawyer" to "the lawyer," – is intended to clarify that a lawyer may not state that he or she is certified as a specialist and is in keeping with rule drafting style. No change in substance is intended. <i>Minority.</i> A minority of the Commission disagrees with the substitution of language specific to the California regulatory framework in paragraph (d)(1), arguing that Proposed paragraph (d)(1) is unduly restrictive. The minority takes the position that a lawyer who truthfully states on his or her letterhead that he or she has been accredited as a specialist in another state, or by a bona fide accrediting organization that may not be designated as such by the State Bar, is not guilty of any deception. Such conduct should not be prohibited.

<u>ABA Model Rule</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Commission's Proposed Rule*</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.	~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services~~	The Commission determined that the provisions of Rule 7.4 are self-explanatory and do not require comment to clarify them further. Accordingly, the Commission does not recommend adoption of the comments to Model Rule 7.4.
[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.	~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~	See Explanation of Changes, Comment [1].

* Proposed Rule 7.4, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Commission's Proposed Rule*</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.	~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~	See Explanation of Changes, Comment [1].

Rule 7.4 Communication of Fields of Practice and Specialization
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer is certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and
 - (2) the name of the certifying organization is clearly identified in the communication.

TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0

**Rule 7.4. Communication of Fields of Practice and Specialization.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.4 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel ("OCTC")	A	Yes		OCTC is not sure this rule is necessary but has no objection.	No response required.
3	San Diego County Bar Association ("SDCBA")	M	Yes	(a)	Recommends that the second sentence of rule 7.4(a) be revised to substitute "subject to the requirements of Rule 7.1" for "if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1."	The Commission agreed with, and made the change. It simplifies language with no effect on meaning.
				(d)(1)	Requests that the phrase in paragraph (d)(1), "a current certificate," be changed to "current certification" to clarify the rule is not referring to a piece of paper.	The Commission agreed with, and made the change for the reasons stated by the commenter.
				(e)	SDCBA proposes the addition of a new paragraph (e), which would provide: "(e) A lawyer who has not been certified as a specialist pursuant to rule 7.4(d) may not state or imply that he or she is a specialist in a particular field of law." SDCBA also recommends an alternative that would add the following clause: "unless he or she accompanies the statement or implication with an express statement to the effect that	The Commission did not make the change. The key concept is the word "certified." The prohibition is, and should be, on claiming one is certified when that in fact is not true. A person can specialize in a particular field even if he or she is not certified in that field. Proving a person has misstated a specialization or misled the consuming public might be difficult, but the micromanagement inherent in the commenter's proposal would cause more problems than it would correct.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 7.4. Communication of Fields of Practice and Specialization. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyers can be certified as specialists by state-approved institutions and that he or she has not been so certified."	

TOTAL = 3
Agree = 2
Disagree = 0
Modify = 1
NI = 0

Rule 7.4: Communication of Fields of Practice and Specialization

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: The equivalent to Rule 7.4(d) permits lawyers to state or imply that they are specialists only if they are “certified by the Arizona Board of Legal Specialization” or by a “national entity” that the Board has recognized as having standards substantially the same as the Board’s standards.

California has no rule comparable to ABA Model Rule 7.4 in the California Rules of Professional Conduct, but California has developed an extensive program of specialty certification. To be eligible for certification, an attorney must be a member of the California State Bar in good standing and must (1) have spent at least 25 percent of his or her occupational time during the previous five years working in the area of law in which certification is sought, (2) pass a written exam tailored to the particular specialty field, (3) demonstrate a high level of experience in the specialty field by meeting specific task and experience requirements, (4) complete at least 45 hours of continuing legal education in the specialty field, and (5) be favorably evaluated by other attorneys and judges familiar with the attorney’s work. California offers specialty certification in eight areas of practice, including Appellate Law, Bankruptcy Law (both Personal and Small Business), Criminal Law, Estate Planning, Trust and Probate Law, Family Law, Immigration

and Nationality Law, Taxation Law, and Workers’ Compensation Law. Each field has its own particular requirements. For more information, including links to the Rules Governing the State Bar of California Program for Certifying Legal Specialists (most recently amended effective November 1, 2003) and the requirements for each specialty field, visit the California State Bar’s web site at www.calbar.org and enter “Legal Specialization” in the site’s search box.

Connecticut: Rule 7.4A(d) describes in some detail 27 different fields of law in which lawyers may be certified as specialists. Rule 7.4B concerns the appointment, powers, and duties of a Legal Specialization Screening Committee that evaluates certifying entities, and Rule 7.4C concerns applications for approval as a certifying entity.

District of Columbia omits ABA Model Rule 7.4.

Florida: Rule 4-7.2(c)(6) divides the rules regulating claims and disclaimers for specialty certification into three categories, depending on whether a lawyer is certified as a specialist by (A) the Florida Bar, (B) another state bar, or (C) an entity not connected with any state bar.

Georgia tracks the first sentence of ABA Model Rule 7.4 verbatim, but eliminates the rest of the ABA rule and instead states the following: “A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.”

Illinois: In the rules effective January 1, 2010, Rule 7.4(c) requires that if a lawyer's advertisement uses the terms “certified,” “specialist,” or “expert,” then the terms (1) must be “truthful and verifiable and may not be misleading,” and (2) must state that “the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.”

Iowa: Rule 7.4 contains a list of 71 distinct fields of practice that a lawyer may identify or describe in communications.

Louisiana: In the rules effective October 1, 2009, Louisiana addresses this issue in Rule 7.2(c)(5) and specifies that lawyers generally cannot state or imply that they are specialists or experts unless they fit within certain narrow exceptions identified in the rule.

Massachusetts: Rule 7.4(a) permits lawyers to hold themselves out as “specialists” if the holding out does not include a false or misleading communication. The rule defines “holding out” to include “(1) a statement that the lawyer concentrates in, specializes in, is certified in, has

expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and (3) any other association of the lawyer's name with a particular service, field, or area of law.” Comment 3A to Rule 7.2 provides, in part, as follows:

Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of the lawyer or law firm's name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule.

Michigan: Rule 7.4 stops after the first sentence of ABA Model Rule 7.4.

Missouri: Rule 7.4 provides that a lawyer other than an admiralty or patent attorney shall not state or imply that the lawyer is a specialist “unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations.”

Nevada: Rule 7.4(d)(2)(iii) requires that any lawyer claiming to be a specialist “shall carry a minimum of \$500,000 in professional liability insurance, with the exception of lawyers who practice exclusively in public law.” Nevada also adds a Rule 7.4A to establish procedures for the State Bar Board of Governors to approve organizations that certify lawyers as specialists.

New Jersey: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist only if the lawyer states (among other things) that “the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association.” If the certification has been granted by an organization that has not been approved, or has been denied approval, by either the Supreme Court of New Jersey or the American Bar Association, “the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.”

New York: In the rules effective April 1, 2009, Rule 7.4(c)(1) provides that a lawyer who is “certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association” may advertise the certification only if the lawyer identifies the certifying organization and “prominently” makes the following disclaimer: “The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.” If the lawyer is certified as a specialist by an “authority having jurisdiction over specialization under the laws of another state” (rather than by an ABA-approved private organization), Rule 7.4(c)(2) requires a slightly different disclaimer.

North Carolina relegates the substance of ABA Model Rule 7.4(b) (regarding patent and trademark practice) to a Comment and deletes Rule 7.4(c) (regarding admiralty practice).

Ohio: Rule 7.4(a) expressly adds that a lawyer may state that the lawyer “limits his or her practice to or concentrates in particular fields of law.” Rule 7.4(c) provides that a lawyer engaged in “trademark practice” may use the designation “Trademarks,” “Trademark Attorney,” or a substantially similar designation. “Ohio’s equivalent to ABA Model Rule 7.4(d)(1) applies if the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists.”

Pennsylvania: Rule 7.4 permits lawyers to advertise that they are certified by organizations approved by the Supreme Court. The Supreme Court may approve an organization upon recommendation of the State Bar Association if the court finds that advertising certification by the organization “will provide meaningful information, which is not false, misleading or deceptive, for use of the public in selecting or retaining a lawyer.” Certification must be available to all lawyers “who meet objective and consistently applied standards relevant to practice in the area of law to which the certification relates.”

Texas: Rule 7.04(b)(2) permits lawyers to advertise that they have been certified as specialists by the Texas Board of Legal Specialization or by an organization that has been:

accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special

competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar. . . .

Virginia: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist by a particular organization if the communication “clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.”

Proposed Rule 7.5 [RPC 1-400]

“Firm Names and Letterheads”

(XDraft #8, 6/16/10)

Summary: Proposed Rule 7.5 is the fifth of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.5 sets out basic rules governing the use of firm names and letterheads.

Comparison with ABA Counterpart

Rule	Comment
☒ ABA Model Rule substantially adopted	☒ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, [86 Cal.Rptr.2d 816]

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 1

Abstain/ 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed* Rule 7.5 Firm Names and Letterheads

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. **Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads.** The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.3, XDraft 8 (6/16/10).

INTRODUCTION (Continued):

Proposed Rule 7.5 is identical to Model Rule 7.5 except that paragraph (d) has been revised to provide specific reference to the current regulatory framework in California.

The Model Rule comment has been revised to remove expository language and to add specific language the California Supreme Court has adopted in the Discussion to current rule 1-400.

Variation in Other Jurisdictions. There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape.

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.	(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.	<u>Paragraph (a)</u> is identical to Model Rule 7.5(a). The closest counterpart to this provision in the current California Rules is Standard (6) to current rule 1-400, which provides that the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization."
(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.	(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.	<u>Paragraph (b)</u> is identical to Model Rule 7.5(b). Currently, there is no similar provision in California.
(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.	(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.	<u>Paragraph (c)</u> is identical to Model Rule 7.5(c). Currently, there is no similar provision in California.

* Proposed Rule 7.5, XDraft 8 (6/16/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads	<u>Explanation of Changes to the ABA Model Rule</u>
(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.	(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.	<u>Paragraph (d)</u> is identical to Model Rule 7.5(d).

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.	[1] A firm may be designated by the names of all or some of its ~~members~~<u>lawyers</u>, by the names of deceased ~~members~~<u>or retired lawyers</u> where there has been a continuing succession in the firm's identity, <u>by a distinctive website address</u>, or by a trade name such as the "ABC Legal Clinic." ~~A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use~~ <u>Use</u> of such names in law practice is acceptable so long as it is not misleading <u>in violation of Rule 7.1</u>. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," ~~an express disclaimer~~<u>the firm may have to expressly disclaim</u> that it is a public legal aid agency ~~may be required~~ to avoid a misleading implication. ~~It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it~~ is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.	Comment [1] is based on Model Rule 7.5, cmt. [1]. Comment [1] elaborates upon the general prohibition in paragraph (a) of the Rule, and gives examples of firm names that violate or do not violate proposed Rule 7.1's proscription against false or misleading communications. The Model Rule language in what is now the next-to-last sentence was revised in response to public comment that the Model Rule syntax was confusing. See 12/1/2006 OCBA Memo to Commission. The two next-to-last sentences in Model Rule 7.5, cmt. [1], were deleted as unnecessary exposition.

* Proposed Rule 7.5, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm..	[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. <u>A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.</u>	The first sentence of comment [2] is identical to Model Rule 7.5, cmt. [2]. The second sentence of comment [2] has no counterpart in the Model Rule but is instead derived from Standard (8) to current rule 1-400. The "close, personal, continuous, and regular" standard has been adopted by the California Supreme Court in the conflicts of interest context. See, e.g., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (1999) 20 Cal.4th 1135, 1139-40, 86 Cal.Rptr.2d 816.

Rule 7.5 Firm Names and Letterheads

(Redline Comparison of the Proposed Rule to Public Comment Draft)

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

- [1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased or retired lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," the

firm may have to expressly disclaim that it is a public legal aid agency to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. [Lawyers associated with a lawyer who is disbarred or who resigns with charges pending must comply with Business and Professions Code section 6132.](#)

- [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

Rule 7.5 Firm Names and Letterheads
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

- [1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased or retired lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," the firm may have to expressly disclaim that it is a public legal aid agency to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer. Lawyers associated with a lawyer who is disbarred or who resigns with charges pending must comply with Business and Professions Code section 6132.
- [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

TOTAL = 5 Agree = 4
Disagree = 0
Modify = 1
NI = 0

Rule 7.5. Firm Names and Letterheads.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Access to Justice Committee of L.A. County Bar Association [Toby Rothschild]	A	Yes		Commenter appreciates the proposed Rule and Comment [1]'s guidance re the prohibition on the use of trade names that include words such as "legal aid" that might mislead consumers to believe that a private law firm is associated with a government program intended to provide legal services to the poor.	No response required.
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.5 and the Comments to the Rule.	No response required.
3	Office of Chief Trial Counsel ("OCTC")	A	Yes		OCTC supports this rule. Comments 1 and 2 should be broken down into several comments so that the ideas do not get buried. Also, a Comment should refer attorneys to section 6132 of the Business and Profession Code regarding their duty to remove the names of disbarred and resigned attorneys from their law firms.	No response required. The Commission did not make the suggested change. It disagrees that the ideas are buried in the comments. The Commission has made the suggested change.
4	Orange County Bar Association ("OCBA")	M	Yes	Comment [1]	The words "all or some" in the second line of Comment [1] should be changed to "one or more." Some firms use the name of only one lawyer as the firm name.	The Commission declines to change the language of the Model Rule comment, which has been nearly universally adopted across the country. The Commission does not understand how the use of only one lawyer's name for the firm name would violate the Rule.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 7.5. Firm Names and Letterheads.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	An additional sentence should be added at the end of Comment [2] stating: "It is permissible to use the name of a lawyer who has a proper 'of counsel' relationship with a law firm in the name of the firm." Adding such a sentence eliminates any confusion on this question and would reconcile two ethics opinions that are currently inconsistent in this regard. LACBA Formal Op. No. 421 (1983), addressing then applicable Rule 2-101 (Rule 1-400's predecessor), determined that using an "of counsel" lawyer's name in a firm name was improper. California State Bar Form. Op. 1986-90, also addressing 2-101, implies that the use of a lawyer's name who is "of counsel" to the firm in a firm name is permissible if the lawyer's actual relationship and true role is properly communicated. Add a new Comment [3] stating: "Also with regard to paragraph (d), a lawyer may not denominate a firm name as, for example, "Smith & Associates" or "Smith, Jones & Associates," if Smith or Smith and Jones do not in fact practice with associates." The OCBA believes that this is a sufficiently common practice among some sole practitioners or small firms such that it should be specifically addressed. The OCBA also believes that the practice is misleading.	The Commission disagrees that the suggested sentence should be added. The proposed sentence would be merely permissive and potentially misleading, and thus should not be included in a comment to the rule. Whether an "of counsel" relationship with a firm is "proper" would depend upon the particular facts and circumstances, see last sentence of Comment [2] to Rule 7.5, and a blanket statement that it is appropriate to use the name of a person who is "of counsel" in the firm's name would itself be misleading. The Commission has determined that if, as the commenter asserts, it is a "common practice" for sole practitioners to use the term "associates" in their firm names, then those lawyers are already in violation of Rule 7.5. Rule 7.5 prohibits the use of firm names "in violation of Rule 7.1," which in turn prohibits lawyers from making a "false or misleading communication." No further elaboration is required.

Rule 7.5. Firm Names and Letterheads. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	San Diego County Bar Association	A	Yes		Approves proposed Rule in its entirety.	No response required.

Rule 7.5: Firm Names and Letterheads

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 adds the following paragraph (e): “The term ‘of counsel’ shall be used only to refer to a lawyer who has a close continuing relationship with the firm.”

Arizona deletes the qualification in the second sentence of subparagraph (a) beginning, “if it does not imply a connection with a government agency. . . .”

California: Compare Standards 6 through 9 following Rule 1-400. In addition, §16952 of the California Corporations Law, entitled “Requirements for Name,” provides that the name of a registered limited liability partnership must contain the words “Registered Limited Liability Partnership” or “Limited Liability Partnership” or one of the abbreviations “L.L.P.,” “LLP,” “R.L.L.P.,” or “RLLP” as the last words or letters of its name.

Florida: Rule 4-7.9(b) permits a lawyer to practice under a trade name if the name is “not deceptive” and “does not imply that the firm is something other than a private law firm.” The same rule permits a lawyer to use the term “legal clinic” or “legal services” in conjunction with the lawyer’s own name “if the lawyer’s practice is devoted to providing routine legal services for fees that

are lower than the prevailing rate in the community for those services.”

Under Rule 4-7.9(c) a lawyer may not advertise under a trade or fictitious name “unless the same name is the law firm name that appears on the lawyer’s letterhead, business cards, office sign, and fee contracts, and appears with the lawyer’s signature on pleadings and other legal documents.” The Comment to Rule 4-7.9 notes that a lawyer may not advertise under “a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name.”

Georgia adds Rule 7.5(e)(1), which permits a lawyer in private practice to use a trade name if it “includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm.”

Iowa: Rule 7.5 provides in paragraph (f) that a “lawyer who is engaged both in the practice of law and in another profession or business shall not so indicate on the lawyer’s

letterhead, office sign, or professional card, and shall not be identified as a lawyer in any publication in connection with the lawyer's other profession or business."

Massachusetts adds to ABA Comment 2 that the term "associates" implies practice in either a partnership or sole proprietorship form and "may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility."

Nevada: Rule 7.5(b) provides that a law firm with offices in more than one jurisdiction "that has registered with the State Bar of Nevada under Rule 7.5A" may use the same name in each jurisdiction. Rule 7.5A(a) provides: "All law firms having an office in Nevada and in one or more other jurisdictions shall register with the State Bar of Nevada and shall pay an annual fee of \$500 for such registration." The remainder of the rule sets out lengthy, detailed disclosure requirements such as: "(1) The names and addresses of all lawyers employed by the firm, the jurisdictions in which each lawyer is licensed, and verification that each lawyer is in good standing in the jurisdictions in which each lawyer is licensed; (2) Any pending disciplinary action or investigation against a lawyer employed by the firm;" and (5) a certification that:

(i) The firm will maintain a permanent office in Nevada with a resident member of the firm who is also an active member in good standing of the State Bar of Nevada at all times the firm is practicing in Nevada . . . [and]

(ii) The firm agrees to disclose in writing to its Nevada clients whether all of its lawyers are licensed to practice in Nevada and, if any of its lawyers are not so licensed, to disclose what legal work will be performed by lawyers not admitted to practice in this state. Upon request of the State Bar of Nevada, the firm shall provide documentation evidencing its compliance with these disclosure requirements. . . .

New Jersey: Rule 7.5(b) permits a law firm with offices in more than one jurisdiction to use the same name in each jurisdiction, but all advertisements, letterheads or "anywhere else that the firm name is used," must indicate the jurisdictional limitations on those not licensed to practice in New Jersey. If a firm name includes the name of any lawyer not licensed in New Jersey, then any advertisement, letterhead or other communication containing the firm name "must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof. . . ." Rule 7.5(d) permits lawyers to state or imply that they practice in a partnership "only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services." Rule 7.5(e) provides as follows:

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with

a public, quasi-public or charitable organization. However, no firm shall use the phrase “legal aid” in its name or in any additional identifying language.

However, in *In the Matter of the Decision on CAA 47-2007*, 2009 WL 468292 (N.J. 2009), which addressed whether a law firm could use the name “Alpha Center for Divorce Mediation,” the New Jersey Supreme Court ordered its Committee on Attorney Advertising to consider and make recommendations on “any additional information, or change in format, that this Court should allow in respect of law firm names, including specifically any additional or changed language that the Committee recommends for insertion into the present [RPC 7.5](#),” and “to consider (among other things) “whether special rules should be established for attorney practices that include the performance of activities that may be performed by non-attorneys.” When we went to press in September of 2009, the review was still under way.

New York: In the rules effective April 1, 2009, New York sets forth detailed regulations in Rule 7.5(a) regarding “internet websites, professional cards, professional announcements, office signs, letterheads or similar professional notices or devices.” Rule 7.5(b), which is based on DR 2-102(B) of the old ABA Model Code, provides as follows:

A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may use as, or continue to include in its name, the name or names of one or more deceased or retired members of the

firm or of a predecessor firm in a continuing line of succession. . . . A lawyer or law firm may not include the name of a nonlawyer in its firm name. . . .

New York adds Rule 7.5(e)-(f), which addresses domain names and firm names as follows:

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate a disciplinary rule.

North Carolina: Rule 7.5(a) adds the following: “Every trade name used by a law firm shall be registered with the North Carolina State Bar for a determination of whether the name is misleading.” Rule 7.5(d) ends with the words “whether or not the lawyer is precluded from practicing law.”

Ohio: Rule 7.5(a) expressly provides that a lawyer in private practice “shall not practice under a trade name,” and generally permits a law firm to “use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.” Rule 7.5(b) provides that a law firm with offices in more than one jurisdiction that lists attorneys associated with the firm “shall indicate the jurisdictional limitations on those not licensed to practice in Ohio.”

Oregon: Rule 7.5(d) forbids a lawyer to “permit his or her name to remain in the name of a law firm or to be used by the firm during the time the lawyer is not actively and regularly practicing law as a member of the firm” and forbids members of the firm to use the lawyer’s name. The rule does not apply for absences of one year or less during which the lawyer is not actively practicing law if the lawyer plans to return to the firm. The rule also does not apply to the names of “retiring, deceased, or retired members of the firm or a predecessor law firm in a continuing line of succession.”

Virginia: The first sentence of Rule 7.5(a) permits a lawyer or law firm to use “a professional card, professional announcement, card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive.” Rule 7.5(b) prohibits lawyers licensed in different jurisdictions from forming or continuing a law firm “unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of

the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.”

Proposed Rule 8.1 [RPC 1-200]

“False Statement Regarding Application for Admission to Practice of Law”

(XDraft # 4.1, 10/16/09)

Summary: Proposed Rule 8.1, which prohibits certain conduct in applying to be admitted to practice law in California, substantially follows Model Rule 8.1, with three principal departures. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-200; Cal. Rules of Court, Rules 9.40 to 9.46.

Statute

Bus. & Prof. Code §§ 6062, 6068(c),(d),(e); Code Civ. Pro. § 1282.4

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10
Opposed Rule as Recommended for Adoption 1
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.1* False Statement Regarding Application for Admission to Practice Law

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION: Proposed Rule 8.1 substantially follows ABA Model Rule 8.1 with three principal departures: (1) proposed Rule 8.1 addresses statements made in connection with applications for “admission to practice law”, whereas Model Rule 8.1 more narrowly addresses statements made in connection with applications for “admission to the bar” (a difference that is explained in paragraph (d) of the proposed Rule); (2) unlike Model Rule 8.1, proposed Rule 8.1 does not address statements made in connection with disciplinary proceedings; and (3) proposed Rule 8.1 imposes a more stringent standard on applicants with respect to their own applications for admission (prohibiting both false statements of material fact *and* failure to disclose a material fact) than on members with respect to *other* persons’ applications for admission (prohibiting false statements of material fact). However, similar to the Model Rule paragraph (c) of the proposed Rule states that both applicants and lawyers in connection with an application for admission must not fail to correct a material misapprehension in matter. Paragraph (d) and Comment [4] to Proposed Rule also provide illustrations of the various proceedings that constitute “applications for admission to practice law” in California and pertinent related authority.

Conduct in relation to a disciplinary proceeding is not addressed in this rule because the Commission considers the State Bar Court to be a “tribunal” within the meaning of proposed Rule 3.3. A lawyer’s conduct before a tribunal, including statements made to a tribunal, is covered in Rule 3.3 rather than in this rule.

* Proposed Rule 8.1, XDraft 4.1 (10/16/07).

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters	<u>Commission's Proposed Rule*</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law	<u>Explanation of Changes to the ABA Model Rule</u>
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:	~~An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:~~	The title of proposed Rule 8.1 has been revised from Model Rule 8.1 to emphasize that the rule prohibits (1) the making of a false statements (2) in connection with applications for "admission to practice law" and not solely (as in Model Rule 8.1) to applications for "admission to the bar," and provides examples of the broader concept of "admission to practice law" in paragraph (c) and Comment [2]. The expanded scope of the proposed Rule is intended to provide greater public protection. The proposed Rule does not address statements made by a member in connection with disciplinary matters.
	<u>(a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.</u>	Unlike the Model Rule, the proposed Rule creates a two-tier standard, (1) prohibiting an applicant for admission from knowingly making a false statement <u>or</u> knowingly failing to disclose a material fact in connection with the applicant's own application for admission (paragraph (a)) and (2) prohibiting a lawyer from knowingly making a false statement in connection with another's application for admission (paragraph (b)).
(a) knowingly make a false statement of material fact; or	~~(a)~~ <u>(b) A lawyer shall not</u> knowingly make a false statement of material fact; ~~or~~ <u>in connection with another person's application for admission to practice law.</u>	See Explanation of Changes for paragraph (a), above.

* Proposed Rule 8.1, XDraft 4.1 (10/16/07). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters	<u>Commission's Proposed Rule*</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.	~~(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.~~	The proposed Rule does not impose an affirmative obligation to respond to a lawful demand for information, because the Commission did not believe that the omissions described should be the basis for discipline. See below for that part of Model Rule paragraph (b) that addresses disclosures to correct misapprehensions.
	(c) <u>An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.</u>	The part of paragraph (b) of the Model Rule requiring an applicant and a lawyer (in connection with application for admission) to disclose a fact necessary to correct a known misapprehension in the matter is adapted in proposed paragraph (c). The Commission believes that this affirmative obligation is an appropriate basis for discipline.
	(d) <u>As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.</u>	Proposed Rule 8.1 provides illustrations of some of the diverse proceedings encompassed by the term, "admission to practice law," in new paragraph (d) for guidance, and Comment [4] to the proposed Rule lists additional examples.

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.	[1] <u>A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.</u> ~~The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.~~	The proposed Comment states the first part of Model Rule Comment [1] in a more concise manner, stating that an applicant for admission who makes a material false statement in connection with that application may be subject to subsequent discipline if admitted. The proposed Rule omits the second part of Model Rule Comment [1] noting that the duty imposed by the rule applies both to a member's statements both with respect to his or her own application for admission and with respect to another person's application for admission because it merely repeats the rule as revised. However, like Proposed Rule 8.1, Comment [1] to the Proposed Rule omits any reference to statements made in connection with disciplinary proceedings.

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.	[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions.~~A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.~~	This is the first sentence of Model Rule Comment [2]. It is included because the Commission agrees with substantive point and omitting it may engender unnecessary questions.
[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.	[3] A lawyer representing an applicant for admission ~~to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3~~ <u>to practice law is governed by the rules applicable to the lawyer client relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.</u>	Comment [3] to Proposed Rule 8.1 substantially tracks Comment [3] to the Model Rule, except that it uses terminology that is more appropriate for California (i.e., substitutes “admission to practice law” for “admission to the bar” and substitutes “disciplinary proceeding” for “disciplinary inquiry”). That part of the Model Rule comment addressing a lawyer who represents an applicant is covered by proposed Comment [5].

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.	See Explanation of Changes for paragraph (d), above.
	[5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule 3.3.	The comment adapts that part of Model Rule Comment [3] that addresses a lawyer who represents an applicant. See above explanation of changes to Comment [3].

Rule ~~1-200~~8.1 False Statement Regarding Application for Admission to the State BarPractice Law

(Comparison of the Current Proposed Rule to Current California Rule)

(a) ~~(A) A member~~An applicant for admission to practice law shall not knowingly make a false statement ~~regarding aof~~ material fact or knowingly fail to disclose a material fact in connection with ~~anthat~~person's own application for admission ~~to the State Bar~~.

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~

(b) ~~(C) This rule~~A lawyer shall not ~~prevent~~knowingly make a ~~member from serving as counsel~~false statement of record for an applicant material fact in connection with another person's application for admission to practice ~~in proceedings related to such admission~~law.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Discussion:

~~For purposes of rule 1-200 "admission" includes readmission.~~

Comment

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of applicable state constitutions.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the client lawyer relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

[4] The examples in paragraph (d) are illustrative. As used in paragraph (d), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services

attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.

- [5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice *in proceedings related to such admission*. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e); Rule 3.3.

Rule 8.1 False Statement Regarding Application for Admission to Practice Law
(Commission's Proposed Rule – Clean Version)

- (a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.
 - (b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.
 - (c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.
 - (d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.
- [3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the client lawyer relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.
 - [4] The examples in paragraph (d) are illustrative. As used in paragraph (d), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.

Comment

- [1] A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.
- [2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of applicable state constitutions.
- [5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Business and Professions Code sections 6068(c), (d) & (e)); Rule 3.3.

**Rule 8.1 False Statement Regarding Application for Admission to Practice Law.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	M	Yes		OCTC has the same objection to the use of the term knowingly in proposed rule 8.1 as to proposed rule 3.3. False statements made with reckless disregard are disciplinable. There are too many comments and some are more appropriate for treatises, law review articles, and ethics opinions. Comment [1] Further, Comment [1] should advise that attorneys may be either disciplined (<i>In the Matter of Pasyanos</i> (Review Dept. 2005) 4	The Commission has determined that in the context of statements regarding the application for admission to practice law, discipline should require a knowing false statement or failure to disclose, not merely "reckless disregard." See RRC Response to Comment 3 to Proposed Rule 3.3. In addition, the Commission's position is that in such a context, whether a particular false statement made with reckless disregard could be disciplined as "gross negligence" or moral turpitude will depend upon the facts of the individual case and should not be a matter of black letter rule. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. The Commission has attempted to balance the desire for conciseness with the need to provide guidance in the interpretation and application of the

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 8.1 False Statement Regarding Application for Admission to Practice Law.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Cal. State Bar Ct. Rptr. 746) or their license cancelled. (<i>Goldstein v. State Bar</i> (1989) 47 Cal.3d 937.)	black letter rule and has determined that the number of length of comments to this rule strikes an appropriate balance. The reference to an attorney's being "subject to discipline" in Comment [1], as throughout the Proposed Rules and Comments, is intended to include potential cancellation of the license to practice.
3	San Diego County Bar Association	A	Yes		Supports as drafted.	No response required.

Rule 8.1: Bar Admission and Disciplinary Matters

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: Rule 1-200 provides as follows:

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Colorado: Rule 8.1(a) also applies to “readmission” and “reinstatement.”

Georgia has adopted a Rule 9.3, entitled “Cooperation with Disciplinary Authority,” which provides as follows: “During the investigation of a grievance filed under these Rules, the lawyer complained against shall respond to disciplinary authorities in accordance with State Bar Rules.”

Comment 2 to this provision states: “Nothing in this Rule prohibits a lawyer from responding by making a Fifth Amendment objection, if appropriate. However, disciplinary proceedings are civil in nature and the use of a Fifth Amendment objection will give rise to a presumption against the lawyer.”

Michigan adds the following new language to its version of ABA Model Rule 8.1:

(b) An applicant for admission to the bar

(1) shall not engage in the unauthorized practice of law (this does not apply to activities permitted under MCR 8.120), and

(2) has a continuing obligation, until the date of admission, to inform the standing committee on character and fitness, in writing, if any answers in the applicant’s affidavit of personal history change or cease to be true.

New York: In the rules effective April 1, 2009, Rule 8.1(a) provides as follows:

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Ohio: Rule 8.1(a) deletes the opening phrase “[a]n applicant for admission to the bar.” According to the Ohio Supreme Court’s note, Rule 8.1(b) clarifies the “unwieldy” language of the ABA Model Rule but does not lower the standard of candor expected of a lawyer in bar admission or disciplinary matters.

Virginia: Rule 8.1 adds language to cover certifications required to be filed as a condition of maintaining or renewing a law license. Virginia also moves the second clause of Rule 8.1(b) to a separate subparagraph (c), and adds Rule 8.1(d), which makes it a separate violation to “obstruct a lawful investigation by an admissions or disciplinary authority.”

Proposed Rule 8.1.1[RPC 1-110]

“Compliance with Conditions of Discipline and Agreements in Lieu of Discipline.”

(XDraft #2, 7/3/07)

Summary: Proposed Rule 8.1.1 amends current rule 1-110 and continues the requirement that a lawyer comply with the terms and conditions attached to agreement made in lieu of discipline, probation or reproof. No substantive changes are recommended to the current rule. The Commission's recommended revisions are intended for brevity and clarity.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☒ No ABA Model Rule counterpart	☒ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC Rule 1-110

Statute

Case law

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 1

Abstain 2

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.1.1* Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 8.1.1 amends current rule 1-110 and continues the requirement that a lawyer comply with the terms and conditions attached to agreement made in lieu of discipline, probation or reproof. No substantive changes are recommended to the current rule. The Commission's recommended revisions are intended for brevity and clarity.

There is no corresponding ABA Model Rule. However, there is a comparable rule in the ABA Model Rules of Disciplinary Enforcement. Rule 10(B) of the Model Rules of Disciplinary Enforcement states, "Conditions. Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent." Proposed Rule 8.1.1 is more specific to the California disciplinary process.

* Proposed Rule 8.1.1, XDraft 2 (7/3/07).

<u>California Rule of Professional Conduct</u> Rule 1-110 Disciplinary Authority of the State Bar	<u>Commission's Proposed Rule*</u> Rule 8.1.1 Disciplinary Authority of the State Bar Compliance with Conditions of Discipline and Agreements in Lieu of Discipline	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.	A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovls. ~~or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court~~ <i>(Comparison continued in Comment below.)</i>	The rule has been renamed to better describe the conduct the rule addresses. The phrase “the terms and” has been added to “conditions” to more accurately describe the scope of the member’s duty to comply under the rule. The clause “any agreement made in lieu of discipline, disciplinary probation, and” has been added to “public or private reprovls” to identify with more particularity the kinds of arrangements in which terms and conditions may be imposed on the member. Reference to the sections of the Business & Professions Code and Court Rules under which sanctions may be imposed on members has been deleted. The Commission regarded the references as surplusage and potentially confusing because the references focus on the source of the authority for the imposition of conditions rather than identifying the circumstances where conditions are imposed.

* No comparable ABA Model Rule. Redline/strikeout showing changes to California Rule 1-110

<u>California Rule of Professional Conduct</u> Rule 1-110 Disciplinary Authority of the State Bar Comment	<u>Commission's Proposed Rule*</u> Rule 8.1.1 Compliance with Conditions of Discipline Comment	<u>Explanation of Changes to the California</u> <u>Rule of Professional Conduct</u>
	[1] Other provisions also require a lawyer to comply with conditions of discipline. (See, e.g., Business and Professions Code sections ~~6077 and 6078~~ <u>6068, subdivisions (k) & (l)</u> and ~~rule 956~~, California Rules of Court, <u>Rule 9.19.</u>)	The Comment was added to alert lawyers to other law (e.g., Bus. & Prof. Code §§ 6068(k), (l), and Cal. Rule of Court 956), under which terms and conditions of compliance may be imposed.

* No comparable ABA Model Rule. Redline/strikeout showing changes to California Rule 1-110

Rule ~~1-200~~8.1 False Statement Regarding Application for Admission to the State BarPractice Law

(Comparison of the Current Proposed Rule to Current California Rule)

(a) ~~(A) A member~~An applicant for admission to practice law shall not knowingly make a false statement ~~regarding aof~~ material fact or knowingly fail to disclose a material fact in connection with ~~anthat~~person's own application for admission ~~to the State Bar~~.

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~

(b) ~~(C) This rule~~A lawyer shall not ~~prevent~~knowingly make a ~~member from serving as counsel~~false statement of record for an applicant material fact in connection with another person's application for admission to practice ~~in proceedings related to such admission~~law.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Discussion:

~~For purposes of rule 1-200 "admission" includes readmission.~~

Comment

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of applicable state constitutions.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the client lawyer relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

[4] The examples in paragraph (d) are illustrative. As used in paragraph (d), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services

attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.

- [5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice *in proceedings related to such admission*. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e); Rule 3.3.

**Rule 8.1.1 Compliance with Conditions of Discipline
and Agreements in Lieu of Discipline**
(Commission's Proposed Rule – Clean Version)

A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reproofs.

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. See, e.g., Business and Professions Code section 6068, subdivisions (k) & (l) and California Rules of Court, Rule 9.19.

**Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline.
[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	Office of Chief Trial Counsel	A	Yes		OCTC supports this rule.	No response required.
2	San Diego County Bar Association	A	Yes		Supports as drafted.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Proposed Rule 8.2 [1-700]

“Judicial and Legal Officials”

(XDraft #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

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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.

* Proposed Rule 8.2, XDraft 4.1 (4/3/2010).

<u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials	<u>Commission's Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>of fact</u> 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 <u>in California</u> shall comply with ~~the applicable provisions~~ <u>Canon 5</u> of the <u>California</u> Code of Judicial ~~Conduct~~ <u>Ethics</u>.	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) <u>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</u>	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, XDraft 4.1 (4/3/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials	<u>Commission's Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.</u>	
	(d) <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials Comment	<u>Commission's Proposed Rule</u> Rule 8.2 Judicial and Legal Officials Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.~~ <u>Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.</u>	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. <u>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).</u>	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).

Rule 8.2: Judicial and Legal Officials

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: 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: In the rules effective April 1, 2009, Rule 8.2 provides as follows: “(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office. (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.”

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.

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.”

Proposed Rule 8.3 [1-120 & 1-500(B)] “Reporting Professional Misconduct”

(XDraft #6, 12/14/09)

Summary: Proposed rule 8.3 adds new permissive and mandatory reporting standards, including a requirement that a lawyer report to the State Bar when another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. Permissive reporting standards are imposed for general lawyer misconduct and for judicial misconduct by judges and other adjudicative officers. In the place of current California Rule 1-500(B), a proposed rule comment provides a cross reference to the broader prohibition in existing Business and Professions Code §6090.5.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 1-120, 1-500(B)

Statute

Bus. & Prof. Code 6090.5.

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption of the Rule ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 5

Abstain 1

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

(See Introduction.)

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

See Introduction. The proposed rule includes limited mandatory reporting of certain lawyer misconduct.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.3* Reporting Professional Misconduct

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 8.3 adds new disciplinary standards concerning a lawyer reporting the misconduct of another member of the legal profession that are not currently found in the California rules or the State Bar Act. The new disciplinary standards include one limited mandatory reporting standard and two permissive reporting standards. (i) Paragraph (a) of proposed Rule 8.3 states that a lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer *must* inform the appropriate disciplinary authority. (ii) Paragraph (b) states that, except *as required by paragraph (a)*, a lawyer *may, but is not required to*, report misconduct of another lawyer. Paragraph (c) states that a lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office *may, but is not required to*, report the violation to the appropriate authority. The proposed Rule thus differs from the broad mandatory reporting requirements as to both lawyer and judicial misconduct that are found in ABA Model Rule 8.3 and most states. The Commission believes that a balancing of the policies involved favors permissive reporting for most misconduct, but a limited mandatory reporting standard for certain egregious criminal acts that, if not remedied, are most likely to cause substantial harm to the public and might remain under the radar for a significant period of time or perhaps forever, during which time additional substantial public injury may occur.

The Commission agrees with the concepts that the self-regulation of the legal profession requires each lawyer to be vigilant for ethical violations, and that lawyers should be encouraged to report the misconduct of other lawyers, but it has concluded that a balanced approach to reporting misconduct is more appropriate than establishing a single standard that subjects all misconduct to possible mandatory reporting. There are several reasons for this approach. These include the following:

* Proposed Rule 8.3, XDraft 6 (12/14/09).

- a. First, a limited mandatory reporting standard for certain, egregious criminal acts is consistent with the concept of self-regulation. Such acts are more likely to result in substantial harm to the public and mandating their reporting will offer additional public protection not present in the existing California rules. A broad mandatory reporting rule, however, would be inconsistent with the lawyer's duty of undivided loyalty to his or her client. This important client-protection principle is enforced more robustly in California than under the Model Rules, and the Commission supports maintaining the obligation of lawyers to focus their professional efforts primarily on client welfare and interests. See *Flatt v. Superior Court* (1994) 9 Cal.4th 281, 289 ["A lawyer's fiduciary duty of loyalty is to protect the client in every possible way and not to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Absent such informed consent, a lawyer is precluded from assuming any relation which would prevent him from devoting the lawyer's entire energies to the client's interests."] Cf. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) [lawyer suspended who abided by client's directive not to report her former counsel's misconduct]. As exemplified by *Himmel*, mandatory lawyer reporting compels the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. The Commission considers the client loyalty issue paramount. Broadly mandating reporting of another lawyer's misconduct could prejudice the reporting lawyer's client, e.g., by: (i) disclosing the client's confidential information; (ii) interfering with the pursuit of the client's legitimate objectives; (iii) implicating the client in wrongdoing; and (iv) as mentioned below (see ¶. 9 of this Introduction), embroiling the client as a witness in the disciplinary proceedings.
- b. Second, the Commission is not aware of any evidence of an underreporting of lawyer misconduct in California. To the contrary, statistics in the 2007 Report on the State Bar of California Discipline System suggest that the volume of lawyer complaints already strains the disciplinary system.
- c. Third, a rule that broadly mandates reporting, similar to the Model Rule, would create a potential conflict with statutory duties of confidentiality a lawyer might have in another role, such as might happen with information a lawyer were to learn while serving as a mediator. For all of these reasons, the Commission believes that any broad reporting obligation should be permissive and left to the exercise of a lawyer's professional judgment; a lawyer's fitness to practice law is not called into question by a decision not to report another person's ethical violation. This view is implemented in the proposed rule that includes permissive reporting for most misconduct and a limited mandatory reporting standard for certain egregious criminal acts.

Georgia has adopted a version of the reporting rule which expressly states that a lawyer cannot be disciplined under it. Kentucky has addressed some of the weaknesses in Model Rule 8.3 in its new Rule (effective 7/15/09) that: (i) adds an immunity provision for the lawyer who makes the Rule 8.3 report [but overlooks the civil risk to a lawyer who exercises judgment to not report]; and (ii) adds an extremely limited self-reporting obligation [limited to a lawyer who is disciplined in another jurisdiction. Cf. Comment [3], below]. A number of jurisdictions have reacted to the mandatory nature of the Model Rule by excepting information learned in certain circumstances, such as by participating in a lawyer assistance program. Ohio's rule limits the duty to providing only unprivileged information. New York's Rule 8.3 (effective 4/1/09) eliminates the duty to report on judicial misconduct. For reasons explained in the comparison chart, the Commission's proposed rule permits but does not require the reporting of judicial misconduct.

In addition to the Model Rule concept that lawyer-self-regulation implies an obligation on all lawyers to report misconduct by other lawyers, which is mentioned above, proponents of broad mandatory reporting argue that lawyers often are in the best position to identify the misconduct of other lawyers. While this might be true sometimes, with most disciplinary charges it is only the client who can be a material, competent witness against the lawyer, and this means that in most circumstances, the offending lawyer's client should determine whether or not to report the misconduct; that person otherwise might be drawn into disciplinary proceedings in a way that he or she does not wish, for example, because of a desire to protect his or her confidential information.

The prohibition found in current California Rule 1-500(B) against agreements not to report violations has been incorporated into this Rule by clarifying in Comment [5] that lawyers may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5, which provides broader prohibitions on such agreements. Following public comment, some revisions were made for clarity and a comment added to emphasize that this new Rule is not intended to abrogate a lawyer's obligations under California Rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges").

Minority. A minority of the Commission dissents from the mandatory reporting requirement in the proposed Rule. The minority contends that mandatory reporting issues often arise in the midst of representing a client. The experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, the innocent client often suffers. Reporting can lead to disputes among the lawyers representing clients in a matter. It can lead to a change in counsel and corresponding continuances or inability to complete a pending settlement as well as other situations in which the innocent client bears the cost. Mandatory reporting does not protect clients in these situations and elevates the protection of non-clients over the legitimate interests of clients.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.	(a) A lawyer who knows that another lawyer has committed a ~~violation of the Rules of Professional Conduct~~felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer ~~in other respects,~~ shall inform the appropriate ~~professional~~disciplinary authority.	As discussed in detail in the Introduction, the Commission is recommending a balanced approach of both permissive and limited mandatory reporting, rather than setting a single standard that subjects all misconduct to possible mandatory reporting. Proposed paragraph (a) states the limited mandatory reporting obligation imposed for egregious criminal acts. This mandatory standard requires that a report be made to a disciplinary authority that would have jurisdiction to take action on the reported misconduct. The Introduction notes the minority view that opposes the mandatory reporting obligation.
	(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.	See above Explanation of Changes for paragraph (a). Proposed paragraph (b) states the general permissive reporting standard for violations of the Rules or the State Bar Act that are not felonious criminal acts subject to mandatory reporting under paragraph (a).

* Proposed Rule 8.3, XDraft 6 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule,
RRC - 1-120 & 1-500B [8-3] - Compare - Rule Explanation - XDFT6 (12-14-09)

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.	(~~b~~c) A lawyer who knows that a judge <u>or other adjudicative officer</u> has committed a violation of applicable rules of judicial conduct that raises a substantial question as to ~~the judge's~~ <u>that person's</u> fitness for office ~~shall inform~~ <u>may, but is not required to, report the violation to</u> the appropriate authority.	The Model Rule expands the scope of the concept of lawyer self-regulation to include a duty to report judicial misconduct. The Commission agrees that there may be situations where a lawyer's report of judicial misconduct would be beneficial for the client and provide public protection; however, the Commission also believes it would be unduly harsh to subject a lawyer to the threat of discipline for deciding not to report judicial misconduct because of concerns about how doing so might affect the lawyer's other current clients or the lawyer's self interest. Accordingly, proposed paragraph (c) states a permissive standard for reporting judicial misconduct.
(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.	(~~e~~d) This Rule does not ~~require disclosure of~~ <u>authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose</u> (i) information otherwise protected by <u>Business and Professions Code section 6068(e)(1), Rule 1.6, or Rule 1.9;</u> (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) <u>information gained during a mediation;</u> (iv) <u>information subject to a confidential protective order;</u> or (v) <u>information otherwise protected under laws governing fiduciaries.</u>	Similar to Model Rule 8.3(c), the Commission agrees that a lawyer should not make a permissive report under paragraphs (b) and (c) of the proposed Rule if doing so would compromise client information, but it disagrees with the Model Rule because it is too narrow in referring only to confidentiality as there are other client interests that a lawyer should consider before deciding whether to make a permissive report.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.	~~[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.~~	The Commission recommends the rejection of Model Rule 8.3, Comment [1], because it is inconsistent with its recommended balanced approach of including a limited mandatory reporting standard egregious criminal acts and a general permissive reporting standard for other misconduct.
	<u>[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.</u>	The Commission agrees with the premise of MR 8.3 that the seriousness of the other lawyer's misconduct is a proper concern in deciding whether to report that misconduct. The Commission therefore recommends the adoption of this Comment [1], which borrows that concept from MR 8.3(a).
[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.	~~[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.~~	As explained above with respect to paragraph (d), the Commission recommends replacing the reference to confidentiality with a broader discussion of pertinent concerns. Given the importance of these concerns, they are addressed in the rule rather than in a comment to the rule.

* Proposed Rule 8.3, XDraft 6 (12/14/09).

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, section 6068(o).) In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.</u>	California is unique in the self-reporting requirement cited in this proposed Comment. Because of the relationship between proposed Rule 8.3 and the separate issue of self-reporting, the Commission believes it would be helpful to include this cross-reference. Also included in this Comment is an express statement that a lawyer is not required to report another lawyer's misconduct under paragraph (a) if that report would constitute a relinquishment of the reporting lawyer's privilege against self-incrimination.
[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.	~~[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.~~	For the most part, Model Rule 8.3, Comment [3], is unrelated to the Rule that the Commission recommends, and it therefore recommends the comment's removal. The limited mandatory reporting standard relates to felonious criminal acts not mere rule violations. The Commission's proposed Comment [3] is on a different topic and is given and explained immediately below.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.	As with proposed Comment [2], the Commission believes it could be helpful to lawyers to provide this cross-reference to the Rule that prohibits lawyers from threatening criminal, administrative or disciplinary charges.
[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.	[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.	Proposed Comment [4] adopts language of the Model Rule counterpart.
	[5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.	Current California Rule 1-500(B) provides that a member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules. The Commission recommends replacing the substance of this current rule with the cross reference in proposed Comment [5] to California's statutory prohibition located at Business and Professions Code section 6090.5. The statutory prohibition subsumes the prohibition in current California Rule 1-500(B) and also prohibits related misconduct not found in the current rule (e.g., a prohibition against improperly agreeing to withdraw a State Bar complaint). Rather than perpetuating the overlap of topics, the Commission is recommending a cross reference to the broader statutory prohibition.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.	~~[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.~~	See above explanation of paragraph (d) of the rule. Model Rule 8.3's general mandatory reporting requirement creates a conflict whenever a lawyer learns, in a confidential setting, information that must be reported under the ABA's version of the rule. Model Rule 8.3, Comment [5] addresses one example of that kind of conflict, which is when a lawyer obtains information while participating in an assistance program for lawyers or judges. To the extent this conflict might manifest under either the proposed permissive or limited mandatory reporting standard in the Commission's proposed rule, the Commission has included, in the rule itself, paragraph (d) that resolves the conflict by favoring confidentiality.

Rule 8.3 Reporting Professional Misconduct (Commission's Proposed Rule – Clean Version)

- (a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority.
 - (b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
 - (c) A lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority.
 - (d) This Rule does not authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client, a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose (i) information otherwise protected by Rule 1.6, Rule 1.9, or Business and Professions Code section 6068(e); (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) information gained during a mediation; (iv) information subject to a confidential protective order; or (v) information otherwise protected under laws governing fiduciaries.
- substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.
- [2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. See, e.g., Business and Professions Code section 6068(o). In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.
 - [3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.
 - [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the lawyer-client relationship.
 - [5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.

COMMENT

- [1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a

**Rule 8.3 Reporting Professional Misconduct.
[Sorted by Commenter]**

TOTAL = 4 **Agree = 1**
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	A	Yes		OCTC believes that Comments [1], [3] and [4] are more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees and has not made the requested changes. It believes that Comment [1] provides useful guidance, that Comment [3] provides a rule cross-reference that is particularly important given the increased complexity of the proposed rules as compared with the current California rules, and that Comment [4] addresses what might be an obvious point but one that is important enough not to be assumed.
2	Orange County Bar Association	M	Yes		OCBA agrees with paragraph (c), which states that a lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority. The OCBA recommends, however, that the words "or to hear a matter" be added after the phrase "fitness for office," as "fitness for office" appears to be too restrictive a term and would not include situations where the judge or judicial officer has acted or threatens to act improperly on only one occasion and only on a specified matter, but may still be otherwise fit for office.	The OCBA comments says, in substance, that the MR language in proposed paragraph (c) – that a lawyer knows "that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office" – might be read narrowly by some lawyers as requiring any over-all conclusion about the judge's qualities in general that might limit reporting for a single known act of misconduct. Because the purpose of paragraph (c) is to encourage reporting of judicial misconduct, the Commission agrees with OCBA and has made the change it suggested.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 8.3 Reporting Professional Misconduct.
[Sorted by Commenter]**

TOTAL = 4
Agree = 1
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Diego County Bar Association	M	Yes		Comment [2] would be clearer if it was changed to use a list format. The rule also should address the reporting of judicial misconduct.	Commission agreed and revised Comment [2]. The draft does so in paragraph (c). As explained in the Rule comparison chart, the Commission recommends that judicial reporting be permissive rather than mandatory to assure that client interests remain paramount.
4	State Bar Law Practice Management and Technology Section (LPMT)	D	Yes	(a)	LPMT recommends that the mandatory reporting requirement be removed for the following reasons and offer alternative language to ¶(a) and to ¶(b) to conform it to the proposed changes to ¶(a). The State Bar should not predicate a rule on the assumption that a lawyer should be able to “know” when a “felonious criminal act” has been committed. We assume that Proposed Rule 8.3(a) is not directed to those circumstances in which the accused lawyer has been convicted of a felony, yet no one has notified the State Bar of that conviction. The typical lawyer may be expected to know other types of rules or principles, but knowledge of criminal law should not be imputed to all lawyers. The mandatory nature of the reporting requirement could prejudice the client and damage the attorney-client relationship by	The Commission disagrees and did not make the requested change, which the Commission believes evidences confusion between committing an act and being convicted of a crime. If for example, a lawyer knows that another lawyer has solicited a bribe, the lawyer should say so without regard to whether the other lawyer ever is prosecuted for the act or convicted, events that might not occur for any number of reasons that could be immaterial to professional discipline. The Commission also doesn’t believe that differences between the laws of different jurisdictions or an individual lawyer’s lack of sophistication in the nuances of criminal law present any risk of discipline to lawyers under the proposed mandatory reporting requirement of paragraph (a). Because of the client-protection standard of proposed paragraph (d), the Commission does not believe that the otherwise mandatory reporting

**Rule 8.3 Reporting Professional Misconduct.
[Sorted by Commenter]**

TOTAL = 4
Agree = 1
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					compelling the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. For the foregoing reasons, we recommend that Proposed Rule 8.3(a)&(b) and Comments [1]-[3] be amended as follows: (a) A lawyer ~~who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall~~ may, but is not required to, inform the appropriate disciplinary authority that another lawyer has committed a felonious criminal act. (b) ~~Except as required by paragraph (a), a~~ A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act. <u>COMMENT</u> [1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act ~~that is not required by paragraph (a),~~ a lawyer should consider, [insert comma] among other things, [insert	requirement of paragraph (a) presents any risk to clients.

**Rule 8.3 Reporting Professional Misconduct.
[Sorted by Commenter]**

TOTAL = 4
Agree = 1
Disagree = 1
Modify = 2
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					~~comma~~] whether the violation raises a substantial question as to ~~another~~ lawyer's honesty, trustworthiness, ~~[insert comma]~~ or fitness as a lawyer. [2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. See, e.g., Business and Professions Code section 6068(o). ~~In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.~~ In addition, under paragraph (a), a lawyer should not report a felonious criminal act committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination. [3] Even if a lawyer is permitted ~~or required~~ to report under this Rule, the lawyer must not threaten to file criminal, administrative, ~~[insert comma]~~ or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.	

Rule 8.3: Reporting Professional Misconduct

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, Alaska exempts a lawyer from making a report under Rule 8.3(a) or (b) if “the lawyer reasonably believes that the misconduct has been or will otherwise be reported.”

Arizona: Rule 8.3(c) retains language similar to the pre-2002 version of the ABA Model Rule, protecting information gained while serving in a lawyer assistance program that “would be confidential if it related to the representation of a client” and if confidentiality has not otherwise been waived.

Arkansas: Rule 8.3(d) generally exempts lawyers working with the Arkansas Lawyer Assistance Program from mandatory reporting obligations “unless it appears . . . that the attorney in question, after entry into the ALAP, is failing to desist from said violation, or is failing to cooperate with a program of assistance to which said attorney has agreed, or is engaged in the sale of a controlled substance or theft of property constituting a felony under Arkansas law, or the equivalent thereof if the offense is not within the State’s jurisdiction.”

California: The California Rules of Professional Conduct have no comparable provision.

Connecticut adds the following sentence to Rule 8.3(a): “A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.” Rule 8.3(c) tracks the pre-2002 version of ABA Model Rule 8.3(c), but Connecticut’s version also refers to Connecticut General Statutes §51-81d(f), which governs crisis intervention assistance to attorneys.

District of Columbia: Rule 8.3(c) omits the phrase “or information gained by a lawyer or judge while participating in an approved lawyers assistance program.” The phrase is unnecessary because D.C. Rule 1.6(i) provides as follows:

[A] lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee . . . shall be treated as a confidence or secret within the terms of paragraph (b) [of Rule 1.6]. Such

information may be disclosed only to the extent permitted by this rule.

D.C. Rule 1.6(j) contains parallel language regarding information that a lawyer receives in connection with service on the D.C. Bar Practice Management Service Committee (formerly known as the Lawyer Practice Assistance Committee).

Florida: Rule 8.3 ends by providing that “if a lawyer’s participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.” Florida also adds Rule 8.3(d), which provides as follows:

Limited Exception for LOMAS Counsel. A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member . . . if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer’s practice. *Provided further*, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

Georgia changes “shall” to “should” in Rule 8.3(a) and (b), and replaces ABA Model Rule 8.3(c) by stating: “There is no disciplinary penalty for a violation of this Rule.” Georgia also adds a special self-reporting provision, Rule 9.1, which

requires members of the Georgia Bar to notify the State Bar of Georgia of (a) all other jurisdictions in which they are admitted to practice law and the dates of admission; and (b) “the conviction of any felony or of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law, within sixty days of conviction.” Finally, Georgia adds a special Rule 9.2, regarding agreements not to report, which provides as follows:

In connection with the settlement of a controversy or suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the person bringing the claim will be prohibited or restricted from filing a disciplinary complaint, or will be required to request the dismissal of a pending disciplinary complaint concerning that conduct.

Georgia’s Comment to Rule 9.2 provides as follows:

[1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then free to injure other members of the general public.

[2] To prevent such abuses in settlements, this rule prohibits a lawyer from settling any controversy or suit involving misuse of funds on any basis which prevents the person bringing the claim from pursuing a disciplinary complaint.

Illinois: In the rules effective January 1, 2010, Rule 8.3(a) deletes the reference to “honesty, trustworthiness or fitness as a lawyer” and simply imposes a duty to report when “another lawyer has committed a violation of Rule 8.4(b) or 8.4(c). . . .” Moreover, Rule 8.3(c) excludes from the reporting obligation any information that is “protected by the attorney-client privilege.” This provision is narrower than the Model Rule’s exception, which applies to all information protected by Rule 1.6. Illinois also adds Rule 8.3(d), which requires lawyers to report to the Illinois Disciplinary Commission any discipline that has been imposed on them by a body other than the Illinois Commission.

Kansas: Rule 8.3(c) adds that lawyers are “not required to disclose information” learned through participation in a variety of self-help organizations, such as Alcoholics Anonymous.

Also, Rule 223 of the Kansas Rules Relating to Discipline of Attorneys, entitled “Immunity,” provides as follows: “Complaints, reports, or testimony in the course of disciplinary proceedings under these Rules shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to judicial immunity and all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state.”

Massachusetts: The Comment to Rule 8.3 provides as follows:

[3] While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to

mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a “serious crime.” . . . Section 12(3) of Rule 4:01 provides that a serious crime is “any felony, and . . . any lesser crime a necessary element of which . . . includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit [such a crime].” In addition to conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct. . . .

[3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

Michigan adds the word “significant” before “violation” in Rules 8.3(a) and (b). The duty to report is suspended if the lawyer gained the information “while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent that the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.” Rule 8.3(c)(2).

New Jersey cuts off Rule 8.3(c) after “Rule 1.6” and adds Rule 8.3(d), which provides as follows:

Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

New York: In the rules effective April 1, 2009, Rule 8.3(b) provides as follows: “A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.”

North Carolina: Rule 8.3(c) provides only that Rule 8.3 “does not require disclosure of information otherwise protected by Rule 1.6,” omitting the ABA reference to a lawyers’ assistance program, but North Carolina accomplishes the same result by providing in Rule 1.6(c) that the duty of confidentiality under Rule 1.6 “encompasses information received by a lawyer then acting as an agent of a lawyers’ or judges’ assistance program . . . regarding another lawyer or judge seeking assistance or to whom assistance is being offered.” (Rule 1.6 also defines the term “client” to include lawyers seeking assistance from approved lawyers’ or judges’ assistance programs.)

North Carolina also adds a Rule 8.3(d), which provides that a lawyer who has been disciplined in any state or federal court for violating that court’s Rules of Professional Conduct must “inform the . . . State Bar of such action in writing no later than 30 days after entry of the order of discipline.” Finally, North Carolina Rule 1.15-2(o), entitled “Duty to Report Misappropriation,” provides that a lawyer who “discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.”

Ohio: Rule 8.3 provides as follows:

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee . . . of a bar association . . . designed to assist lawyers with substance abuse or mental health problems . . . shall be privileged for all purposes under this rule.

Texas alters Rule 8.3(c) as follows:

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

Texas also adds a Rule 8.3(d), which makes clear that Rule 8.3 does not require disclosure of knowledge or information otherwise protected as confidential information by Texas Rule 1.05 (the Texas equivalent to ABA Model Rule 1.6) or by "any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program."

Virginia: Rule 8.3(b) replaces the phrase "who knows" with the phrase "having reliable information." Virginia Rule 8.3(c) provides that if a lawyer serving as a third-party neutral receives "reliable information" in that capacity about another lawyer's misconduct that would otherwise have to be reported, the lawyer/neutral "shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority." Rule 8.3(d) — equivalent to ABA Model Rule 8.3(c) — also exempts disclosure by a lawyer who is a "trained intervenor or volunteer" for an approved lawyers' assistance committee, or who is "cooperating in a particular assistance effort," when the information is obtained "for the purposes of fulfilling the recognized objectives of the program."

Virginia also adds Rule 8.3(e), which requires a lawyer to inform the Virginia State Bar if (1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any jurisdiction for violating that jurisdiction's rules of professional conduct, or (2) the lawyer has been convicted of a felony in any United States jurisdiction, or (3) the lawyer has been convicted of either "a crime involving theft, fraud, extortion, bribery or perjury," or "an attempt, solicitation or conspiracy to commit any of the foregoing offenses" in any United States jurisdiction.

Proposed Rule 8.4 [RPC 1-120]

“Misconduct”

(XDraft #10.2, 4/6/10)

Summary: The text of proposed new Rule 8.4 retains current California Rule 1-120 (Assisting, Soliciting, or Inducing Violations) as paragraph (a) and includes most of the provisions found in ABA Model Rule 8.4. Some of the included Model Rule provisions have counterparts in current California rules or in sections of the Business and Professions Code. The text of proposed Rule 8.4 differs from ABA Model Rule 8.4 by: (i) not proscribing *attempts* to violate the rules in paragraph (a); (ii) including the concept of moral turpitude in paragraph (b); (iii) restricting discipline to misrepresentations that are intentional in paragraph (c); and (iv) limiting violations for conduct prejudicial to the administration of justice to conduct in connection with the practice of law (paragraph (d)).

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 1-120

Statute

Business and Professions Code §§6100 et seq.

Case law

See Comment chart, Comments [2A], [2B] and [2C].

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7
Opposed Rule as Recommended for Adoption 4
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No (See Explanations for Paragraphs (b) and (d)).

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The continued references to moral turpitude when the ABA has essentially abandoned that concept in the Model Rules has been objected to by some, but the Commission believes it has continued viability and continues to be utilized by The State Bar Court for discipline.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4* Misconduct

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

The text of proposed Rule 8.4 retains current California Rule 1-120 (Assisting, Soliciting, or Inducing Violations) as paragraph (a) and includes most of the provisions found in ABA Model Rule 8.4, thus collecting in one rule various misconduct provisions. Some of the included ABA provisions have counterparts in current California rules or in sections of the Business and Professions Code. The text of proposed Rule 8.4 differs from ABA Model Rule 8.4 by: (i) not proscribing attempts to violate the rules in paragraph (a); (ii) including the concept of moral turpitude in paragraph (b); (iii) restricting discipline under paragraph (c) to misrepresentations that are intentional; and (iv) limiting violations for conduct prejudicial to the administration of justice to conduct in connection with the practice of law (paragraph (d)).

Many of the Comments are based on corresponding comments in ABA Model Rule 8.4, but have been revised for brevity and clarity, and to conform to the differences in the Rule text. In addition, several comments have been added to apprise California lawyers of statutory and decisional law that might provide bases for discipline beyond those in Rule 8.4. After the subsequent public comment distribution, a new comment, Comment [2C], was added in response to comment letter from the Department of Justice. The new comment explains that certain covert activities are not prohibited by paragraph (c) of the rule.

* Proposed Rule, XDraft 10.2 (4/6/10).

INTRODUCTION (Continued):

Minority. A minority of the Commission objects to Comment [3], which states that manifestations by words or conduct of certain types of bias or prejudice can be a violation of paragraph (d). This is a category of speech that inherently has implications under the First Amendment and the California Constitution. The minority believes a legal professional should respect the right of all citizens, including lawyers, to express their opinions, even if they are disgusting or repugnant. The legal profession should not condone chilling speech by a rule that would call out a category of speech as a potential ground for discipline. The minority contends the focus of paragraph (d) should be on conduct in connection with the practice of law that is prejudicial to the administration of justice and not on categories of speech.

Variations in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 8.4. District of Columbia Rule 8.4(d) prohibits conduct that “seriously interferes with the administration of justice.” Several jurisdictions, including Georgia, Virginia and Wisconsin, omit Model Rule 8.4(d). Other jurisdictions, e.g., Florida, expand Model Rule 8.4 (d), to prohibit conduct intended to “disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis,” including on account of race, ethnicity, etc. Some jurisdictions have added provisions to address such conduct specifically, e.g., Colorado, Illinois, Maryland (words or conduct), Texas (same), Ohio. See State Variations, below.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;	It is professional misconduct for a lawyer to: ~~(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;~~ (a) <u>knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;</u>	There are two principal changes in paragraph (a). First, paragraph (a) removes "... violate ... the Rules of Professional Conduct" The reason for this change is that any conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation. Second, paragraph (a) eliminates an "attempt" to violate a Rule as a general disciplinary offense. It was the consensus of the Commission during the drafting process that it should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. As a result, the Commission decided not to include attempts to violate as a general rule of discipline.
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;	(b) commit a criminal act <u>that involves moral turpitude or</u> that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer ~~in other respects;~~	The Commission added moral turpitude to the Model rule to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically, section 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. See Explanation of Changes for Model Rule 8.4, Cmt. [2], below. Some states have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding "moral turpitude" to the proposed rule.

* Proposed Rule 8.4, XDraft 10.2 (4/6/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
		In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code sections 6101 and 6102. Moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction. A minority of the Commission believes that California should not continue using moral turpitude as a standard when the ABA has essentially abandoned that concept in the Model Rules. The Commission also recommends deletion of the phrase “in other respects” as surplusage.
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;	The addition of “intentional” is intended to clarify that negligent misrepresentation is not regarded as dishonesty that triggers this Rule. The Commission believes this clarification is consistent with the intended scope of the ABA's rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., <i>State ex rel. Oklahoma Bar Ass'n v. Besly</i> (Okla., 2006) 136 P.3d 590 [2006 OK 18] and <i>In re Clark</i> (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827].

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(d) engage in conduct that is prejudicial to the administration of justice;	(d) engage in conduct <u>in connection with the practice of law, including when acting in propria persona</u>, that is prejudicial to the administration of justice;	The addition of “in connection with the practice of law” was added because of concern that the vagueness of the language might not overcome facial Constitutional challenges under the First Amendment. The Commission sought to delimit the scope of conduct proscribed under paragraph (d) by clarifying in advance that the specific conduct that might be at issue in connection with a charge of prejudice to the administration of justice must be connected to the practice of law. A minority of the Commission disagrees with the language limiting the paragraph’s scope to conduct “in connection with the practice of law” because a lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts. Finally, the Commission has added the phrase “including when acting in propria persona,” to clarify that a lawyer appearing in propria persona is engaging in the practice of law and therefore not immune from this provision.
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or	(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law; or	Paragraph (e) is substantively identical to Model Rule 8.4(e). The Commission has adopted the convention of referring to the Rules of Professional Conduct as “these Rules.” Curiously, the ABA mostly refers to the Model Rules collectively as “these Rules” in its blackletter and comment, only occasionally (as here) referring to them as “the Rules of Professional Conduct.” An inquiry to the Model Rules drafters (reporters) confirmed that no substantive meaning should be attached to the varied usages.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	Paragraph (f) is identical to Model Rule 8.4(f).

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.	<u>Paragraph (a)</u> [1] ~~Lawyers are~~A lawyer is subject to discipline ~~when they violate or attempt to violate the Rules of Professional Conduct, for~~ knowingly ~~assist~~assisting or ~~induce~~inducing another to ~~do so~~violate these Rules or ~~the State Bar Act, or to~~ do so through the acts of another, as when ~~they request~~a lawyer requests or ~~instruct~~instructs an agent to do so on the lawyer's behalf. ~~Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~	Headings have been added to the Comment for clarity. The Model Rule language has been modified and attempted violations eliminated, to conform to the language of the black letter rule. See Explanation for paragraph (a), above. The substance of the deleted last sentence of the Model Rule comment is the subject of proposed Rule 1.2(d), the counterpart to current rule 3-210. See Comment [4], below.
[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a	<u>Paragraph (b)</u> [2] ~~Many kinds of illegal conduct reflect~~A lawyer may be disciplined under paragraph (b) for a criminal act ~~that reflects~~ adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some ~~kinds of~~ offenses carry no such implication. ~~Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.~~	Comment [2] is based on Model Rule 8.4, cmt. [2]. The first sentence of the Model Rule comment was revised to track the actual language of paragraph (b). The second sentence was deleted as unnecessary because the Commission has retained "moral turpitude" in the Rule, for the reasons set out in the Explanation for paragraph (b), above. At one point during the drafting process for this Rule, the Commission crafted a statement, based on the stricken sentence, that was intended to clarify that "offenses concerning some matters of personal morality" were not within the scope of the Rule. However, as it was unclear that such conduct, e.g., adultery, remains a criminal offense in California, the sentence was deleted as potentially

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.	Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. ~~A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~	confusing. The Commission deleted the last sentence of the Model Rule comment because the proposition stated is unclear in the absence of a definition of what is considered a "minor" offense. This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code section 6068(a), and conviction referrals under Business and Professions Code section 6101. A lawyer's conviction for a single misdemeanor charge could be construed as a "minor" offense under the Model Rule language; however, a pattern of that misconduct might not be a prerequisite for discipline under California's standards.
	[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., <i>In re Kelley</i> (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; <i>In re Rohan</i> (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; <i>In re Morales</i> (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)	This Comment was added because there is a substantial body of case law that has confirmed discipline for "other conduct warranting discipline," as set out in the Supreme Court cases cited.

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (<i>Gassman v. State Bar</i> (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; <i>Jackson v. State Bar</i> (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; <i>In the Matter of Myrdall</i> (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; <i>Grove v. State Bar</i> (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also <i>Martin v. State Bar</i> (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; <i>Selznick v. State Bar</i> (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; <i>In the Matter of Varakin</i> (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; <i>In re Calloway</i> (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; <i>In re Craig</i> (1938) 12 Cal.2d 93 [82 P.2d 442].)	This Comment is intended to alert lawyers to the expansive case law on moral turpitude.
	Paragraph (c) [2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with	In response to a public comment from the Department of Justice and, in light of the Commission's decision to not recommend a version of Model Rule 4.1, the language addressing covert activity previously considered for inclusion as Rule 4.1 (b), has been added as new Comment [2C] to Rule 8.4. In part, the new comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.	activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules.
	<u>Paragraph (d)</u> [2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. See, e.g., <i>Ramirez v. State Bar</i> (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); <i>Matter of Anderson</i> (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).	The Commission concluded that it is important to stress the protection of constitutional rights in connection with discipline so that activities protected by the First Amendment do not become the subject of disciplinary proceedings. See also Explanation of Changes at paragraph (d), above.

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.	[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, ~~or sexual orientation~~ ~~or socioeconomic status~~, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this rule~~ <u>paragraph (b)</u>.	Comment [3] is based on Model Rule 8.4, cmt. [3]. The comment clarifies the scope of paragraphs (a) and (d). The Ninth Circuit invalidated Business and Professions Code section 6068(f) relating to "offensive personality" on constitutional grounds, resulting in the subsequent legislative striking of that section. <i>United States v. Wunsch</i>, 84 F.3d 110 (9th Cir. 1996). However, the Ninth Circuit expressly approved of Model Rule 8.4(b).
[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.	[4] ~~A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges of legal~~ <u>regarding the</u> regulation of the practice of law.	Model Rule 8.4, cmt. [4], has been revised for brevity and clarity. This Comment is intended as a cross-reference to another rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended. The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. & Prof. Code section 6068(a), and overly broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.	[5] ~~Lawyers holding public office assume legal responsibilities going beyond those of other citizens.~~ A lawyer's abuse of public office ~~can suggest an inability to fulfill~~ <u>held by</u> the ~~professional role of lawyers. The same is true of~~ <u>lawyer or</u> abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, <u>can involve conduct prohibited by this Rule.</u>	Comment [5] is based on Model Rule 8.4, cmt. [5], but has been revised to make it more concise and also to clarify that the conduct described can violate the Rule. The Commission believes that the recommended clause – “can involve conduct prohibited by this Rule” – does not suffer the same vagueness of the Model Rule clause (“can suggest an inability to fulfill the professional role of lawyers.”)
	<u>[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.</u>	This Comment, which has no counterpart in the Model Rule, is intended as a clarification and to advise lawyers that there are bases for discipline for professional misconduct other than the Rules.

Rule 8.4 Misconduct

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Paragraph (a)

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the

acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

Paragraph (b)

[2] A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business and Professions Code sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [willful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23

Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

Paragraph (c)

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2C] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning

the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the

State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

Rule ~~1-120~~ ~~Assisting, Soliciting, or Inducing Violations~~ **8.4 Misconduct**

(Redline Comparison of the Proposed Rule to the Current California Rule)

It is professional misconduct for a lawyer to:

- (a) ~~A member shall not~~ knowingly assist in, solicit, or induce any violation of these ~~rules~~ Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Paragraph (a)

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the

acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

Paragraph (b)

[2] A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business and Professions Code sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [willful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State*

Bar (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

Paragraph (c)

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct.

Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

Rule 8.4 Misconduct

(Commission's Proposed Rule – Clean Version)

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Paragraph (a)

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the

acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

Paragraph (b)

[2] A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business and Professions Code sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [willful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23

Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

Paragraph (c)

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning

the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the

State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

Rule 8.4 Misconduct.
[Sorted by Commenter]

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		We generally support the adoption of Proposed Rule 8.4 and the Comments to the Rule. Further, COPRAC disagrees with the minority position expressed in the Explanation to paragraph (d) of the Rule, and agrees that the addition of the phrase “in connection with the practice of law” is appropriate. However, with respect to Comment [3], COPRAC agrees with the minority position expressed in the Introduction to the Rule: this comment may have the effect of chilling protected speech under both the First Amendment and the California Constitution. Further, the language of the Comment goes beyond the black letter rule of paragraph (d) and, by implication, suggests that such protected speech (and related conduct) could be the basis for attorney discipline. COPRAC submits that discipline for such conduct is more appropriately addressed in Proposed Rule 8.4.1, where discipline may be imposed only after a separate tribunal has found that the attorney has engaged in discriminatory conduct that is unlawful. As a result, we respectfully suggest that Comment [3] be deleted from the Rule.	No response required. The majority of the Commission disagrees with both its minority and COPRAC that the proposed rule will have the effect of chilling protected speech.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 8.4 Misconduct. [Sorted by Commenter]						TOTAL = 4 Agree = 1 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel	M	Yes	8.4(a)	OCTC supports this rule. However, OCTC believes that the Model Rules version of subparagraph (a) is clearer and better. The Model Rules also prohibit an attorney from violating or attempting to violate the Rules of Professional Conduct. There is no sound reason to exclude this language.	The Commission disagrees. The language in (a) is taken verbatim from current Rule 1-120, which has apparently served well its purpose. The Commission discuss making an attempt to violate the rules an offense and rejected that expansion of the coverage of the rules.
				8.4(f)	OCTC believes that subparagraph (f) should include solicit or induce a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no reason for the differences between (a) and (f).	The Commission did not feel that it was necessary to go beyond the language of the Model rule. "Assist" is broad enough to cover inducing or soliciting on the part of a lawyer, should that ever occur.
					Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
				Comments [2A], [2B] & [6]	OCTC supports Comments [2A], [2B] and [6].	No response required.

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 8.4 Misconduct.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would appear to apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See <i>Rosenthal v. State Bar</i> (1987) 43 Cal.3d 612, 634; <i>In the Matter of Lais</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) OCTC recommends that this Comment be stricken or clarified.	The Commission does not understand this comment as it appears to refer to matters that are not contained in proposed Comment 3.
				Comment [6]	OCTC is very concerned about the last sentence of Comment 6. This is beyond the scope of the Rules and Comments. This Comment invades the prosecutory discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. In fact, the Supreme Court rejected the notion that it objected to duplicative charging. (See <i>Furey v. Commission on Judicial Performance</i> (1987) 43 Cal.3d 1297, 1307 fn. 2 ["We do not wish	The last sentence of Comment 6 is intended as a guide to the interpretation of the Rule. Thus, it does not invade the prosecutorial discretion of the Chief Trial Counsel. The Commission is aware of criticism of OCTC by respondent's counsel of duplicative charging and overcharging by some deputy trial counsel and therefore added this provision as guidance to both OCTC and State Bar Court judges.

TOTAL = 4 Agree = 1
Disagree = 0
Modify = 3
NI = 0

**Rule 8.4 Misconduct.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence.”) Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges, but other times it does not, although it gives them no additional weight. (See <i>In the Matter of Wolf</i> (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; <i>In the Matter of Lais</i> (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; <i>In the Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.	
3	San Diego County Bar Association	A	Yes		Support as drafted.	No action needed.
4	US Attorney’s Office of Central, Southern, Northern, and Eastern District of California	M	Yes	8.4(c)	We propose the addition of a Comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. We recommend adding a Comment to the Proposed Rule that incorporates the concept contained in the Oregon Rules of Professional Conduct 8.4(b). We propose the following new Comment be added in connection with Proposed Rule 8.4(c):	The Commission agreed with the commenter and, in light of the Commission’s decision to not recommend a version of Model Rule 4.1, the language addressing covert activity previously considered for inclusion as Rule 4.1 (b), has been added as new Comment [2C] to Rule 8.4. In part, the new comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules.

TOTAL = 4 **Agree = 1**
Disagree = 0
Modify = 3
NI = 0

Rule 8.4 Misconduct.
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					“Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct. ‘Covert activity,’ as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. ‘Covert activity’ may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.”	

Rule 8.4: Misconduct

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 adds Rule 3.10, which provides that a lawyer “shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Arizona adds Rule 8.4(g), which makes it professional misconduct for a lawyer to “file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay. . . .”

California: Rule 2-400 provides, in part, as follows:

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

In addition, California Business & Professions Code §125.6 (Discrimination in the Performance of Licensed Activity) subjects a lawyer to professional discipline if, because of a prospective client’s “race, color, sex, religion, ancestry, disability, marital status, or national origin,” the lawyer “refuses to perform the licensed activity” (i.e., the practice of law) or “makes any discrimination or restriction in the performance of the licensed activity.”

Also, Business & Professions Code §490.5 permits the State to suspend a lawyer's license if the lawyer "is not in compliance with a child support order or judgment." Finally, Rule 290(a) of the Rules of Procedure of the California State Bar provides that (unless otherwise ordered by the Supreme Court) a member of the bar "shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years."

Colorado: In addition to Rule 8.4(g), which forbids bias in various forms, Colorado adds Rule 4.5, which addresses threats of "criminal, administrative or disciplinary charges" to gain a civil case advantage. See Selected State Variations under Rule 4.4.

District of Columbia: Rule 8.4(d) prohibits conduct that "seriously interferes with" the administration of justice. Rule 8.4(e) omits the ABA phrase "or to achieve results by means that violate the Rules of Professional Conduct or other law." D.C. adds Rule 8.4(g), which makes it misconduct to "[s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter."

In addition, D.C. adds Rule 9.1, which provides that a lawyer "shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap."

Florida expands Rule 8.4(d) to provide that a lawyer shall not:

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Florida also adds Rule 8.4(g), which provides that a lawyer shall not "fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency . . . when bar counsel or the agency is conducting an investigation into the lawyer's conduct."

In addition, Florida adds Rule 8.4(h) that makes it professional misconduct for a lawyer to "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation." The Comment explains that subparagraph (h) was added to make the treatment of lawyers who fail to pay child support consistent with the treatment of other professionals in Florida who fail to pay child support. Those other professionals are governed by §61.13015 of the Florida Statutes, which provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted.

Florida also adds Rule 4-8.4(j), which relates to sexual conduct with a client and provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client.” See the Selected Variations following Rule 1.8 for more detail.

Finally, the Florida Supreme Court has promulgated Rule 3-4.7, which provides:

Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida is ground for disciplinary action. Membership in, alliance with, or support of any organization, group, or party advocating or dedicated to the overthrow of the government by violence or by any means in violation of the Constitution of the United States or constitution of this state shall be a violation of the oath.

Georgia deletes ABA Model Rule 8.4(b) in favor of two subparagraphs making it a violation to be “convicted of a felony” or to be “convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.” Rule 8.4(a)(4) — Georgia’s equivalent to ABA Model Rule 8.4(c) — makes it improper to engage in “professional” conduct involving dishonesty, fraud, deceit or misrepresentation. Georgia adds a Rule 8.4(a)(5) that makes it improper for a lawyer to “fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten (10) days after the time appointed in the order or judgment.” A Rule 8.4(d) provides that Rule 8.4(a)(1) “does not apply to Part Six of the Georgia Rules of Professional Conduct” (which covers pro bono work, court appointments,

legal service organizations, and law reform organizations). Georgia deletes ABA Model Rules 8.4(d), (e), and (f).

For Georgia attorneys seeking guidance on their ethical conduct, Georgia Supreme Court Rule 4-401 authorizes the Georgia State Bar’s Office of General Counsel to “render Informal Advisory Opinions concerning the Office of the General Counsel’s interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts.” However, the rule cautions that an Informal Advisory Opinion is merely “the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia.” Rule 4-403 describes the procedures by which the Supreme Court of Georgia issues Formal Advisory Opinions and describes the weight to be given to Formal Advisory Opinions in various circumstances.

Illinois: In the rules effective January 1, 2010, Illinois expands Rule 8.4(f) and adds paragraphs (g)-(k), some of which are taken directly from the old ABA Model Code of Professional Responsibility. They provide that it is professional misconduct for a lawyer to:

(f) . . . give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge’s family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to

the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after

consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Iowa: Rule 8.4(g) forbids lawyers to “engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s direction and control to do so.”

Louisiana: Among other variations, Louisiana adds a Rule 8.4(g), which makes it professional misconduct for a lawyer to “[t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.”

Maryland: Rule 8.4(e) provides that a lawyer may not “manifest by words or conduct” various kinds of bias or prejudice when such action is prejudicial to the administration of justice.

Massachusetts: Rule 8.4(h) forbids a lawyer to “engage in any other conduct that adversely reflects on his or her fitness to practice law.” Comment 5 states that such conduct is subject to discipline even if it “does not constitute a criminal, dishonest, or fraudulent or other act specifically described in the other paragraphs of this rule.”

Michigan: Rule 6.5, entitled “Professional Conduct,” provides as follows:

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person’s race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

(b) A lawyer serving as an adjudicative officer shall, without regard to a person’s race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer’s direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

In addition, the Michigan Court Rules include the following Rule 9.104:

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

Minnesota adds Rule 8.4(g)-(h), which prohibits various kinds of harassment and discrimination.

Missouri: Rule 8.4(g) forbids a lawyer to “manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation.” However, the rule “does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.”

New Jersey: Rule 8.4(g) makes it professional misconduct for a lawyer to “engage, in a professional capacity, in conduct involving discrimination (except

employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socio-economic status, or handicap, where the conduct is intended or likely to cause harm.” The Supreme Court’s comment states that the rule

would, for example, cover activities in the court house, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer’s office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct.

New Mexico creates a Rule 3.0 (Rule 16-300), which specifies as follows:

In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion,

national origin, disability, age or sexual orientation is material to the issues in the proceeding.

New York: In the rules effective April 1, 2009, New York adds Rule 8.4(g) and (h), which provides that a lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

North Carolina: Rule 8.4(e) omits the clause "or to achieve results by means that violate the Rules of Professional Conduct or other law," and a Rule 8.4(g) makes it professional misconduct for a lawyer to "intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule

3.3." North Carolina also adds a Rule 6.6, which prohibits lawyers who hold "public office" from abusing their public positions.

Ohio adds Rule 8.4(g)-(h), which makes it professional misconduct for a lawyer to:

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Ohio also adds an unusual Comment 2A, which provides that Rule 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law."

Oregon: Rule 8.4(b) is the result of a decision of the Oregon Supreme Court, *In re Gatti*, 8 P.3d 966 (Or. 2000). It provides that, notwithstanding Rules 8.4(a)(1), (3), and (4) and Rule 3.3(a)(1), "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights," provided the lawyer's conduct otherwise complies with the Rules of Professional Conduct. "Covert activity" is defined in Rule 8.4(b) to mean "an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge." The rule permits covert activity to "be commenced by a lawyer or

involve the lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.”

Rhode Island adds Rule 9.1, which establishes an ethics advisory panel to be appointed by the Supreme Court and provides that “[a]ny lawyer who acts in accordance with an opinion given by the panel shall be conclusively presumed to have abided by the Rules of Professional Conduct.”

Texas: Rule 5.08, entitled “Prohibited Discriminatory Activities,” provides as follows:

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Texas Rule 8.04(a)(9) forbids a lawyer to “engage in conduct that constitutes barratry as defined by the laws of this state.” Rule 8.04(a)(2) forbids a lawyer to “commit a serious crime or commit any other criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.04(b) defines “serious crime” to include “barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.”

Virginia: Rule 8.4(b) applies to a criminal “or deliberately wrongful act,” and Rule 8.4(c) applies to conduct involving dishonesty, fraud, deceit or misrepresentation “which reflects adversely on the lawyer’s fitness to practice law.” Virginia omits Rule 8.4(d) (which forbids “conduct that is prejudicial to the administration of justice”), and retains the pre-2002 version of ABA Model Rule 8.4(e), which made it professional misconduct for a lawyer to “state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official,” without any reference to “means that violate the Rules of Professional Conduct or other law.”

Wisconsin: Among other variations, Wisconsin omits paragraph (d) and adds several additional paragraphs, including one relating to harassment.

Proposed Rule 8.4.1 [2-400]

“Prohibited Discrimination in Law Practice Management and Operation”

(XDraft #8, 10/1/09)

Summary: Proposed Rule 8.4.1 is based on current rule 2-400 which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (Model Rule 8.4 and proposed Rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

Proposed Rule 8.4.1 expands the scope of present rule 2-400, which is limited to unlawful discrimination in employment and offering goods and services, while the proposed Rule includes any unlawful discrimination in the management and operation of a law practice. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☒ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☒ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 2-400

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The scope of enforcement of laws against discrimination is always somewhat controversial and this rule is no different. The commenters' views on policy ranged from having no rule at all (Santa Clara County Bar Association) to removing the prior adjudication requirement and to extending the scope of the rule to lawyer ancillary business services (Simmons Firm ALC).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4.1* Prohibited Discrimination in Law Practice Management and Operation

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 8.4.1 prohibits unlawful discrimination, based upon race, national origin, sex, gender, sexual orientation, religion, age or disability, in the management and operation of a law firm.

Proposed Rule 8.4.1 is based on current rule 2-400, which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (although ABA Model Rule 8.4 and proposed rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

Proposed Rule 8.4.1 expands and narrows the scope of rule 2-400:

- a. Expanded scope: The current rule is limited to unlawful discrimination in employment and offering goods and services; the proposed rule includes any unlawful discrimination in the management and operation of a law practice based upon race, national origin, sex, gender, sexual orientation, religion, age or disability.
- b. Narrowed scope: Based upon commenter suggestions, the proposed rule was narrowed to apply only to managerial and supervisory lawyers within the law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(e).

* Proposed Rule 8.4.1, XDraft #8 (10/1/09).

Minority. A minority of the Commission argues that the Rule provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct. See Explanation of Changes for paragraph (c). Another minority of the Commission believes that the rule, although well intended, is ambiguous as drafted and that certain provisions are inconsistent with the proposed Rule 5.1 on the responsibilities of partners, managers and supervisory lawyers. This minority also believes that the concerns raised by COPRAC have not been adequately addressed.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
(A) For purposes of this rule: (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;	(Aa) For purposes of this ~~rule~~Rule: (1) ~~"law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~	This Rule carries forward current rule 2-400's prohibitions against unlawful discrimination in the operation or management of a law firm. While comment [3] to Model Rule 8.4 prohibits a lawyer from knowingly manifesting bias or prejudice by words or conduct, when such actions are prejudicial to the administration of justice and when representing a client, no Model Rule prohibits discrimination in the operation and management of a law firm. Amendments show the variations from current rule 2-400. Proposed paragraph (a) contains definitions which are applicable to this Rule only. Comment [2] clarifies that the definition of "law practice" means the same as "law firm," which is defined in proposed Rule 1.0.1. Therefore, no additional definition of "law practice" is necessary and the definition from current rule 2-400 has been deleted.
(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and	(21) "knowingly permit" means a failure to advocate corrective action where the ~~member~~managerial or supervisory lawyer knows of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination prohibited in paragraph (Bb); and	Subparagraph (a)(1) has been narrowed and clarified, at the suggestion of commenters (COPRAC, Simmons Firm ALC and Orange County Bar Association), so that culpability is limited to those lawyers who have the authority to change the discriminatory practice. (See also Public Commenter's Chart.)

* Proposed Rule 8.4.1, XDraft 8 (10/1/09). Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.	(32) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes ~~or decisions making unlawful~~ prohibiting discrimination ~~in employment and in offering goods and services to~~ on the public basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.	Subparagraph (a)(2) definitions have been streamlined and clarified. The words "decisions making unlawful" were stricken for imprecision since court decisions do not inherently make conduct unlawful, but rather interpret the meaning of the words of a statute concerning the affected conduct. Accordingly, the words "as interpreted by case law" were substituted to clarify the definition. Also, because administrative bodies are often empowered to develop administrative regulations to enforce and regulate discriminatory conduct, the words "or administrative regulations" was added to clarify the definition. The scope of the Rule has been expanded beyond employment and offering goods and services. (See paragraph (b).) Therefore the words "in employment and in offering goods and services to" were stricken and the words "basis of race, national origin, sex, gender, sexual orientation, religion, age or disability" were added consistent with the expansion of the subject matter of prohibited conduct. See Explanation of Changes for paragraph (b).

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client.	~~(B)~~ In the management or operation of a law practice, a ~~member~~<u>lawyer</u> shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, <u>gender</u>, sexual orientation, religion, age or disability ~~in~~. ~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~ ~~(2) accepting or terminating representation of any client.~~	Paragraph (b)'s scope has been expanded from unlawful discrimination in employment and in selling goods and services to any unlawful discrimination in the operation and management of a law practice on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability. The expanded scope includes for example, unlawful conduct in leasing, violations of the Americans with Disabilities Act, or sexual harassment. The word "gender" was added at the suggestion of the Bar Association of San Francisco to conform to the wording of discrimination statutes. Consistent with the expanded scope of the Rule, and as requested by the Santa Clara County Bar Association, the limitations of subparagraphs (b)(1) and (b)(2) have been deleted.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.	(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this ~~rule~~<u>Rule</u> unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this ~~rule~~<u>Rule</u>. In order for discipline to be imposed under this ~~rule~~<u>Rule</u>, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.	Paragraph (c) has not been changed except ~~to~~for minor style changes. Paragraph (c) continues to prohibit any disciplinary investigation unless and until there is an appropriate adjudication that unlawful discriminatory misconduct has occurred. This policy recognizes that the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy for complaints about law practice discrimination when the law provides other specialized administrative agencies to enforce and regulate all alleged discriminatory conduct and provides for specialized remedies. <i>Minority Position.</i> A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment	<u>Explanation of Changes to the California Rule 2-400</u>
	<u>[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.</u>	The comparison is to current rule 2-400, Discussion. Comment [1] is new and explains the policy supporting this Rule.
	<u>[2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (See Rule 5.1. But see also Rule 8.4(g).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Business and Professions Code section 6068(a).)</u>	Comment [2] is new and explains the changed scope of the Rule: 1. The scope of the rule is limited to managerial or supervisory lawyers. (See explanation under paragraph (a)(2) above.) 2 "Law practice" means the same as law firm and includes sole practices. (See Explanation for subparagraph (a)(1), above.) 3. The scope of the Rule does not include non-legal services not connected to or related to the law practice. The Commission did not adopt this because the State Bar has no authority to regulate ancillary businesses, which may be managed or operated by non-lawyer personnel, where the non-legal businesses are not engaged in the practice of law. While a lawyer engaged in ancillary business activities may be disciplined for some conduct, as defined by case law, <u>not</u> all ancillary business conduct, unconnected with the provision of legal services, is the subject of discipline if- it is authorized- by other law.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment	<u>Explanation of Changes to the California Rule 2-400</u>
In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.	[3] In order for discriminatory conduct to be ~~actionable~~ <u>sanctionable</u> under this ~~rule~~<u>Rule</u>, it ~~must~~ first <u>must</u> be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this ~~rule~~<u>Rule</u>.	Comment [3] is the same as rule 2-400 Discussion, paragraph 1, with stylistic editorial changes only.
A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.	[4] A complaint of misconduct based on this ~~rule~~<u>Rule</u> may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding ~~is~~ thereafter <u>is</u> appealed.	Comment [4] is the same as rule 2-400 Discussion, paragraph 2, with stylistic editorial changes only.
A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.	~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)~~	Rule 2-400 Discussion, paragraph 3, was deleted as unnecessary. The proposed Rule does not otherwise limit the State Bar's prosecutorial authority to investigate and prosecute alleged attorney misconduct coming within the ambit of California Business and Professions Code sections 6106 or 6068 where the conduct may arguably be a violation of this rule. Nor does the promulgation of this Rule pursuant to Business and Professions Code section 6007 limit in any way the California Supreme Court's inherent authority to impose discipline or another disciplinary standard. (Bus. & Prof. C., §6087.)
	[5] <u>This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).</u>	Comment [5] is new and provides a cross reference to rule 8.4(g) concerning lawyer's discriminatory conduct while representing clients.

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation
(Commission's Proposed Rule – Clean Version)

(a) For purposes of this Rule:

- (1) “knowingly permit” means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and
- (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice , a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

COMMENT

- [1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.
- [2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. See Rule 5.1. But see also Rule 8.4(g). “Law practice” in this Rule means “law firm,” as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. See Business and Professions Code section 6068(a).
- [3] In order for discriminatory conduct to be sanctionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.
- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.
- [5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 2**
Disagree = 1
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	A	Yes		Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. We support Comment [2].	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations. No response required.
2	San Diego County Bar Association	A	Yes		Support as drafted.	No response required.
3	State Bar Law Practice Management & Technology Section (LPMT)	D	Yes		The Law Practice Management & Technology (LPMT) Section applauds the State Bar's noble intentions in reiterating the principles present in the current Rule of Professional Conduct Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice. Discrimination has no place in our society, least of all among those charged with realizing the promise of the Declaration of Independence: that all are equal. We fear, however, that, given the lightness of the remedies available to the State Bar,	After a full exploration and debate on this and other policy approaches, the Commission recommends the current proposed rule as the best means to both protect the public from lawyer discrimination and conserving prosecutorial resources.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 2
Disagree = 1
Modify = 0
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					this Proposed Rule would not be useful. The State Bar may act only after a final judgment in an arena where settlement is the rule, and final judgments are rare. In terms of what the State Bar will do pursuant to the Rules of Professional Conduct, we have come no further than what has been in place under current Rules of Professional Conduct, Rule 2-400. We agree with the Minority Position: “A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct.” We therefore request the State Bar and, where appropriate, the Commission to explore more innovative approaches. Instead of putting the issue adrift on ice while being	This recommendation will be forwarded to the Board of Governors for further appropriate action.

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]

TOTAL = 3 Agree = 2
Disagree = 1
Modify = 0
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					studied, however, please engage members of the bar and bench to grapple with perhaps the defining legal and moral issue in American history. Indeed, this honorable principle is one that runs from before the founding of the Republic to this very day.	

Proposed Rule 8.5 [RPC 1-100(D)]

“Disciplinary Authority; Choice of Law”

(XDraft #4, 2/26/10)

Summary: This amended rule states the territorial and extra-territorial reach of the California Rules of Professional Conduct. It also addresses conflicts of law with regard to professional conduct rules by setting a choice of law standard.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☒ Some material additions to ABA Model Rule	☒ Some material additions to ABA Model Rule
☒ Some material deletions from ABA Model Rule	☒ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 1-100(D); Rules 9.40 - 9.48 of the California Rules of Court

Statute

Case law

- ☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 3

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☐ Yes ☒ No

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.5* Disciplinary Authority; Choice of Law

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed rule 8.5 is based upon Model Rule 8.5, except that proposed 8.5(b)(2) adopts the California rules as a choice of law unless an admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of another jurisdiction to engage in different conduct. The Model Rule concepts of the “predominant effect of the conduct is in a different jurisdiction” and the “safe harbor” provision (providing no discipline to a lawyer believing that the predominant effect of the rules of another jurisdiction applied) have been deleted in the interests of protecting the residents of California and in creating a brighter line for application by practicing lawyers, disciplinary prosecutors and disciplinary adjudicators.

Most of the Model Rule 8.5 comments have been retained and used as a basis for the comments to the proposed rule, except where the comments have been inconsistent with the proposed black letter rules or California law.

* Proposed Rule 8.5, XDraft 4 (2-26-10).

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law	<u>Commission's Proposed Rule*</u> Rule 8.5 Disciplinary Authority; Choice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.	(a) Disciplinary Authority. A lawyer admitted to practice in ~~this jurisdiction~~<u>California</u> is subject to the disciplinary authority of ~~this jurisdiction~~<u>California</u>, regardless of where the lawyer's conduct occurs. A lawyer not admitted in ~~this jurisdiction~~<u>California</u> is also subject to the disciplinary authority of ~~this jurisdiction~~<u>California</u> if the lawyer provides or offers to provide any legal services in ~~this jurisdiction~~<u>California</u>. A lawyer may be subject to the disciplinary authority of both ~~this jurisdiction~~<u>California</u> and another jurisdiction for the same conduct..	Paragraph (a) is identical to Model Rule 8.5(a), except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."
(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:	(b) Choice of Law. In any exercise of the disciplinary authority of ~~this jurisdiction~~<u>California</u>, the rules of professional conduct to be applied shall be as follows:	Paragraph (b) is identical to Model Rule 8.5(b) except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction".
(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and	(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits <u>apply</u>, unless the rules of the tribunal provide otherwise; and	A minor addition has been made to Paragraph (b)(1) to improve clarity. There is no substantive change.

* Proposed Rule 8.5, XDraft 4 (02/26/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law	<u>Commission's Proposed Rule*</u> Rule 8.5 Disciplinary Authority; Choice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.	(2) ~~for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.~~ <u>these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</u>	Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct. This rule deletes the MR concept of "predominant effect" because the concept is ambiguous, over broad and undefineable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators. The rule also deletes the "safe harbor" provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a "wilful" standard, without any intent requirement. The reasonable belief of the lawyer may properly be considered as a mitigating factor rather than a complete defense.

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Disciplinary Authority [1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.	Disciplinary Authority [1] It is longstanding law that the conduct of a lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California. Extension of the disciplinary authority of ~~this jurisdiction~~California to other lawyers who provide or offer to provide legal services in ~~this jurisdiction~~California is for the protection of the citizens of ~~this jurisdiction~~. ~~Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement~~California. A lawyer ~~who is subject to the~~disciplined by a disciplinary authority ~~of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this~~another jurisdiction may be a factorsubject to discipline in ~~determining whether personal jurisdiction may be asserted over the lawyer~~California for civil mattersthe same conduct. See e.g., Business and Professions Code section 6049.1.	Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law. First, its substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and the court rules for multijurisdictional practice¹, which also contain the inherent authority of the California Supreme Court over the practice of law in California. Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions. Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.

¹ **Sapiro Cmt #15:** I think something got garbled in the second sentence. Was that supposed to be a placeholder for insertion of citations of Rules of Court regarding multijurisdictional practice? I do not see any citations to those Rules of Court in my copy of proposed Comment [1].
RRC - 1-100 [8-5] - Compare - Rule & Comment Explanation - XDFT5 (02-26-10)RD-ML

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Choice of Law [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.	Choice of Law [2] A lawyer may ~~be~~ potentially <u>be</u> subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.	Comment [2] is identical to Model Rule 8.5 comment [2].
[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.	[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; <u>and</u> (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; ~~and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.~~	Comment [3] is based on Model Rule 8.5, cmt. [3] except that it deletes the third provision referring to the black letter “safe harbor” to conform to proposed 8.5(b)(2). See explanation above.

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.	[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to ~~the~~<u>these</u> ~~rules of the jurisdiction, unless a lawyer admitted in which the lawyer's conduct occurred, or, if the predominant effect of the conduct~~<u>California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow</u> rules of ~~that jurisdiction shall be applied to the~~<u>professional</u> conduct <u>different from these rules</u>. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, ~~the predominant effect of such conduct could be where the conduct occurred~~<u>these rules apply, where unless</u> the tribunal ~~sits or is in another~~<u>is in another</u> jurisdiction <u>in which the lawyer is lawfully practicing and that jurisdiction requires different conduct</u>.	Comment [4] is based on Model Rule 8.5, cmt. [4] but deletes language to conform the comment to proposed rule 8.5(b)(2). Sentence two clarifies that these rules apply to a lawyer's conduct, including prior to the initiation of a proceeding before a tribunal [after which the rules of the tribunal would generally apply under 8.5(b)(1)], unless the lawyer is lawfully practicing in another jurisdiction that expressly requires a different standard of conduct. In sentence three, the same conformance to proposed rule 8.5(b)(2) has been made. The deleted language does not provide a bright line for lawyers engaged in multijurisdictional practice; whereas the proposed rule provides greater clarity.

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.	~~[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.~~	Model Rule 8.5 comment [5] has been deleted because it refers exclusively to the safe harbor language which was deleted from proposed rule 8.5(b)(2). See explanation above.
[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.	~~[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~	This entire comment has been deleted because it is improper to discuss what another disciplinary jurisdiction should or should not do or to recommend that the California Supreme Court should limit its inherent power with this comment. Moreover, the statement is inconsistent with the operation of Bus. & Prof. C., §6049.1 [discipline of a California lawyer who has been disciplined by another jurisdiction].
[7] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.	~~[7]~~^[5] The choice of law provision applies to lawyers engaged in ~~transnational~~^{transactional} practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions ~~provide otherwise~~^{preempt these rules}.	Comment [5] is identical to Model Rule 8.5 Comment [7] except that the words "provide otherwise" have been deleted and the words "preempt these rules" have been added. This conforms the comment to the black letter rule 8.5(b)(2) that the California rules will be the default standards, unless the rules of a jurisdiction in which the lawyer is lawfully practicing require different conduct. Accordingly, only preemption by treaty, etc. would "require other conduct."

Rule ~~1-100~~ ~~Rules of Professional Conduct, in General~~ 8.5 Disciplinary Authority; Choice Of Law

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

~~(A) Purpose and Function.~~

~~(a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.~~

~~The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.~~

~~(b) For a willful breach~~ Choice of Law. In any exercise of these rules the disciplinary authority of California, the Board rules of Governors has the power professional conduct to discipline members be applied shall be as provided by law follows:

~~The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct.~~

~~Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

~~(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and~~

~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~

~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~

~~(b) a law corporation which employs more than one lawyer; or~~

~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~

~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

~~(2) "Member" means a member of the State Bar of California.~~

~~(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~

~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

~~(C) Purpose of Discussions.~~

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~

~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~(2) These these rules shall govern the activities of members apply to any other conduct, in and outside this state, except as members where a lawyer admitted to practice in California, who~~

is lawfully practicing ~~outside this state may be specifically~~ in another jurisdiction, is required specifically by ~~a~~ the jurisdiction in which ~~they are~~ he or she is practicing to follow rules of professional conduct different from these rules.

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

~~(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."~~

~~Comment Discussion:~~

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

~~The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See Ames v. State Bar (1973) 8 Cal.3d~~

~~910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)~~

[2] A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)~~

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the

profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

[5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Clean Version)

- (a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and
 - (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment

Disciplinary Authority

- [1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers

who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

- [2] A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.
- [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.
- [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

- [5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

Rule 8.5 Choice of Law. [Sorted by Commenter]						TOTAL = 5 Agree = 2 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 8.5 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel	M	Yes		OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with B&P Code section 6049.1. B&P Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing B&P Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to	The Commission believes that OCTC has misunderstood the relation (or nonrelation) between this rule and B&P Code 6049.1. The Rule makes <i>conduct</i> outside California subject to discipline if the conduct violates the California rules and unless otherwise authorized. The statute authorizes California discipline based on an <i>adjudication</i> of professional misconduct in another jurisdiction. The Commission views the statute and the proposed rule as complimentary and sees no reason to make a change.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					be discussed and addressed in this rule and its Comments. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the Comments except for the last two sentences of Comment [1].	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response needed.
4	State Bar Law Practice Management & Technology Section (LPMT)	M	Yes	(b)	LPMT should like to highlight a potential difficulty present in Proposed Rule 8.5, much like CRPC 1-100(D) before it --yet a difficulty much less obvious than its analogue that existed in years past. That difficulty arises from the extraterritorial reach of the California Code of Professional Conduct. With the rise of multijurisdictional practice, such reach may easily put lawyers of good faith in a bind. Re: Diverse types of proscribed conduct: It may be that the difficulty increases the more	The Commission has considered this Comment and has concluded that the rule should not be changed as the LPMT section proposes. It believes that if the conduct is forbidden to California lawyers, there is no reason to permit that conduct unless the attorney is required by another jurisdiction to do what California forbids.

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the Rules of Professional Conduct diverge from what may be called acts that are <i>malum in se</i> to those that are merely <i>malum prohibitum</i>. Of course, some of the latter are critical to protect clients from the former. For example, one method of accounting for client funds may not be inherently more ethical than certain others. Nonetheless, there is an inherent need for a uniform method to protect clients from acts that are clearly <i>malum prohibitum</i>. Lawyers must keep their books in a specified way to shield clients from acts of fraud and theft. Re: Tricky conflicts between sister states' respective rules: The difficulty arises most prominently where one jurisdiction's rule is permissive but CA's is mandatory. (See full text of comment for examples). It is critical to emphasize that we do not speak of acts of moral turpitude or other egregious or dishonest conduct. Rather, our concern is with conduct perfectly acceptable and morally correct in one or more of our sister states. Re: Express Prohibition vs. Silence: An even harder case is that in which the foreign jurisdiction is silent. Should CA impose its rule on that jurisdiction, a rule to which other	

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyers in that jurisdiction working on the same matter are not beholden? (See full text of comment for examples). We agree with the Commission's premise as stated in Comment [3] but disagree with the RRC in regard to those situations in which a lawyer may be <i>permitted</i> different conduct by another jurisdiction in which the lawyer is lawfully practicing. To be unable to practice as other lawyers do in that other jurisdiction would cripple the lawyer's fulfillment of his or her obligations to the client. Perhaps, even at this late date, may we respectfully suggest the Commission consider an additional round of review of its excellent product? In so doing, the Commission could determine if it has included any proscriptions based more on California case law interpretations of what is mostly procedural law and less on the basic tenets and intent of a set of universal rules to govern a lawyer's professional conduct? For the foregoing reasons, we recommend that Proposed Rule 8.5(b)(2) be amended as follows: (b) Choice of Law. In any exercise of the	

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disciplinary authority of California, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. Additionally, we recommend that Comment [4] be similarly amended, as shown below. Moreover, the last sentence of Comment [4] (italicized below) appears redundant and should thus be deleted. If the sentence expresses a nuance that has escaped our reading, we respectfully suggest that the nuance be made more explicit. Finally, if the last sentence of Comment [4] is retained, we recommend the additional insertion of "or permits" as shown.	

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 0
Modify = 3
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [4]: [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required or permitted specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. <i>In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires or permits different conduct.</i>	
5	US Attorney's Office of Central, Northern, Southern, and Eastern District of California	M	Yes	8.5(b)(2) & Comment [4]	We oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its	The Commission has carefully considered the United States Attorneys' position and has heard directly from them on this issue at length. It sees no reason to change its recommendation on account of

Rule 8.5 Choice of Law. [Sorted by Commenter]							TOTAL = 5 Agree = 2 Disagree = 0 Modify = 3 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
					accompanying Comment or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.	this submission, which is substantially the same as what the authors presented to the Commission and that the Commission long debated.	

Rule 8.5: Disciplinary Authority; Choice of Law

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: Rule 1-100(D), headed “Geographic Scope of Rules,” provides as follows:

(1) As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

In addition, in 2004 California Supreme Court adopted Rules 964 and 965, which permit “Registered Legal Services Attorneys” and “Registered In-House Counsel” to practice law in California without being members of the California Bar. Each requires that qualifying attorneys “[a]bide by all of the laws and rules that govern members of the State Bar of

California, including the Minimum Continuing Legal Education (MCLE) requirements.” Rules 966 and 967, respectively entitled “Attorneys Practicing Law Temporarily in California as Part of Litigation” and “Non-Litigating Attorneys Temporarily in California to Provide Legal Services,” each contain the following language:

[Conditions] By practicing law in California pursuant to this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

Substantial excerpts from Rules 964 through 967 are reprinted below in our chapter on California Materials

following Rule 1-300 of the California Rules of Professional Conduct.

District of Columbia: Rule 8.5(a) omits the second sentence of ABA Model Rule 8.5(a) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”) Rule 8.5(b)(2) provides as follows:

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Florida: In Supreme Court Rule 3-4.6, Florida has adopted the language of Rule 8.5(b) except for the second sentence of paragraph (b)(2). In addition, Florida Rule 3-4.1 provides as follows:

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies

under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

When the Florida Supreme Court rejected a proposal to amend this rule in 1999, it said: “Out-of-state lawyers are not lawyers who are subject to the Rules Regulating the Florida Bar; rather, they are ‘nonlawyers’ subject to chapter 10 unlicensed practice of law charges if they . . . engage in improper solicitation or advertising in Florida.” See Amendments to Rules Regulating the Florida Bar — Advertising Rules, 762 So. 2d 392, 393-395 (Fla. 1999).

Georgia: Rules 8.5(a) and (b) both use the phrase “Domestic and Foreign Lawyer” in place of the phrase “lawyer.” Georgia defines those terms as follows:

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

In addition, Georgia Rule 9.4 generally tracks Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement (reprinted below in the Related Materials for ABA Model Rule 8.5), which govern jurisdiction and reciprocal discipline.

Illinois: Illinois Supreme Court Rules 716 and 717 (summarized above in the Related Materials following ABA Model Rule 5.5) permit in-house and legal services lawyers to engage in limited law practice in Illinois. Rules 716 and 717 both provide that all lawyers licensed under the rules “shall be subject to the jurisdiction of the Court for disciplinary purposes to the same extent as all other lawyers licensed to practice law in this state.”

Maryland: Rule 8.5(a) explicitly extends disciplinary jurisdiction to any lawyer who “holds himself or herself out as practicing law in this State,” or who “has an obligation to supervise or control another lawyer practicing law in this State whose conduct constitutes a violation of these Rules.”

Massachusetts: Rule 8.5(b)(2) refers to the “jurisdiction in which the lawyer’s principal office is located” instead of where “the predominant effect of the conduct” occurred. The rule also adds several comments that clarify how the choice of law provisions are supposed to operate.

Michigan: The second sentence of Rule 8.5 provides as follows: “A lawyer who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.” Michigan has not adopted Rule 8.5(b).

Nevada: Rule 8.5 consists of only one sentence: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.” Also relevant is Nevada Rule 7.2(a), which states as follows: “These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.”

New Jersey deletes the last sentence of Rule 8.5(b) (“A lawyer shall not be subject to discipline. . . .”).

New York: In the rules effective April 1, 2009, Rule 8.5 provides as follows:

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be

the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Oregon: Rule 8.6 designates certain entities authorized to issue advisory ethics opinions and provides that in any disciplinary matter, the tribunal “may consider any lawyer’s good faith effort to comply with an opinion” in evaluating the lawyer’s conduct or in mitigation of sanction.

South Carolina: S.C. Appellate Court Rule 418 requires any “unlicensed lawyer” (defined as “any person who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina”) to comply with South Carolina’s lawyer advertising rules (Rules 7.1 through 7.5) if the unlicensed lawyer engages in any of six specified forms of advertising or solicitation.

Texas: Rule 8.05(b) provides as follows:

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Virginia rejects the “predominant effect” test used in Rule 8.5(b)(2), favoring instead the rules from the jurisdiction where the lawyer’s conduct occurred. The Virginia rule also contains specific provisions regarding lawyers who hold themselves out as Virginia attorneys. Virginia also explicitly rejects Comments 2 through 7 of the Model Rule and adopts its own explanations for how to resolve conflicts between different choice of law rules.