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 1.0.1 [1-100]
"Terminology"
(**XDraft #8, 08/30/10**)

Summary: Proposed Rule 1.0.1, which is based on Model Rule 1.0 ("Terminology"), defines 16 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	Bus. & Prof. Code section 6068(e); 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 __1___
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

August 2010
(Proposed rule following August 25, 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 16 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.

Public Comments. Following the last public comment period that ended on August 25, 2010, the Commission received three public comments: a comment from OCTC recommending changes to paragraphs (e), (n), and (m); a comment from a lawyer expressing concerns about paragraph (e) and Comment [6]; and a comment from a lawyer suggesting a possible ambiguity in paragraph (e)(1), the definition of "informed written consent." Regarding the latter comment, the Commission made a clarifying, non-substantive revision. (Refer to the public comment synopsis chart for the Commission's response to each of these public comments.)

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.

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* Proposed Rule 1.0.1, XDraft #8 (6/30/10).

INTRODUCTION Continued:

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."

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.

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

* Proposed Rule 1.0.1, XDraft 8 (08/30/10).

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

ABA Model Rule Rule 1.0 Terminology	Commission's Proposed Rule* Rule 1.0.1 Terminology	Explanation of Changes to the ABA Model Rule
	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 the disclosures and the 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. In response to a public comment received suggesting a potential ambiguity in construing what is required to be in writing, a minor, non-substantive revision was made which clarifies that both the disclosures and the 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].	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.

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

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

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

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

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

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

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

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving	for example, Rules 1.2(c)~~,~~ and 1.6(a) ~~and~~(informed consent) with Rules 1.7, 1.8.1 and 1.9 (~~b~~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.

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

ABA Model Rule Rule 1.0 Terminology Comment	Commission's Proposed Rule Rule 1.0.1 Terminology Comment	Explanation of Changes to the ABA Model Rule
[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.	[9] The purpose of screening is to assure the affected ~~parties~~client, former client, or prospective client that confidential information known by the personally ~~disqualified~~prohibited lawyer ~~remains protected~~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 ~~disqualified~~prohibited lawyer ~~should~~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 ~~should~~promptly shall be informed that the screening is in place and that they may not communicate with the personally ~~disqualified~~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 ~~lawyers~~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 ~~screened~~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 ~~screened~~personally prohibited lawyer relating to the matter, denial of access by ~~the screened~~that lawyer	Comment [9] is based on Model Rule 1.0, cmt. [9], but makes several changes: First, "parties" in the first sentence is replaced because a lawyer's duty of confidentiality is owed only to clients, former clients, and prospective clients and not to anyone else that might be called a "party". Second, to conform to proposed language in the applicable conflicts rules, "disqualified" has been replaced throughout the comment with "prohibited". Similarly, the one appearance of the phrase "screened lawyer" has been replaced with "personally prohibited lawyer." Third, a gap in the Model Rule Comment has been eliminated by stating on each occasion that screening involves both all other law firm lawyers and all non-lawyer personnel. The same change has been made to paragraph (k). Fourth, the obligation of the screened lawyer to acknowledge the existence of the screen is stated in mandatory ("shall") rather than permissive ("should") terms. Fifth, the obligation to inform other law firm personnel of the screen is made mandatory and, to conform to the paragraph (k) requirement of timeliness, the requirement is to do so "promptly". This mandatory statement also appears in the Connecticut Comment, and the mandatory language also appears in the New York Comment.

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

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 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 the disclosures and the consent ~~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
(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 the disclosures and the 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 = 3 **Agree = __ Disagree = _ Modify = 3 NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Feldman, Phillip	M	No	(e)	The Commission's proposed language inappropriately deletes "adequate information and explanation" which enables factual application narrowed down to adequacy of the communication form the lawyer to a lay client.	The Commission recommended the current draft of paragraph (e) after receiving earlier public comment that urged the use of wording that closely tracks current California Rule 3-310(A)(1), and that argued that California's current language more forcefully expresses the lawyer's disclosure obligation than does the Model Rule language favored by the commenter. On this question, the Commission sides with the earlier public comments and adheres to its previous recommendation.
				Comment [6]	In Proposed Comment [6], the Commission inappropriately deleted the ABA language: "In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek advice of other counsel."	The sentence identified by the commenter makes an observation not connected to any rule requirement. The Commission has attempted to avoid such good practice observations, which might lead to a claim of civil or disciplinary responsiblity for failing to do something that is not required by any rule. Some rules do require a lawyer to advise a client to seek independent counsel, and those rules stand on their own without the need for any indefininte buttressing in this Comment.
					Request the definition of "informed consent" and the language of Comment [6] more closely conform to the national standard of the ABA language.	While many jurisdictions have used the Model Rule wording, others have not, and at least three states do not use the term "informed consent" (these are Georgia, N. Dakota, and Wyoming).

[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 = 3 **Agree = __ Disagree = _ Modify = 3 NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Liederman, Peter H.	M	No	(e)(1)	If I read this paragraph correctly, it imposes written disclosure as an essential and non-explicit compenent of "informed written consent." First, this creates a trap for the unwary lawyer who might reasonably believe that "written consent" is only what its plain English suggests it is; second, without evident good cause it burdens any attorney in every circumstance from giving oral advice and obtaining a written consent on which he can rely, even when it is otherwise completely reasonable, mutually agreeable, and (except by your definition) ethical to do so. When there are circumstances where both written advice and written consent are necessary these should be specified. Further, the drafters should consider that handing unsophisticated clients written warnings or disclaimers about a legal question may actually impair informed consent compared to a patient oral explanation without the formidable-looking piece of paper.	The Commission believes that the current wording of paragraph (e)(1) is accurate, but has made a minor, non-substantive revision in order to avoid a misreading of the paragraph. The revision clarifies that both the disclosures and the consent required by paragraph (e) must be in writing. The Commission disagrees with this comment and does not propose any change based on it. The obligation in some situations to make a written disclosure and obtain a written consent does not prevent a lawyer from also providing an oral disclosure and explanation, either before or after delivering the writing to the client, whenever the lawyer thinks it would be helpful to the client to do so.
3	Office of Chief Trial Counsel	M	Yes	1.0.1(e)	OCTC is concerned with the addition of the term "where appropriate" to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct. The term "where appropriate" is vague, confusing, and too subjective. It gives the attorneys, rather than	The Commission did not make the requested deletion of the phrase "where appropriate." The Commission believes that the phrase provides an important limitation on what would otherwise be an absolute mandate that a lawyer address "alternatives" to proposed conduct when obtaining a client's informed consent. In some situations, there

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 3 Agree = __ Disagree = _ Modify = 3 NI = _
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					the clients, the right to determine if it is appropriate to provide this information. Likewise, it makes the rules more difficult to enforce. The term "where appropriate" is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term "where appropriate" from the definition for informed consent.	may not be any reasonably available alternatives.
				1.0.1(e)(2)	OCTC remains concerned with the definition in Proposed Rule 1.0.1(e)(2). 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. 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 has stated that it is not defining the statute, only providing attorneys with guidance. However, that is not what the rule states. Rule 1.0.1(e)(2) states: "'Information protected by Business & Professions Code section	The Commission 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 which 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.

Rule 1.0.1 Terminology [Sorted by Commenter]						TOTAL = 3 Agree = __ Disagree = _ Modify = 3 NI = _
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					6068(e)' is defined in Rule 1.6, Comments [3] - [6]." [Emphasis added.]" In addition, the rules lack authority to provide "guidance" about the definition of a term in a statute.	
				1.0.1(m)	OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule's definition of tribunal. The Commission's proposed rule excludes from the definition of tribunal legislative bodies acting in an adjudicative capacity. However, there is no valid reason to exclude legislative bodies when they are acting in an adjudicative capacity. Like the ABA, OCTC believes that legislative bodies acting in an adjudicative capacity should be included in the definition of a tribunal. Any attempt to distinguish misrepresentations to courts or others is misleading, confusing, and could present problems for enforcement of the State Bar Act and the Rules of Professional Conduct. OCTC supports the ABA's version of this definition.	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 *ex parte* 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 extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, *et seq*. The Commission believes it is important to retain the distinction between the special responsiblities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.

Rule 1.0.1 Terminology
[Sorted by Commenter]

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.0.1(n)	OCTC supports the definition for a signed writing in rule 1.0.1(n), but believes it should be a separate definition and not in the same paragraph as the definition for writing or written.	The Commission did not make the requested revision, in part because the inclusion of "signed" within the definition of "writing" conforms to the Model Rule counterpart to paragraph (n).
					Comments [I], [3], [4], [5], [11] and [12] are more appropriate for treatises, law review articles, and ethics opinions. Comments [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. In addition, the Commission believes that Comments [6] – [10] belong in Rule 1.0.1 as they are in the Model Rule counterparts.

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 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 __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:

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

August 2010
(Proposed rule following August 25, 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.

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* Proposed Rule 2.1, XDFT5.2 (07-06-10)

Public Comment. Following the last public comment period that ended on August 25, 2010, the Commission made no changes to the proposed rule. Only two public comments were received: a comment from COPRAC supporting the rule as drafted; and a comment from OCTC expressing concerns about the comments to the rule. Refer to the public comment synopsis chart for the Commission's response to the OCTC concerns.

Minority. A minority of the Commission objects to this Rule because it imposes an undefined duty to exercise duty of independent judgment. Largely due to the absence of a definition of "independent judgment," the minority is concerned that the vast majority of lawyers will not understand when and how this Rule applies. See full minority statement, below.

ABA Model Rule **Rule 2.1 Advisor**	**Commission's Proposed Rule*** **Rule 2.1 Advisor**	**Explanation of Changes to the ABA Model Rule**
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

ABA Model Rule Rule 2.1 Advisor Comment	Commission's Proposed Rule Rule 2.1 Advisor Comment	Explanation of Changes to the ABA Model Rule
	[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.	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 duty of 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~~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.	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.

ABA Model Rule **Rule 2.1 Advisor Comment**	**Commission's Proposed Rule** **Rule 2.1 Advisor Comment**	**Explanation of Changes to the ABA Model Rule**
[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.	[~~2~~3] ~~Advice~~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. ~~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~~in rendering advice, a lawyer may ~~decisively influence how the~~refer not only to law~~ will~~*, but to other considerations such as moral, economic, social and political factors that may* be ~~applied~~relevant to the client's situation.	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.

ABA Model Rule **Rule 2.1 Advisor Comment**	**Commission's Proposed Rule** **Rule 2.1 Advisor Comment**	**Explanation of Changes to the ABA Model Rule**
[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.

ABA Model Rule **Rule 2.1 Advisor Comment**	**Commission's Proposed Rule** **Rule 2.1 Advisor Comment**	**Explanation of Changes to the ABA Model Rule**
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

(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* = 2** **Agree = 1** **Disagree =** **Modify = 1** **NI = _**

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 2.1 and the Comments to the Rule.	No response needed.
2	Office of Chief Trial Counsel	M	Yes	Comment [1]	OCTC is concerned about the new Comment [1] to this rule. It seems unnecessary. Further, the second sentence is ambiguous, confusing, and vague. OCTC does not know what is meant by the term "not properly part of the lawyer-client relationship." This term is vague and ambiguous. It could cause problems for attorneys in complying with this rule and problems for OCTC in enforcing the rule in a fair manner. Likewise, OCTC is concerned about Comment [2], especially the third sentence in Comment 2: "In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits." This Comment, and particularly the third sentence, appears to impermissibly permit an attorney to balance the attorney's concern with client morale with the attorney's duty of candor, straightforward plain talking, and honesty to the client. This Comment also seems to be at odds with Proposed Rules 1.4 and 1.2.	The Commission did not make the requested change. Comment [1] was added because concept of "independent judgment" in the Rule has not been applied consistently in other jurisdictions. Some jurisdictions that have applied the Rule have construed "independent judgment" to mean judgment independent of the client's interests. (*See e.g. Thomas v. Tenneco Packaging Co.,* 293 F.3d 1306 (11th Cir. 2002) [lawyer sanctioned for rude and abusive conduct; in reply to the lawyer's argument that she merely was following orders, the Court confirmed the sanction, in part because Rule 2.1 requires lawyers to exercise independent professional judgment (and not just follow orders)]; *U.S. v. Hughes,* 41 Fed.Appx. 276, 281 n. 3 (C.A.10 (Okla.) [part of the Court's recital of underlying facts, it explains that counsel sought to withdraw on the basis that they had "reached an ethical conflict between their duty to follow the client's wishes and yet retain the required independent professional judgment mandated by Rule 2.1 ...."] This construction of "independent judgment," which imposes a duty on lawyers to advise clients for the benefit of others, is antithetical to a duty of loyalty

[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 = 2 Agree = 1 Disagree = Modify = 1 NI = _
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Comments [1], [2], and [3] seem more appropriate for treatises, law review articles, and ethics opinions.	and the reason that duty exists. Furthermore, it would conflict with other Rules, such as Rule 1.2 and 1.4. The Commission concluded that the Comment was necessary in order to assure that California authorities would not import constructions of the Rule in other jurisdictions that would be inconsistent with the duty of loyalty in California. In general, "independent judgment" means judgment that is independent of influences other than what is in the interest of the client. However, that definition would be too narrow and would suggest the existence of a conflict of interest in circumstances where a conflict would not exist. For example, most lawyer-client relationships are also economic relationships in which the lawyer receives compensation for services rendered. In a literal sense, the compensatory nature of the lawyer client relationship could be construed as an influence that is other than what is in the interest of the client. However, in most cases that interest does not mean that a lawyer is not exercising independent judgment. The same may be said about a routine discovery motion that seeks sanctions against lawyer and client. (See State Bar Formal Opinion No. 1997-151.) The Commission does not believe it is possible to

Rule 2.1 Advisor.
[Sorted by Commenter]

***TOTAL* = 2** **Agree = 1** **Disagree =** **Modify = 1** **NI = _**

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						list all of the circumstances that ordinarily would not adversely affect the lawyer's judgment. The phrase "that are not properly part of the lawyer-client relationship" is intended to distinguish between influences that are part of the ordinary lawyer-client relationship and which ordinarily do not interfere with a lawyer's judgment on a client's behalf and influences that are not part of the ordinary lawyer-client relationship, which would affect adversely the lawyer's professional judgment.

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 3.3 [5-200]
"Candor Toward the Tribunal"

(YDraft #13, 8/30/10)

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 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 5-200
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

August 2010
(Draft rule following final public comment period ending August 25, 2010)

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, YDraft 13 (8/30/10).

Final Public Comment Period (Ending August 25, 2010). The only significant change made to the Rule following the final round of public comment that ended August 25, 2010 was to add new Comment [14], which is based on Model Rule 3.3, cmt. [14] and delimits the scope of the term, "ex parte proceeding." Unlike most jurisdictions in which an "ex parte proceeding" is limited to those situations in which one party is not present or represented, under California procedure, the term also applies to situations where the other party is present, e.g., an ex parte temporary restraining order often shortens the time for notice but still requires notice to the other party, who is given an opportunity to be heard. The Comment is necessary to clarify the scope of the term within the meaning of the Rule. Moreover, because the comment is simply a clarification of a rule provision, it is not necessary that the Rule be re-circulated for further public comment.

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.

ABA Model Rule **Rule 3.3 Candor Toward the Tribunal**	**Commission's Proposed Rule**[*] **Rule 3.3 Candor Toward the Tribunal**	**Explanation of Changes to the ABA Model Rule**
(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., *Batt v. City and County of San Francisco*, 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. *Minority*. 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, *Schaefer v. State Bar*, 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,	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 13 (8/30/10); Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.3 Candor Toward the Tribunal	Commission's Proposed Rule* Rule 3.3 Candor Toward the Tribunal	Explanation of Changes to the ABA Model Rule
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.	disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	
(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~~extent permitted by Business and Professions Code section 6068(e).	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 or the representation, whichever comes first~~ 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 of the proceeding, 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.

ABA Model Rule **Rule 3.3 Candor Toward the Tribunal**	**Commission's Proposed Rule*** **Rule 3.3 Candor Toward the Tribunal**	**Explanation of Changes to the ABA Model Rule**
		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). *Minority*. 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.	In response to a comment letter from the San Diego Bar Association Legal Ethics Committee, the Commission revised paragraph (d) to be identical to the Model Rule counterpart provision for better clarity and consistency in regulating lawyer conduct. The language previously provided that a lawyer shall inform the tribunal of all facts "needed" to enable a tribunal to make an informed decision in a particular matter.

ABA Model Rule **Rule 3.3 Candor Toward the Tribunal** **Comment**	**Commission's Proposed Rule** **Rule 3.3 Candor Toward the Tribunal** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~1.0~~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~~ 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 ~~allow the tribunal to be misled by~~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	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

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	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.	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~~A lawyer is responsible for pleadings and other documents prepared for litigation~~,~~ but is usually not required to have personal knowledge of ~~matters~~the facts asserted therein~~, for~~ because litigation documents ordinarily present assertions of fact by the client, or ~~by someone on the client's behalf~~a witness, and not ~~assertions~~ by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud	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.

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	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 ~~authorities~~argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. ~~Furthermore, as stated in paragraph~~ A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2)~~, an advocate has~~ requires a ~~duty~~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. ~~The underlying concept is that legal argument is a discussion seeking to determine~~ Legal authority in the controlling jurisdiction may include legal ~~premises properly applicable~~authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on	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.

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	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.	
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, which merely contains expository language, 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.

ABA Model Rule **Rule 3.3 Candor Toward the Tribunal** **Comment**	**Commission's Proposed Rule** **Rule 3.3 Candor Toward the Tribunal** **Comment**	**Explanation of Changes to the ABA Model Rule**
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. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit ~~or otherwise permit the witness to present~~ the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.	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. *Minority*. 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~~ If a ~~witness or to give a narrative statement if~~criminal defendant insists on testifying, and the ~~accused so desires, even if counsel~~lawyer knows that the testimony ~~or statement~~ will be false, the lawyer may offer the testimony in a narrative form if the lawyer	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.

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
also Comment [9].	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 ~~obligation~~obligations of ~~the advocate~~a lawyer under ~~the~~these Rules ~~of Professional Conduct is~~and the State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~applicable constitutional provisions.	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. 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~~1.0.1(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.	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.

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
[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~~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. ~~In such situations, the advocate's~~ The lawyer's 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

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
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 effect~~materiality of the false evidence~~, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing~~.	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).

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
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)

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	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

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
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~~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~~some ex parte ~~proceeding, such as an application for a temporary restraining order~~proceedings, 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~~When the judge has an affirmative responsibility to accord the absent party just consideration~~. The~~, 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.	Comment [14] is based on Model Rule 3.3, cmt. [14], but has been revised to reflect California procedural law relating to ex parte proceedings. Unlike most jurisdictions in which an "ex parte proceeding" is limited to those situations in which one party is not present or represented, under California procedure, the term also applies to situations where the other party is present, e.g., an ex parte temporary restraining order often shortens the time for notice but still requires notice to the other party, who is given an opportunity to be heard. The Comment is necessary to clarify the scope of the term within the meaning of the Rule. Otherwise, lawyers would likely be confused about their duties in those ex parte proceedings when the other party is present to advance its own position.

ABA Model Rule Rule 3.3 Candor Toward the Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
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~~A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's ~~disclosure~~taking reasonable 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 ~~such an extreme~~a deterioration of the ~~client~~ 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. ~~In connection~~ 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 ~~a~~respect to any 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 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.

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 some ex parte proceedings, there is no balance of presentation by opposing advocates. When 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.

Withdrawal

~~[14]~~[15] 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~~3.3 ~~Trial Conduct~~ Candor Toward the Tribunal

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

~~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~~

(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 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.

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 some ex parte proceedings, there is no balance of presentation by opposing advocates. When 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.

Withdrawal

[15] 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 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.

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 some ex parte proceedings, there is no balance of presentation by opposing advocates. When 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.

Withdrawal

[15] 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* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association ("CPDA")	M	Yes	Comment [4]	CPDA requests an additional new sentence be added to Comment [4], using the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows: "A criminal defense lawyer is not subject to discipline for not disclosing directly adverse authority in the controlling jurisdiction under paragraph (a)(2) if the lawyer reasonably believed that the lawyer was not required to do so by controlling constitutional principles, even if that belief is later shown to have been wrong."	The Commission disagrees with the commenter. Whether the lawyer reasonably believed that he or she was not required to disclose directly adverse authority by controlling constitutional principles would be a fact in mitigation, not an exemption from the rule. The obligations of a defense lawyer under this Rule do not exceed what a defense lawyer might be prohibited from doing under the Fifth and Sixth Amendments. See also Rule 3.1(a), which provides: "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." Rather than providing a blanket exception to the obligations under this Rule, it is better left to development in the case law.
2	COPRAC	A	Yes		COPRAC supports the adoption of proposed Rule 3.3 and the Comments to the Rule.	No response required.
3	Los Angeles County Bar Association Professional Responsibility and Ethics Committee ("LACBA")	M	Yes	3.3(a)(3) & (b) Comment [10]	There are competing ethical concerns between California's strict adherence to the duty of confidentiality and the Proposed Rule's requirement that remedial measures be taken to inform the tribunal if the lawyer comes to know that false evidence has been presented, or a person,	The Commission disagrees with the commenter's proposed revision. The Commission believes the Rule is clear on a lawyer's obligations to take reasonable remedial measures. The obligations under Rule 1.6 and Bus. & Prof. Code § 6068(e) are always present and consequently are read into a lawyer's duties under every rule; it is not necessary

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

***TOTAL* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					potentially including a client, has engaged in or is about to engage in fraudulent or criminal conduct in the proceedings. We generally believe that the Proposed Rule could be improved by a more concise statement as to what the lawyer is not permitted to do, rather than merely directing the lawyer to Section 6068(e). The concept is well stated in the last sentence of Comment [10], which reads: "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)." We support the view that the language of the last sentence of Comment [10] should be made a part of the body of the Rule itself, in place of the references to Section 6068(e) contained in Subsections (a)(3) and (b) of the Proposed Rule as presently drafted.	to expressly state them in every rule. The Commission has added express references to Rule 1.6 and section 6068(e) in paragraphs (a)(3) and (b) because express exceptions to confidentiality are provided in the counterpart sections in the ABA Model Rule. The Commission thought it important to emphasize that California had not adopted the Model Rule approach in order to avoid confusing lawyers about their obligations under those provisions where the counterpart Model Rule had diverged significantly from California policy.
				3.3(d)	We also believe that Subsection (d) of the Proposed Rule overstates the concept of disclosure to the tribunal in an ex parte proceeding, and omits the necessary reference to avoid disclosure of client	The Commission agrees that without further clarification, the duties stated under paragraph (d) are overly broad and might be construed to apply even in situations when an opposing party or its representative is present during the proceeding.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

***TOTAL* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					confidential information. Thus a similar revision should be made to temper the overly broad statement as to required disclosure of material facts in an ex parte proceeding. Perhaps one way to implement these suggestions might be to add a subsection (e) to the Proposed Rule, which reads more or less as the last sentence of Comment [10].	The Commission therefore has added new Comment [14], based on Model Rule 3.3, cmt. [14], which delimits the scope of the term, "ex parte proceeding" and provides: 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 some ex parte proceedings, there is no balance of presentation by opposing advocates. When 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. Regarding the concerns the commenter has expressed concerning confidentiality, see Commission's response to comment on paragraphs (a)(3) and (b), above.
4	Office of Chief Trial Counsel ("OCTC")	M	Yes	3.3(d)	1. OCTC is concerned about the changes to Proposed Rule 3.3(d) because the new proposal strikes out the term "knows or reasonable should know" and replaces it with the term "known." Rule 1.0 defines knowingly, known, or knows as "actual	1. The Commission disagrees. The cases cited by the commenter were decided under Business & Professions Code sections 6106 and 6068(d). The standards of Sections 6106 and 6068(d) are not changed by proposed Rule 3.3(d). Instead, they supplement the standards of Rule 3.3. Proven

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = _
Modify = 5
NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					knowledge of the fact in question." However, requiring actual knowledge in order to establish a disciplinable offense is contrary to established California law regarding misrepresentations to tribunals.	gross negligence in failing to ascertain the truth would still be a cause for discipline under the State Bar Act. To the extent that cases such as *Chestnut, Dale, Vaughn, Harney, Loftus,* and *Casey* were decided under Sections 6106 or 6068(d), they are not overturned by this rule. The Commission concludes that repeating the contents of Section 6068(d) in proposed Rule 3.3 would be unnecessary and redundant and would invite double charging for the same offense.
					CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." FRCP rule 11 is similar to CCP 128.7. We should not be allowing lawyers to make material false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may often be a defense to a charge of misrepresentation, this is because it is currently a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct.	It is possible that a lawyer might be subjected to a sanctions order under C.C.P. section 128.7 or under Federal Rule 11 but not be subject to professional discipline. This is understandable, considering the differences in purpose between the discovery rules and the disciplinary rules. While the civil standards can be seen as designed to punish a lawyer who burdens a court with unnecessary work and adversaries with unnecessary expense, the purpose of disciplinary proceeding is not to punish the lawyer but to inquire into the lawyer's fitness to practice law. See *In re Kreamer*, 14 Cal.3d 524, 532 (1975). Moreover, as demonstrated by the last sentence of Comment [8], proposed Rule 3.3 will not permit a lawyer to ignore an obvious falsehood.
					Further, this proposed change to the rule is inconsistent with Proposed Rules 8.2, 8.4, 4.2, and Comment [2B] of Proposed Rule	Similarly, proposed Rules 8.2, 8.4, 4.2, and Comment [2B] of Rule 8.4 are not abrogated by proposed Rule 3.3(d). To the contrary, Rule 3.3 is

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = _
Modify = 5
NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					8.4. While negligence is not a basis for discipline, gross negligence is and should be a basis for discipline. Further, even if this rule were adopted, OCTC could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently parts of Proposed Rule 8.4). Thus, this change creates inconsistent and confusing rules or duties for attorneys and could mislead attorneys into believing that actual knowledge is required for discipline in these situations when gross negligence can and will support discipline for this conduct.	augmented by those rules, and they are not inconsistent with it. The Commission concludes that it is not necessary for every rule to repeat all of the contents of every other rule. Instead, the rules are to be read as a whole.
				3.3(a)	2. OCTC also remains concerned with the use of the term "knowingly" in rule 3.3(a). Our concern is for the same reasons stated in our June 15, 2010 letter and in our expressed concerns about the change in rule 3.3(d).	2. The word "knowingly" is part of the introduction in Model Rule 3.3(a). In the Model Rules, "knowingly" denotes "actual knowledge." Actual knowledge is and should be the standard for discipline under proposed Rule 3.3, even if other standards, such as gross negligence, might apply under other rules or under Section 6068(d).
					3. OCTC is concerned that the Proposed Rule omits the term "artifice" as provided in current rule 5200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule. Further, that term is used in B&P Code section 6068(d).	3. Not including "artifice" in proposed Rule 3.3 will not impair the ability of OCTC to charge lawyers. The word is in Bus. & Prof. Code § 6068(d). OCTC will still have the ability to charge a violation of that section if a lawyer attempts to mislead a judicial officer by use of an artifice. Duplicate charges for the same conduct, one alleging a violation of the

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 6 Agree = 1
Disagree = _
Modify = 5
NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						statute and the other a violation of the rule, are not needed. Conversely, closely tracking the wording of Model Rule 3.3 will enhance lawyers' compliance with the duty of candor and provide better public protection.
				3.3(a)(1) & (2)	4. OCTC remains concerned that the Proposed Rule omits without Comment the following language in the Current Rule: 1) "Shall not intentionally misquote 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) & (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. The excluded language serves an important public purpose and provides guidance to the attorneys in this state. OCTC requests at the very least a Comment to explain that this is not a change in the law, but merely because it is already covered by Proposed Rule	4. Proposed Comment [2] of Rule 3.3 clarifies that it would be an offense under proposed paragraph (a)(1) to make a false statement of law or to fail to correct a material misstatement of law. Comment [2], which expressly includes "citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional," addresses the commenter's concern.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

***TOTAL* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					3.3(a)(1) & (2). 5. 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." The courts have noted that this can be an attempt to get around the evidence rules and that jurors are likely to give attorney statements more credibility as being based on outside knowledge. OCTC knows of no reason to omit the language in Current Rule 5-200(E) and believes that it serves an important public purpose. OCTC has observed attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. Attorneys have properly been disciplined for this conduct. OCTC recommends that this language be included in the Proposed Rule. 6. OCTC is also concerned that the Proposed Rules do not specifically 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 *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108,118); 2)	5. The language of current rule 5-200(E) is found elsewhere in the proposed Rules. Asserting personal knowledge of facts is expressly prohibited by proposed Rule 3.4(g) (a lawyer shall not "in trial, assert personal knowledge of facts in issue except when testifying as a witness.") 6. Neither the current Rules of Professional Conduct nor the proposed Rules attempt to identify every situation in which a lawyer might be sanctioned or disciplined. *Hawk* was a contempt case, not a case of discipline imposed by the State Bar Court or the Supreme Court. Adopting proposed Rule 3.3 will dictate a different result in facts similar to those in *Hawk*.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 6 Agree = 1 Disagree = _ Modify = 5 NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					states the attorney's belief in the credibility of a witness (see Hawk v. Superior Court, supra, 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders or rulings of a court. OCTC recognizes that arguably these rules could be included in Proposed Rule 3.4, but they are not there either. They should be somewhere.	
				Comment [3]	7. Comment [3] is too long. If "knowingly" is stricken from the Proposed Rule, this Comment should be also stricken. Further, this Comment does not address CCP 128.7 or FRCP 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."]) It is reasonably foreseeable that laypersons will offer selective or incomplete recitation of the facts. An attorney has a duty to make a reasonable inquiry before making a statement to a tribunal.	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. Regarding the stated concerns about CCP 128.7, see response in ¶.1, above.
5	Orange County Bar Association ("OCBA")	M	Yes	3.3(a)(3) & (b)	If client confidentiality is to take precedence over the obligation to pursue	Please see response to LACBA re paragraphs (a)(3) and (b), and Comment [10], above.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

***TOTAL* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [10]	remedial measures in correcting false information provided to the tribunal, the Proposed Rule needs to be more explicitly drafted. The bottom line is that if you don't have a client's permission, or some other exception to the duty of confidentiality, you can't take any remedial measures that involve disclosures of confidential information. This isn't plainly stated until the end of Comment [10], where it provides that remedial measures do not include the disclosure of client confidential information which the lawyer is required to maintain inviolate. The clarity of the Proposed Rule would be enhanced if the last sentence of Comment [10] were actually moved into the body of the Rule, modifying the language of paragraphs (a)(3) and (b), to avoid the inconsistent or confusing treatment of these competing professional obligations.	
				Comment [4]	Line 6 of Comment [4] has an "and" between "directly adverse" and "legal authority." The OCBA believes the "and" should be deleted, because the Comment pertains to directly adverse legal authority, and the conjunctive is unnecessary.	The Commission agrees and has deleted the word "and" from the third sentence of Comment [4].

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

***TOTAL* = 6** **Agree = 1** **Disagree = _** **Modify = 5** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Pansky, Ellen A.	M	No	3.3(a)(3) & (b)	Subsections (a)(3) and (b) can be read to suggest that lawyers have a duty to reveal client confidences at an ex parte hearing, in order to correct a judge's misunderstanding of facts. There is no known authority for this proposition, which seems to directly contradict the duty to maintain client secrets, set forth in B&P Code § 6068(e). It seems to me that the purpose of Model Rule 3.3 is to require a lawyer to make sure that no misrepresentations occur with respect to ex parte notice, so that ex parte relief is not given on faulty procedural grounds. This point is not clear in Proposed Rule 3.3.	Please see response to LACBA re paragraphs (a)(3) and (b), above.

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 3.8 [RPC 5-110]
"Special Responsibilities of a Prosecutor"

(YDraft #12, 8/29/10)

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 __11__
Opposed Rule as Recommended for Adoption __0__
Abstain __1__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No
(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 in paragraphs (g) and (h). Members of the defense bar have appeared at a RAC meeting concerning the scope of a prosecutor's discovery obligations under paragraph (d) and, following changes to that provision implemented at the RAC meeting, prosecutors appeared at a Commission meeting to present their side of the issue.

☑ Very Controversial – Explanation:

See the Introduction and Explanation of Changes for Commission minority positions on 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 paragraph 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

August 2010
(Draft rule revised following public comment period ending August 25, 2010.)

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 obtain 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.

Solicitation of public comment on paragraph (d), as revised at the July 24, 2010 Board of Governors meeting, and recommendation that the Board of Governors adopt the version of that paragraph that appeared in earlier drafts of the Rule. In response to a letter to the Board of Governors from the Los Angeles Public Defender, the Board decided at its July 2010 meeting to solicit comment on whether California should adopt the broader scope of duty provided in Model Rule 3.8(d). See ABA Formal Ethics

* Proposed Rule 3.8, YDraft 12 (8/30/10).

Op. 09-454, available at http://www.abanet.org/cpr/pubs/ethicopinions.html. In previous versions of the Rule circulated for public comment, paragraph (d) generally followed the Model Rule but clarified 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. During the public comment period that ended August 25, 2010, the Commission received a substantial amount of comments from the prosecution bar that uniformly objected to the adoption of the Model Rule. The commenters all pointed out that Model Rule 3.8(d) conflicted with California statutes that had been approved with the passage of Proposition 115 in 1991. After considering the arguments of the prosecution bar, which were not represented at the July 23, 2010 the Board Committee meeting where a representative of the L.A. County Public Defender's office made a presentation, the Commission voted at its August 27, 2010 meeting to recommend that the Board restore the previous version of paragraph (d), slightly revised to include a reference to statutory obligations in addition to constitutional obligations. If the Board agrees, paragraph (d) would now provide that a prosecutor must "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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." (underlined words added to the Model Rule). In restoring the previous version of the paragraph, the rule would not have to be re-circulated for public comment.

Minority. A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." See Explanation of Changes for paragraph (g), below.

ABA Model Rule **Rule 3.8 Special Responsibilities of a Prosecutor**	**Commission's Proposed Rule*** **Rule 3.8 Special Responsibilities of a Prosecutor**	**Explanation of Changes to the ABA Model Rule**
The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;	~~The~~A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;	Paragraph (a) is based on Model Rule 3.8(a). The additional language clarifies that the scope of prohibited conduct includes both prosecuting and the act of *commencing* 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;	Paragraph (b) is identical to Model Rule 3.8(b).
(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~~ unless the tribunal has approved the appearance of the accused *in propria persona*;	Paragraph (c) is based on Model Rule 3.3(c), with two revisions. First, the reference to "preliminary hearing" has been deleted because it conflicts with Penal Code section 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can only waive a preliminary hearing if represented by counsel. Second, paragraph (c) carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding *in propria persona* with leave of the tribunal.

* Proposed Rule 3.8, YDraft 12 (8/29/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule **Rule 3.8 Special Responsibilities of a Prosecutor**	**Commission's Proposed Rule*** **Rule 3.8 Special Responsibilities of a Prosecutor**	**Explanation of Changes to the ABA Model Rule**
(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) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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;	Paragraph (d) is based on Model Rule 3.8(d) but clarifies that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution and statutes, as intrepreted and applied in relevant case law.. In response to a July 22, 2010 letter from the Los Angeles Public Defender, the Board of Governors decided at its July 2010 meeting to solicit comment on whether California should adopt the broader scope of duty provided in Model Rule 3.8(d). During the public comment period that ended August 25, 2010, the Commission received a substantial number of comments from the prosecution bar that uniformly objected to the adoption of the Model Rule provision. The commenters all pointed out that Model Rule 3.8(d) conflicted with California statutory law that had been approved with the passage of Proposition 115 in 1991. After considering the arguments of the prosecution bar, which was not represented at the July 23, 2010 RAC meeting where a representative of the L.A. County Public Defender's office made a presentation, the Commission voted at its August 27, 2010 meeting to recommend that the Board restore the previous version of paragraph (d), slightly revised to include a reference to statutory obligations in addition to constitutional obligations.
(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, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes:	Paragraph (e) is based on Model Rule 3.8(e). 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.

ABA Model Rule **Rule 3.8 Special Responsibilities of a Prosecutor**	**Commission's Proposed Rule*** **Rule 3.8 Special Responsibilities of a Prosecutor**	**Explanation of Changes to the ABA Model Rule**
(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 or the work product doctrine;	Paragraph (e)(1) is based on Model Rule 3.8(e)(1), 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~~reasonably necessary to the successful completion of an ongoing investigation or prosecution; and	Paragraph (e)(2) is based on Model Rule 3.8(e)(2), 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." in order to provide greater guidance to the prosecutor. It is a difficult, if not impossible, task to decide *ex ante* 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~~reasonable alternative to obtain the information;	Paragraph (e)(3) is based on Model Rule 3.8(e)(3), 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.

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor	Commission's Proposed Rule* Rule 3.8 Special Responsibilities of a Prosecutor	Explanation of Changes to the ABA Model Rule
(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 statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.	(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 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 ~~or this Rule~~.	Paragraph (f) is based on Model Rule 3.8(f), except that the reference to the prosecutor's ability to make certain statements that serve a legitimate law enforcement purpose has been deleted because they are an imprecise re-formulation of the more detailed statements already present in Model Rule 3.6(a) and (b), to which prosecutors are also subject.
(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	(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	Paragraph (g) and all of its subparagraphs are identical to Model Rule 3.8(g). 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]. Minority. A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor	Commission's Proposed Rule* Rule 3.8 Special Responsibilities of a Prosecutor	Explanation of Changes to the ABA Model Rule
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.	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.	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 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).

ABA Model Rule **Rule 3.8 Special Responsibilities of a Prosecutor Comment**	**Commission's Proposed Rule** **Rule 3.8 Special Responsibilities of a Prosecutor Comments**	**Explanation of Changes to the ABA Model Rule**
[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~~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 ~~and knowing~~. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.	Comment [1] is based on Model Rule 3.3, Comment [1], with generally explanatory language not relevant to California deleted as unnecessary.
	[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.	Comment [1A] has no counterpart in the Model Rule. This definition is intended to clarify, but not to expand, the scope of persons covered by the Rule.

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
	[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.	Comment [1B] has no counterpart in the Model Rule. It 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 clarify 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~~ forbid the lawful questioning of ~~a~~ an uncharged suspect who has knowingly waived the ~~rights~~right to counsel and ~~silence.~~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.	Proposed Comment [2] is based on Model Rule 3.8, cmt. [2], with several changes. First, the first two sentences to the Comment have been deleted because they explain language in the Model Rule that has been deleted because it conflicts with California law. See Explanation of Changes for paragraph (c). Second, the exception governing an accused who is appearing *in propria persona* with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c). Finally, the last sentence has been added to clarify the application of paragraph (c).
	[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	Comment [3] has no counterpart in the Model Rule. The first sentence of Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed the law at the

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
	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.	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 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.	Comment [3] is identical to Model Rule 3.8, cmt. [3].
[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-client or other privileged relationship.	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~~	Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2) does not

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
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 Comment~~ This comment is not intended to restrict the statements which a prosecutor may make ~~which~~that comply with Rule 3.6(b) or 3.6(c).	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~~Prosecutors 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~~standard will be satisfied if the prosecutor ~~from making improper extrajudicial statements, even when such persons are not under~~issues the ~~direct supervision of the prosecutor~~appropriate cautions to law-enforcement personnel and other relevant individuals. 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 identical to Model Rule 3.8, cmt. [6]. A public commenter, however, noted that language in the Model Rule comment 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."

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
	[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].	Comment [6A] has no counterpart in the Model Rule. It 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	Comment [7] is based on Comment [7] of the ABA Model Rule, with several revisions. 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.

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
	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.	[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 identical to Model Rule 3.8, cmt. [8].
[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 even if the	Comment [9] largely tracks Model Rule 3.8, cmt. [9]. 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.

ABA Model Rule Rule 3.8 Special Responsibilities of a Prosecutor Comment	Commission's Proposed Rule Rule 3.8 Special Responsibilities of a Prosecutor Comments	Explanation of Changes to the ABA Model Rule
	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]	Comment [10] has no counterpart in the Model Rule. In response to concerns elicited during public comment, a reference to the California statutory prohibition applicable to both current and former prosecutors was added. 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 statutory and constitutional obligations, as interpreted by relevant case law, to 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;

(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:

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

(5) 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.

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) 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 unless the tribunal has approved the appearance of the accused *in propria persona*;

(d) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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;

(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] Paragraph (c) 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. 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 unless the tribunal has approved the appearance of the accused *in propria persona*;

(d) comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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;

(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] Paragraph (c) 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. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct

material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g)(1) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

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

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.

[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16].

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California District Attorneys Association	M	Yes	3.8(d)	Proposed Rule 3.8(d), on its face and as interpreted by ABA Opinion 09-454, is at odds with California criminal discovery law as defined by the California Constitution and California statutes. With all due respect, in an area with such detailed and specific statutory provisions, supported by a California constitutional mandate, which incorporate the discovery requirements of the U.S. Constitution, it is not the place of the State Bar to revise the discovery obligations of the prosecution. We urge that the Bar adopt Proposed Rule 3.8(d) as it was originally proposed for California.	After further review, the Commission agrees with the commenter that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."
2	California Public Defender's Association	M	Yes	Comment [2A] 3.8(d)	CPDA agrees with the points made below by the Los Angeles County Public Defender's Office. CPDA supports the Proposed Rule because it requires lawyers to have high professional standards that go beyond the minimum required by law.	The Commission disagrees with the commenter. After further review, the Commission has determined that paragraph (d) was in conflict with California statutory law and has revised the provision to provide that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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,

[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* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						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." Consequently, the sentence in Comment [2A] that the L.A. County Public Defender requests be stricken clarifies the provision and should be retained.
3	COPRAC	A	Yes		COPRAC supports the adoption of proposed Rule 3.8 and the Comments to the Rule.	No response required.
4	County of Santa Cruz District Attorney's Office	D	Yes	3.8(d)	The Board of Governors has proposed a new version of subdivision (d) that eliminates important language requiring prosecutors to comply with all constitutional obligations, as defined in relevant case law. If adopted in this form, the rule would no longer be consistent with the constitutional law and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of conceivably favorable evidence. The Proposed Rule seems to unfairly single out prosecutors for discipline for an unintentional or inadvertent delay in complying with the statutory time limit. However, there appears to be no rule which would subject criminal defense counsel to the same disciplinary consequences.	After further review, the Commission agrees with the commenter that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Prosecutors should be governed by the same ethical rules applicable to criminal defense lawyers if they violate a reciprocal discovery time limit applicable to both parties' lawyers. Both the former proposal and the new proposal go beyond the prosecutor's constitutional duty to disclose mitigating evidence to the defense. The Proposed Rule further requires that the prosecutor then perform defense counsel's job of presenting any such mitigating information "to the tribunal." The language "and to the tribunal" should be deleted from this rule.	The Commission disagrees with commenter that, as revised, see above, the provision exceeds a prosecutor's duties under the constitution or statute.
5	Jenness, Evan A.	A	No	3.8(d)	I support Proposed Rule 3.8(d). Rule 3.8(d) properly preserves a meaningful role for State Bar disciplinary authorities in ensuring that both State and Federal prosecutors in California adhere to appropriate standards of professional conduct, advances the goals of protecting the public from prosecutorial lapses, and promotes public confidence in the integrity of the legal profession.	The Commission disagrees with the commenter. After further review, the Commission determined that paragraph (d) was in conflict with California statutory law and has revised the provision to provide that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Los Angeles City Attorney's Office	D	Yes	3.8(b)	The Commission should delete Proposed Rule 3.8(b) because the court is already required by statute to advise the defendant of the right to counsel, there is no need to shift this responsibility to prosecutors.	The Commission disagrees with the commenter. The statutes cited by the commenter are limited in scope. They do not address whether a prosecutor is obligated during an interrogation at which the prosecutor is present to take measures to ensure whether the accused has been apprised of his or her rights.
				3.8(d)	Proposed Rule 3.8(d) is overly broad and places an undue burden upon prosecutors to disclose pre-trail exculpatory evidence. Proposed Rule 3.8(d) does not consider California's unique statutory *Pitchess* mechanism designed to access police personnel records and, as such, the Proposed Rule will create confusion, will substantially burden public entities and will cause needless litigation.	After further review, the Commission has determined that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."
				3.8(f)	Proposed Rule 3.8(f) should be deleted because it would improperly subject a prosecutor to discipline for extrajudicial statements made by persons over whom the prosecutor has no supervision or control.	The Commission disagrees with the commenter. Unlike the corresponding Model Rule provision, proposed paragraph (f) imposes a duty on a prosecutor only as to "person under the supervision or direction of the prosecutor."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g)	Proposed Rule 3.8(g) is overly broad by placing an undue burden upon prosecutors to disclose post-conviction exculpatory evidence. Proposed Rules 3.8(d) and (g) will cause a significant increase in costs to the City Attorney's Office, which does not have the resources due to devastating budget and personnel cutbacks.	The Commission disagrees with the commenter. The Commission recommends adoption of paragraphs (g) and (h) in order to impose an affirmative duty upon a prosecutor who, in specified circumstances, may be in a position to assist in undoing a wrongful conviction. The burden is not undue; the provision requires that the evidence be both "credible" and "material" and, if the conviction occurred in another jurisdiction, the prosecutor need only disclose the evidence to an appropriate court or authority." Although there is the potential for misuse of the proposed Rule by prisoners who may have been properly convicted, potentially increasing costs of compliance, that consideration does not outweigh the importance of the proposed duty.
7	Los Angeles County District Attorney's Office	D	Yes	3.8(d)	The Constitutional and statutory and case law of both the United States and California have long been the guiding touchstones of prosecutorial discovery in our State. The present version of Proposed Rule 3.8 eviscerates these authorities by expanding the scope of a prosecutor's ethical duty to provide discovery to defense far beyond what is required. This is particularly unreasonable in California where the voters of the state have specifically addressed this issue by voting to pass the Crime Victims Justice Reform Act,	After further review, the Commission has determined that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "<u>comply with all statutory and constitutional obligations, as interpreted by relevant case law, to</u> 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."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Proposition 115, on June 3, 1990. Proposition 115 mandated a criminal discovery process. Our current reliance on the constitution, statutes and case law provides clear guidance to prosecutors who are litigating matters before judges who are in the best position to determine if violations occur. Tactical gamesmanship by some defendants will be exacerbated without any improvement to the quality of justice. Trials will be delayed, and the fairness and balance to be accorded to victims and witnesses, and demanded by the voters of California, will be substantially and unnecessarily diminished.	
8	Los Angeles County Public Defender's Office	A	Yes	Comment [2A]	Comment [2A] should be modified regarding its reference to subdivision (d). The Comment states, in relevant part: "The obligations in paragraph (d) apply only with respect to controlling law existing at the time of the obligation and not with respect to subsequent law that is determined to apply retroactively." This language is not found in the Comments to Model Rule 3.8, and should not be adopted because it incorrectly implies that the disclosure obligation of Proposed Rule 3.8(d) is limited by "controlling law." In other words, it brings in through the back door what the Proposed Rule has eliminated at the front.	After further review, the Commission has determined that paragraph (d) was in conflict with California statutory law and has revised the provision to provide that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						tribunal." Consequently, the sentence the commenter requests be stricken clarifies the provision and should be retained.
9	Office of Chief Trial Counsel	M	Yes	3.8(d)	While OCTC agrees with the proposed change to broaden the rule beyond the technical requirements of *Brady* and *Bagley*, OCTC is concerned that the language of this rule appears to permit gross carelessness or gross negligence in complying with this duty. The rule requires a prosecutor to "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 . . ." [Emphasis added.] Rule 1.0.1(f) defines knowingly, known, or knows as "actual knowledge of the fact in question." By requiring that the information be "known" to the prosecutor, the rule seems to be permitting a prosecutor to fail to comply with his or her duty to search for exculpatory evidence and permits a "see no evil or hear no evil" approach to this obligation. However, it is well established that a prosecutor not only has the duty to disclose exculpatory evidence he or she knows about, a prosecutor has an affirmative duty to search for exculpatory evidence.	After further review, the Commission has determined that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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." A prosecutor's constitutional and statutory obligations that are referenced in the provision impose on the prosecutor a duty to investigate.

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					In *In the Matter of Halsey, Jr*., the State Bar Court rejected a prosecutor's claim that he did not know about certain exculpatory evidence. The court stated: "Even assuming arguendo that respondent did not know the full extent of Dr. Gill's coaching, 'we can only conclude this is so because he adhered to an approach unlikely to uncover this information ... [A] prosecutor cannot adopt a practice of 'see or hear no evil.' Under these circumstances, the prosecution has an affirmative duty and cannot – by looking the other way – shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury." (*People v. Kasim*, supra, 56 Cal.App.4th at p. 1386.) As the State Bar noted, like the prosecutor in *Kasim*, respondent purposely made himself ignorant of the details by taking a 'see no evil or hear no evil" approach. Such a conscious decision to look the other way is no defense." (Mr. Halsey did not appeal that decision and, on December 13, 2006, the Supreme Court filed its order suspending him in Case No. S147283.) A prosecutor's recklessness or gross negligence should support misconduct. Other jurisdictions appear to be in agreement. (See	

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					e.g. *In the Matter of Carpenter* (Ka. 1991) 808 P.2d 1341.) While OCTC does not believe mere negligence should support a finding of misconduct for discipline purposes, we believe gross negligence should be a sufficient basis to support a finding of misconduct by a prosecutor for discipline purposes.	
				3.8(b) & (c)	OCTC remains 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 police, not the prosecutor, control this process. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. *People v. Jacinto* (2010) 49 Cal.4th 263 [finding that the Sheriffs deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor? The same concern applies to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing,	Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of police conduct. 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 advice etc. The Commission believes this places the correct burden on prosecutors. The Commission's recommendation of the proposed paragraph 3.8(c) is based on its agreement with the Model Rule concept that the proposed Rule will prevent prosecutors from overreaching with respect to unrepresented defendants that may result in waiver of important pre-trial rights.

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					unless the tribunal has approved of the appearance of the accused in propria persona.	
				3.8(f)	OCTC is also 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 laudable, this Comment has 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.	The Commission agreed with the commenter's concerns and revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case, from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
				3.8(e)	OCTC is concerned that paragraph (e) does not discuss how the prosecutor addresses a waiver of the privilege or the work product doctrine.	The Commission is uncertain what point the commenter is making. Paragraph (e) is not intended to address waivers of either the lawyer-client privilege or lawyer work product. That is more properly addressed in evidence rules and the law of evidence. In addition, 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."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g) Comments generally	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. Comment [1A] defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should be in the Rule, not a Comment.	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.
10	Orange County Bar Association	A	Yes		The OCBA supports the adoption of Proposed Rule 3.8 addressing the special responsibilities of a prosecutor.	No response required.
11	San Diego County District Attorney.	D	Yes	3.8(d)	Strongly oppose the proposed version of Rule 3.8(d). This proposed version is inconsistent with both constitutional and statutory law related to criminal discovery in California. The original proposal was appropriate insofar as it imposed ethical duties on prosecutors commensurate with those required by the United States Constitution as interpreted by the USSC in the case of *Brady v. Maryland* and its progeny. On the other hand, the language of ABA Model Rule 3.8(d), now being circulated for consideration, imposes obligations on the part of prosecutors that	After further review, the Commission agrees with the commenter that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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."

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					are inconsistent with the law. The Proposed Rule on its face, and as interpreted in ABA Opinion 09-454, is at odds with California criminal discovery laws as defined by the California Constitution and California statutes. In an area with such detailed and specific statutory provisions, supported by a California constitutional mandate, which incorporate the discovery requirements of the U.S. Constitution, it is not the place of the State Bar to extend the discovery obligations of the prosecution. I urge the Bar adopt Rule 3.8(d) as it was originally proposed in September 2009.	
12	Ventura County District Attorney's Office	M	Yes	3.8(d)	The prosecution is obligated to provide the defense in criminal cases with exculpatory evidence if it is *material* to either guilt or punishment. (*Brady v. Maryland*) An extensive body of state and federal law defines the parameters of what must be disclosed under *Brady*. An earlier draft of 3.8(d) incorporated the law in this area by requiring prosecutors to "comply with all constitutional obligations, as defined by relevant case law." This language should be added back into the Rule. Elimination of the materiality requirement	After further review, the Commission has determined that the proposed provision was in conflict with California statutory law and has made the requested change. Paragraph (d) now provides that a prosecutor must: "comply with all statutory and constitutional obligations, as interpreted by relevant case law, to 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

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					would subject prosecutors to discipline for the *least serious* breaches of discovery, the failure to disclose *immaterial* evidence or information. It would also result in the development of two inconsistent lines of authority: what prosecutors must disclose to the defense under the constitution, and what they must disclose under the State Bar rules.	the tribunal."
				Comment [2A]	Proposed Comment [2A] is helpful but confusing. The reference to "controlling law" could be read in two different ways. If it is a reference to the large body of law construing the constitutional obligation to disclose material exculpatory evidence, then the Comment would incorporate the language about "constitutional obligations" that the State Bar now proposes to delete from the Rule. Or the "controlling law" could be read as whatever new decisions of the State Bar Court and other courts develop to interpret the new disciplinary rule. The Proposed Rule would require the prosecutor to disclose information that may mitigate the sentence to the defense *and to the tribunal*. Providing material mitigating evidence to the defense is required by *Brady*. But requiring the prosecutor to also provide the information to the court raises practical	In light of the revisions to paragraph (d), see above, the commenter's concerns about the potentially confusing nature of Comment [2A] are no longer present.

Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]

***TOTAL* = 12** **Agree = 4** **Disagree = 4** **Modify = 4** **NI = ___**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					difficulties and is inconsistent with the advocacy roles of both the prosecutor and the defense. The prosecution is required to provide material exculpatory and mitigating evidence to the defense, but is not required to identify *which* bits of information might be helpful to the defense. (*Rhodes v. Henry*). The Proposed Rule would require the prosecutor either to glean out and identify for the court all potentially mitigating evidence, or provide the court with a copy of all documents that might include mitigating evidence. If evidence that might mitigate sentence has already been provided to the defense in pretrial discovery, the Rule is unclear as to whether the prosecutor would have to disclose to the tribunal as well. In order to avoid discipline under the Proposed Rule, the prudent prosecutor must err on the side of disclosure, but may be providing the court with information that neither side feels is pertinent to sentencing. Counsel for each side should continue to be free to present the evidence that it feels supports its position.	

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 4.2 [2-100]
"Communication with a Represented Person"

(**YDraft 20, 08/30/10**)

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	*Matter of Dale* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __12___
Opposed Rule as Recommended for Adoption ___0___
Abstain ___0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

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. Refer to the current Public Comment Chart for those stakeholders who most recently commented upon the proposed Rule.

☑ 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"

August 2010
(Proposed rule following August 25, 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. See paragraph (b) and Explanation thereto. 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. See paragraph (c) and Explanation thereto. 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. See paragraph (e) and Explanation thereto. 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. See paragraph (f) and Explanation thereto.

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, YDraft 20 (08/30/10).

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 [17]-[20]. 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 [19] 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. At its July 2010 meeting, the Board approved that sentence and the Rule was circulated for a further 30-day public comment period that ended August 25, 2010. Again, a substantial amount of comment was received. The Commission continues to believe that the approach taken in paragraph (c)(3) and Comments [17]-[20] strikes an appropriate balance between the need to protect the important lawyer-client relationship and the need to permit lawyers to act as advocates. See complete public comment received and Public Comment Chart, summarizing the public comment received with the Commission's responses thereto.

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 [15].

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, 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.

ABA Model Rule **Rule 4.2 Communication With Person Represented By Counsel**	**Commission's Proposed Rule*** **Rule 4.2 Communication with a Represented Person**	**Explanation of Changes to the ABA Model Rule**
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 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 ~~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 has been moved to paragraph (c).
	(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	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, YDraft 20 (08/30/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel	Commission's Proposed Rule* Rule 4.2 Communication with a Represented Person	Explanation of Changes to the ABA Model Rule
	(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.	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.
	(c) This Rule shall not prohibit: (1) Communications with a public official, board, committee or body; or	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.
	(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or	Subparagraph (c)(2) carries forward an exception found in current Rule 2-100.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel	Commission's Proposed Rule* Rule 4.2 Communication with a Represented Person	Explanation of Changes to the ABA Model Rule
	(3) Communications *authorized by law or a court order*.	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) 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.	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) 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.	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) 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.	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.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel	Commission's Proposed Rule* Rule 4.2 Communication with a Represented Person	Explanation of Changes to the ABA Model Rule
	(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).	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.

ABA Model Rule **Rule 4.2 Communication With Person Represented By Counsel** **Comment**	**Commission's Proposed Rule** **Rule 4.2 Communication with a Represented Person** **Comment**	**Explanation of Changes to the ABA Model Rule**
	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 uncounselled disclosure of information relating to the representation.	[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~~uncounseled 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~~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.	Comment [3] is identical to Model Rule 4.2, cmt. [3], except for the substitution of "This" for "The".

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model 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.	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. *Matter of Dale* (Rev.Dept. 2005) 4 Cal. State Bar Ct.Rptr. 798, 804-807.)
	[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.	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	[46] This Rule does not prohibit communicationcommunications with a represented person, or an employee or, member, agent, or other constituent of such a personrepresented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between athe government agency and a private partyperson, 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. 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.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model 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.	~~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.	***Communications Between Represented Persons*** ~~[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 [15] and [18], and so the Model Rule comment has been stricken.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).	The gist of Comment [4] – that represented persons may communicate with each other – is found in Model Rule, cmt. [4]. The second sentence of this comment, which states that a lawyer may advise a client on what to say or not to say to the represented person is designed to address the issue of whether giving a client instructions or directions on what to say to the represented person amounts to an "indirect communication" with the represented person. (Cf. COPRAC Opn. 1993-131.) This comment thus seeks to clarify that a lawyer can advise or edit a client's communications with the represented party without the communication being deemed an indirect communication. The Model Rule does not address the concept of indirect communications with represented persons; hence the need to add this comment.
	[8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.	Comment [8] has no counterpart in the Model Rule. As noted in Comment [7], represented persons in a matter may communicate directly with each other. Comment [8] clarifies that the Rule does not preclude a lawyer who is a party from communicating with the represented person. The second sentence provides cautionary advice on how a represented person may avoid abuses.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	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).)	The substance of Comment [9] is in Model Rule 4.2, cmt. [8].
	[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.	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.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	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.	Comments [11] to [14] 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.
	[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.	See Explanation of Changes for Comment [11].
	[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.)	See Explanation of Changes for Comment [11].

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	[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].
	Represented Governmental Organizations [15] 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.	Comment [15] 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.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	Represented Person Seeking Second Opinion [16] 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.	Comment [16] explains paragraph (c)(2), which has no counterpart in the Model Rule.
	Communications Authorized by Law or Court Order [17] 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 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.	This comment explains what is meant by the "authorized by law exception." It expands on Comment [5] of the Model Rule.
	[18] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement	Comment [18] explains that law enforcement agencies, as permitted by the "authorized by law" exception in Paragraph (c)(3), may engage in lawful investigative activities which involve

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	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 courts have recognized that 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.	communications with persons represented by counsel. The comment clarifies that it is the courts that have recognized a need to promote legitimate law enforcement functions notwithstanding the Rule's broad policy to protect against intrusions into the important lawyer-client relationship. The comment provides additional guidance not found in Model Rule 4.2, cmt. [5].
	[19] 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	Comment [19] 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

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	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.	Commission added a new sentence at the end of Comment [19] 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.	[~~6~~20] 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 [20] 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.

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
[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 [14] 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.	**Prohibited Objectives of Communications Permitted Under This Rule** ~~[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).

ABA Model Rule Rule 4.2 Communication With Person Represented By Counsel Comment	Commission's Proposed Rule Rule 4.2 Communication with a Represented Person Comment	Explanation of Changes to the ABA Model Rule
	[21] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).	Comment [21] 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.
	[22] 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 [22] clarifies the scope and application of paragraphs (d) and (e), which are not found in the ABA 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.	[~~9~~23] ~~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 [23] 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 Previous 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~~15] 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~~16] 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~~17] 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~~18] 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 courts have recognized that 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~~19] 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~~20] 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~~21] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[~~23~~22] 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~~23] 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

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~~if 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.)~~

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.

Represented Governmental Organizations

[15] 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

[16] 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

[17] 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.*

[18] 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 courts have recognized that 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.

[19] 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.

[20] 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

[21] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[22] 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).

[23] 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.

Represented Governmental Organizations

[15] 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

[16] 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

[17] 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.

[18] 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 courts have recognized that 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.

[19] 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.

[20] 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

[21] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[22] 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).

[23] 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 = 13 **Agree = _**
Disagree = 7
Modify = 6
NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California District Attorneys Association	M	Yes	4.2(c)(3)	Use of the term "person" rather than "party" creates significant potential issues under Marsy's Law, specifically California Constitution Article I, Section 28(c)(1). Under that provision, a victim may retain an attorney to enforce Marsy's Law rights. However, since the victim is not a party in a criminal case, under the previous California rule the prosecutor would not be barred from contacting a victim represented by counsel and dealing with such a victim in the preparation and presentation of the case. By expanding the rule to cover and "person" represented by counsel, the Proposed Rule puts the prosecutor in the position of first having to seek permission of an attorney to deal with the chief witness in a criminal prosecution.	Rule 4.2, the "no contact" rule, is intended to protect the attorney-client relationship regardless of whether the person sought to be contacted is a party to a proceeding. The change from "party" to "person" makes 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. Instead the important fiduciary relationship between lawyer and client is protected, whether the client is a party or witness in a proceeding, or a person engaged in a transaction. Nevertheless, if applicable law authorizes contact with a represented person, then such contacts are permitted under paragraph (c)(3), which provides an exception for "communications authorized by law or a court order." In addition, Comments [17] to [20] expressly recognize that law enforcement agencies may be authorized to engage in investigative activities which involve communications with represented persons that are necessary for legitimate law enforcement functions.
				Comment [19] & [20]	The Proposed Rule states that communications are not prohibited when "authorized by law or court order." Newly added Comments [19] and [20] (now Comments [18] and [19], respectively) specify	The Commission believes that the points addressed in the comments to the Rule belong in the comment section and not in the black-letter to the rule. The comments explain an express exception that is in the black-letter and further explain the intent of the

[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**
					that appropriate law enforcement investigative contacts and communications are not meant to be covered by the rule. It appears that the Commission has sought to address the concerns of the criminal bar by writing exceptions into the Comments. It would seem a better practice to make the scope of the exception for criminal matters specific and detailed in the Proposed Rule itself. The alternative will likely be years of litigation over the meaning and application of this rule.	exception, providing examples of circumstances that may fall within the exception. Placement of this explanatory information in the comments rather than in the black-letter is consistent with the purpose of the comments as stated in Rule 1.0(c).
2	California Public Defenders Association	M	Yes	Comment [4]	CPDA requests an additional new sentence be added to Comment [4], using the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows: "A criminal defense lawyer is not subject to discipline for communicating with a represented person on the subject of that representation without the consent of the other lawyer under paragraph (a) if the criminal defense lawyer reasonably believed that the lawyer was not communicating on the subject of the representation, or if the criminal defense lawyer reasonably believed that he or she was not required to obtain the consent of the other lawyer by controlling constitutional principles, even if that belief	The Commission did not make the requested change. Comment [19] (previously Comment [20] in the public comment version of the Rule) 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. In response to prior input from public defenders indicating that the rule's proposed change from "party" to "person" would impair an accused's constitutional rights, the Commission added a the sentence at the end of Comment [19] 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. The Commission considered the current commenter's request for an additional sentence but concluded that the addition was not

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**
					later is shown to have been wrong."	necessary, in part because there is no evidence of a demonstrated impairment of the defense counsel function in other jurisdictions that that have adopted Model Rule 4.2 and the general exception for "communications authorized by law or court order."
3	COPRAC	M	Yes	Comment [15]	We believe the language of the two sentences in Comment [15] may be contradictory and may not be easily reconciled. The language in the second sentence of the Comment appears to bar communications with in-house lawyers if: (1) outside counsel has been engaged; (2) the in-house lawyer is not an officer of the organization; and (3) either (a) the in-house lawyer's acts or omission relate to the subject of the communication or (b) the in-house lawyer's statements may constitute an admission on behalf of the entity. We are generally in agreement that that formulation is acceptable as long as such in-house lawyer is not involved in a representative capacity in the matter. However, where such in-house lawyer is acting in a representative capacity in the matter, there's no reason to bar communications with such lawyer. As a result, we propose that the Comment be modified by adding the following to the end of the second sentence of Comment [15]: ", unless such in-house lawyer is acting in a legal representative capacity on behalf of the organization with respect to the subject matter of the communication."	In response to COPRAC's comment, the Commission has recommended that Comment [15] be deleted. Inclusion of a comment concerning the application of the rule to in-house counsel is not typical in the jurisdictions that have adopted Model Rule 4.2 (see Comment [5] to District of Columbia Rule 4.2 which is the only variation found by the Commission). The Commission deleted Comment [15], in part because it believes a potentially overly simplistic comment would belie the complexity and fact bound nature of the rule's application in-house counsel situations. For example, an in-house counsel sometimes also serves as a corporate officer or other control group person, complicating the analysis of whether that person could be contacted in a particular situation. The Commission believes that an ethics opinion addressing several different factual situations of that nature would be preferable to a rule comment.

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**
4	County of Santa Cruz District Attorney's Office	D	Yes		In criminal cases, existing Rule 2-100 has worked well for many years. To now change the term "party" to "person" will create a plethora of new problems for prosecutors and defense attorneys alike. Victims and witnesses who have an interest in a civil recovery related to the charged criminal conduct may have retained counsel. The fact that a witness has retained counsel will present great practical problems for a prosecutor or defense lawyer who needs to speak with that witness in order to prepare a criminal case if speaking with the represented "person" will subject the lawyer to discipline. Although the Proposed Rule contains an exception in subdivision (c)(3) for communications authorized by law or court order, the scope of what is "authorized by law" is impossible to determine despite the lengthy accompanying Comment [19]. The proposed alternative of obtaining a court order does not appear to exist elsewhere in California law. It does not appear feasible to obtain a court order in the investigatory phase of a criminal prosecution since the court does not have jurisdiction until a case has been filed with a court. It would also be costly and burdensome to have to seek a court order in order to speak with a represented witness. More importantly,	Rule 4.2, the "no contact" rule, is intended to protect the attorney-client relationship regardless of whether the person sought to be contacted is a party to a proceeding. The change from "party" to "person" makes 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. Instead the important fiduciary relationship between lawyer and client is protected, whether the client is a party or witness in a proceeding, or a person engaged in a transaction. As explained in Comment [1], the Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented in a matter against possible overreaching by other lawyers who are participating in the matter. The rule thus protects against interference with the attorney-client relationship and against uncounseled disclosure of information relating to the representation, including privileged attorney-client communications. The Rule strikes an appropriate balance between the need to protect the important lawyer-client relationship and the need to permit lawyers to act as advocates. The rule's applicability is triggered by the express elements of *actual* knowledge that a person is represented in a "matter" that is the

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**
					it would unconstitutionally grant the judiciary oversight over the prosecutor's investigations and case preparation in violation of the separation of powers doctrine. The Current Rule is much clearer and more easily applied in criminal cases. If it is decided that there is a compelling need to change the ethical rule in civil cases, the provisions of Rule 2-100 should continue to apply to a lawyer handling a criminal matter.	"subject of the representation." Moreover, even where all the elements are present, a lawyer does not violate the Rule if the lawyer is able to obtain the consent of the attorney for the represented person. Where such consent is refused, the Rule includes an express exception for "communications authorized by law or court order." Comments [17] – [20] explain the exception by providing examples of situations that may fall within the exception. Moreover, with respect to conduct by prosecutors, these comments expressly state that the change from "party" to "person" is not intended to preclude communications recognized under current rule 2-100, and that the Rule is not intended to preclude development of the law with respect to authorized communications. Based on the foregoing analysis, the Commission believes that the Rule, including the change from "party" to "person" fulfills an important public protection policy in California. Particularly with respect to criminal investigations, the Commission relies on the experience of the vast majority of jurisdictions in concluding that the Rule is a workable standard of professional responsibility.
5	Genego, William J.	D	No	4.2(c)(3) Comment [19] & [20]	Subparagraph (c)(3) exempts certain communications from those that are otherwise prohibited by Rule 4.2. The provision makes clear that the "communication" must be	The Commission did not make the requested change. When the language of the (c)(3) exception is read in the context of the entire Rule and in conjunction with the specific comments that explain

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**
					authorized by law or court order, *i.e.*, the law must authorize the lawyer to communicate with the represented person. Comment [19] (now Comment [18]), however, seems to say that as long as the investigative activity is "authorized by law," communications with a person represented by counsel in the course of that investigative activity are not prohibited by the Rule. Indeed, that would seem to be the most plausible reading, given that the sources of law referenced in the Comment do not expressly "authorize" government lawyers (or their agents) to communicate with represented persons. If the Comment were read in that manner, as government lawyers no doubt urge it should be, it will dramatically broaden what the Rule intends.	the purpose of the Rule and the (c)(3) exception (Comments [17] to [20]),the interpretation ascribed to (c)(3) by the commenter is ill-founded. By its terms, the (c)(3) exception applies to a "communication" authorized by law rather than an "investigation."
				Comment [22]	The expansive reading that Comment [19] (now Comment [18]) gives to subparagraph (c)(3) conflicts with Comment [22] (now Comment [21]), which requires that "[a] lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e)." In particular, compliance with paragraph (d) cannot be reconciled with the broad investigatory activity that Comment [19] suggests subparagraph (c)(3) would allow in the interest of effective law enforcement. The	The Commission did not delete the comments opposed by the commenter, in part because these specific comments were developed with stakeholder input, including representatives of prosecutors. The Commission agrees with those stakeholders that the comments offer helpful guidance. The Rule does not attempt to define communications that are authorized by law. Instead, the Rule recognizes the exception as a category of communications that would not violate the Rule. Even where communications fall within the exception, the lawyer's conduct is still constrained by the

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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					solution to all of these problems is to avoid them in the first place by not including Comments [19] and [20].	limitations imposed by paragraphs (d) and (e).
6	Gunn, Carlton F.	D	No	Comment [19] & [20]	Comments [19] and [20] (now Comments [18] and [19]) should be deleted from the Proposed Rule because they would have the effect of holding prosecutors and other government lawyers (including those in civil and administrative proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers. The reference at the end of Comment [20] (now Comment [19]) to "lawyers representing persons accused of crimes that might be authorized under the Sixth Amendment . . ." does not remedy these flaws and adds to the interference with attorney-client relationships that is invited by Comments [19] and [20].	See the response to the comment from the County of Santa Cruz District Attorney's Office. In addition, in response to the concern that it is the Rule itself which is "holding prosecutors" to "lower standards of professional conduct," Comment [18] clarifies that it is the courts that have recognized and established a public policy exception for legitimate law enforcement functions that would otherwise be prohibited communications. The "authorized by law" exception as it pertains to prosecutors is not created by the language of the Rule but rather arises from decisional law. The Commission refers the commenter to Rule 3.8(d) (regarding the duty of prosecutors to disclose exculpatory information) in observing that for sound public policy reasons, the law may impose different standards on prosecutors that must be accounted for in the development of professional responsibility standards.
7	James, Becky Walker	M	No	Comment [19] & [20]	I object to Comments [19]-[20] (now Comments [18]-[19]) insofar as they create exceptions for contacts with represented persons by government lawyers and law	See the response to the comment from the California Public Defenders Association. See also the response to the comment from the Carlton Gunn.

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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					enforcement agents. Persons accused of crimes have the greatest need for and the most fundamental right to counsel. Contact by prosecutors or law enforcement represents a serious intrusion on that right. This exception is necessary. Federal prosecutors have long been trained on the rules restricting contacts with represented persons and there is no reason they cannot continue to follow those rules. Moreover, the exemption for criminal defense lawyers does not cure the problem. It does nothing to lessen the intrusion by law enforcement to have other defendants' lawyers also contact the represented person. And again, criminal defense lawyers have long worked within the confines of ethical rules restricting their access to represented persons and no change in those rules is needed.	
8	Jenness, Evan A.	D	No	Comment [19] & [20]	These Comments would have the effect of holding prosecutors and other government lawyers (including those in civil proceedings) to lower standards of professional conduct than those which apply to all other members of the California Bar. Such a special-interest carve-out is unprincipled, may endorse conduct that is prohibited by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation for or accused of crimes,	See the response to the comment from the California Public Defenders Association. See also the response to the comment from the Carlton Gunn. Regarding the reference to the "Thornburgh Memo," the Commission observes that the precise policy in that directive took the untenably broad position that federal prosecutors were *exempt* from *any application* of a state's no contact rule. The Commission's Rule, which is based on the Model

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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					would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of government and other lawyers.	Rule counterpart adopted in the vast majority of jurisdictions is distinguishable from the "Thornburgh Memo" because the Rule does not include a complete exemption for prosecutors. Rather, paragraph (c)(3) recognizes the applicability of the Rule to prosecutors and provides only a limited exception to its application where such exception is authorized by relevant federal and state, constitutional, statutory, or decisional law.
9	McGowan, David	M	No		Proposed Rule 4.2(e) is vague and, taken at face value, changes the law in a way likely to multiply discovery practice and disadvantage one class of clients in favor of another. It is not clear to me the Commission considered these aspects of the rule and endorses such changes, so I write to bring them to the Commission's attention. Many lawyers conduct informal discovery through interviews with former employees or current employees not within the scope of 4.2(b). Many if not most such employees will have signed non-disclosure agreements restricting their ability to discuss their employment. Such agreements are very broad, and in general would restrict employees from discussing most matters of interest to interviewing lawyers. Such NDA's create contractual duties to "another"—the employer. This provision changes the law. The most similar ABA Rule is 4.4(a), which provides that	Regarding the public policy purpose of the Rule, the elements of its application, and the exception for communications authorized by law or court order, see the response to the comment from the County of Santa Cruz District Attorney's Office. Rule 4.2(e) relates to the effectuation of these public protection interests. Regarding discovery practice concerns, the Commission observes that existing California case law already provides that this standard of professional responsibility should not be construed in litigation matters "so as manifestly to make the routine investigation of claims prior to filing of a lawsuit more difficult" (see *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403). However, the Commission also observes that existing California case law provides that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." (See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818). When

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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					lawyers may not use "methods of obtaining evidence that violate the legal rights of such a person." Proposed Rules 4.2(e) and 4.3 change this rule in three ways. First, the Proposed Rules are not limited to "methods," as is the ABA rule. Second, the ABA rule limits its scope to "legal rights" of third persons. The Restatement (Third) of the Law Governing Lawyers interprets its similar provision to extend to rights granted by law, such as privilege and work product, but not rights granted by contract. So far as I know, case law is consistent with this interpretation. Third, and relatedly, Rule 4.2(e) goes beyond "privileged" information to cover "other confidential information." These changes are significant and tend to impede informal discovery.	lawyers engage in communications permitted by Rule 4.2, inclusion of paragraph (e) assures that lawyers do not assume erroneously that that there are no limits or standards applicable to such communications. Finally, Model Rule 4.4 is not being recommended for adoption. Paragraph (e) of this Rule is therefore a logical place for this limitation.
10	Office of Chief Trial Counsel	M	Yes		OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale.* In Dale, 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	The Commission does not believe any additional clarification is necessary. Rule 4.2, the "no contact" rule, is intended to protect the attorney-client relationship regardless of whether the person sought to be contacted is a party to a proceeding. The change from "party" to "person" makes 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. Instead the important fiduciary relationship between lawyer and client is protected, whether the client is a party or witness in a

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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					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 situation. Even the court in Dale appeared to encourage that. While the Proposed Rule now states "person" and not "party" so that the *Dale* issue would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the Proposed Rule be made clearer or, at least, a Comment should be added to clarify that the Dale type of situation is covered by this rule. There are far too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments [7] and [12] should be in the Rule, not a Comment.	proceeding, or a person engaged in a transaction. 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. Regarding the specific comments referenced by the commenter, the Commission believes that the points addressed in those comments to the Rule belong in the comment section and not in the black-letter to the rule. The comments either explain the inapplicability of the rule when represented persons seek to communicate with one another without their lawyers, or explain the scope of a term in the black-letter. Placement of this explanatory information in

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						the comments rather than in the black-letter is consistent with the purpose of the comments as stated in Rule 1.0(c).
11	Otani, Kay	D	No		Although the Supreme Court has curtailed the rights of criminal defendants to be free from state intrusion in the form of questioning by agents of the state, that does not mean there should be any change to the ethical duties of attorneys in the criminal law arena. Clients are always free to speak with opposing parties whether in civil or criminal cases. Attorneys are not free to approach or speak to opposing parties in either civil or criminal cases. If anything, there should be stronger protection against contact with criminal defendants because of the constitutional issues involved. This is a terrible rule change and diminished the protections of criminal defendants as compared to civil parties. Furthermore, there is no ethical justification for the change. There is even less ethical justification for an attorney to contact a party in a criminal action than in a civil action. The dangers of convincing a criminal defendant to act against her legal interest are if anything greater than the dangers for a civil party.	See the response to the comment from the California Public Defenders Association. See also the response to the comment from the Carlton Gunn.
12	Tarlow, Barry	D	No	4.2(c)(3) Comment	The "authorized by law" exception for prosecutors and their agents in the Proposed Rule is unprincipled, will endorse conduct that	See the response to the comment from the California Public Defenders Association. See also the response to the comment from the Carlton

Rule 4.2 Communication with a Person Represented by Counsel. [Sorted by Commenter]						
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				[19] & [20]	is prohibited in almost every state in the country and by the California Penal Code, would lead to violations of the Fifth and Sixth Amendment rights of persons under investigation or accused of crimes, would foster civil rights violations (42 U.S.C. § 1983), and would create irrational disparities in the ethical obligations of prosecutors, defense lawyers, and civil practitioners. In particular, the comment language authorizing defense counsel contacts with represented parties is problematic. For example, it would permit a lawyer to obtain information from a represented witness who is a defendant in a separate criminal matter, which later may be used to incriminate the witness in their criminal matter.	Gunn. Regarding the reference to the "Thornburgh Memo," the Commission notes that the precise policy in that directive took the untenably broad position that federal prosecutors should be *exempt* from *any application* of a state's no contact rule. The Commission's Rule, which is based on the Model Rule counterpart adopted in the vast majority of jurisdictions, is distinguishable from the "Thornburgh Memo" because the Rule does not include a complete exemption for prosecutors. Rather, paragraph (c)(3) recognizes the applicability of the Rule to prosecutors and provides only a limited exception to its application where such exception is authorized by relevant federal and state, constitutional, statutory, or decisional law. In addition, regarding the example of defense counsel contacts, the Commission has three observations. First, a communication by defense counsel with a represented person is permitted by the Rule only if it is, in fact, a "communication authorized by law or court order" under paragraph (c)(3). Second, nothing in Rule 4.2 abrogates the prohibition against conduct constituting moral turpitude, in particular conduct that misleads a party into disclosing privileged information. (see *In the Matter of Dale* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798). Third, Rule 4.2(d) imposes

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						standards on communications permitted by the Rule that require affirmative conduct to correct a person's misunderstanding about a lawyer's role the matter.
13	Vandevelde, John D.	D	No	Comment [19] & [20]	These Comments are an ill-advised attempt to eviscerate the right to retain and benefit from the advice of counsel in criminal matters, especially complex white-collar matters. No matter how well-intentioned government counsel may believe themselves to be, counsel and agents will have an unfair advantage over the represented person in eliciting admissions that will be designed to go behind the back of counsel in order further the investigation and prosecution of the person under investigation. This will undermine what I view as a cornerstone of our legal system, the right to seek and have the benefit of legal counsel.	See the response to the comment from the California Public Defenders Association. See also the response to the comment from the Carlton Gunn.

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.

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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 __11__
Opposed Rule as Recommended for Adoption __0__
Abstain __0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

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

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.4* Financial And Similar Arrangements With Nonlawyers

August 2010
(Proposed rule following August 25, 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)).

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* 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]. Following the last public comment period that ended on August 25, 2010, the Commission made no changes to the proposed rule. Only three public comments were received: a comment from COPRAC supporting the rule as drafted; a comment from OCTC supporting the rule but expressing concerns that some of the comments should be deleted as they are more appropriate for a treatise or an ethics opinion; and a comment from a lawyer who requested substantive revisions that would allow lawyers and accountants to form partnerships. Regarding the latter comment, the Commission did not make the requested revisions because such changes would impair a lawyer's professional independent judgment (refer to the public comment synopsis chart for the Commission's complete response).

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.

ABA Model Rule **Rule 5.4 Professional Independence Of A Lawyer**	**Commission's Proposed Rule*** **Rule 5.4 Financial and Similar Arrangements With Nonlawyers**	**Explanation of Changes to the ABA Model Rule**
(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 directly or indirectly with a ~~nonlawyer, except~~person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:	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 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;	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

ABA Model Rule **Rule 5.4 Professional Independence Of A Lawyer**	**Commission's Proposed Rule*** **Rule 5.4 Financial and Similar Arrangements With Nonlawyers**	**Explanation of Changes to the ABA Model Rule**
(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;	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;or	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~~5) 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

ABA Model Rule Rule 5.4 Professional Independence Of A Lawyer	Commission's Proposed Rule* Rule 5.4 Financial and Similar Arrangements With Nonlawyers	Explanation of Changes to the ABA Model Rule
		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 *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]."
(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 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.	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 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.	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~~ organization 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.

ABA Model Rule **Rule 5.4 Professional Independence Of A Lawyer**	**Commission's Proposed Rule*** **Rule 5.4 Financial and Similar Arrangements With Nonlawyers**	**Explanation of Changes to the ABA Model Rule**
(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).

ABA Model Rule Rule 5.4 Professional Independence Of A Lawyer	Commission's Proposed Rule* Rule 5.4 Financial and Similar Arrangements With Nonlawyers	Explanation of Changes to the ABA Model Rule
	(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.	Paragraph (f) has no counterpart in the Model Rule. It has been added to address the concerns raised by the California Supreme Court in *Frye v. Tenderloin Housing Clinic, Inc*. (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].

ABA Model Rule **Rule 5.4 Professional Independence Of A Lawyer Comment**	**Commission's Proposed Rule** **Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment**	**Explanation of Changes to the ABA Model Rule**
[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] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule ~~express traditional limitations on sharing fees. These limitations are to~~ protect the lawyer's ~~professional~~ independence of professional judgment~~. Where someone other than~~ by restricting the ~~client pays the lawyer's fee or salary, or recommends employment~~sharing 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~~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.	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.

ABA Model Rule Rule 5.4 Professional Independence Of A Lawyer Comment	Commission's Proposed Rule Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	Explanation of Changes to the ABA Model Rule
	[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 *employee* 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 *nonlawyer consultant and contractor* compensation methods and plans that do not pose a threat a lawyer's independence of judgment.

ABA Model Rule Rule 5.4 Professional Independence Of A Lawyer Comment	Commission's Proposed Rule Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	Explanation of Changes to the ABA Model Rule
	[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.

ABA Model Rule Rule 5.4 Professional Independence Of A Lawyer Comment	Commission's Proposed Rule Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	Explanation of Changes to the ABA Model Rule
	[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].	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 *Frye v. Tenderloin Housing Clinic, Inc.* (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 *Gafcon, Inc. v. Ponsor Associates* (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 ~~1-320~~5.4: Financial and Similar Arrangements With ~~Non-Lawyers~~Nonlawyers

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

(~~A~~a) ~~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~~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~~other consideration at once 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~~including 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;

(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* = 3** **Agree = 2** **Disagree = _** **Modify = 1** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 5.4 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel	A	Yes		OCTC supports the new changes to the rule. Many of the Comments, especially Comment [1], more appropriately belong 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.
3	Quinn, Thomas C.	M	No		There are many cases and areas of the law that involve accounting issues. Thus it seems arbitrary to not allow lawyers and accountants to become partners if that relationship is strictly regulated. Otherwise, attorneys will simply farm out these services to accountants as hired experts and pass the cost along to the client, itself an accounting device to avoid "fee sharing" with the bottom line to the client being the same but the service and process provided being more cumbersome. By allowing accountants and lawyers to work together in firms, it would provide for greater efficiency in service and would potentially keep accountants working under greater legal oversight on a higher ethical basis.	After review of this commenter's points, the Commission continues to believe that the rule is critical because it protects the professional independence of a lawyer in circumstances where it is most vulnerable to outside influence – non-lawyer capital and equity control renders it impossible to maintain professional independence. Rule 5.4 has received wide acceptance and currently no jurisdiction other than the District of Columbia has adopted a rule that allows for non-lawyer ownership in a law firm. Even there, such arrangements are permitted only if the law firm is limited to providing legal services. Alternative business structures as the commenter suggests have yet to receive sufficient consideration to warrant a rule at variance with Rule 5.4.

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

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 8.4 [RPC 1-120]
"Misconduct"

(**YDraft #11.2, 7/26/10**)

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 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 1-120
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 __10___
Opposed Rule as Recommended for Adoption __0___
Abstain __1___

Approved on Consent Calendar ☐

Approved by Consensus ☐

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

August 2010
(Proposed rule following August 25, 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.

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* Proposed Rule, YDraft 11.2 (7/26/10).

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.

ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
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) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;	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 that involves moral turpitude or 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, YDraft 11.2 (7/26/10). Redline/strikeout showing changes to the ABA Model Rule.

ABA Model Rule Rule 8.4 Misconduct	Commission's Proposed Rule* Rule 8.4 Misconduct	Explanation of Changes to the ABA Model Rule
		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., *State ex rel. Oklahoma Bar Ass'n v. Besly* (Okla., 2006) 136 P.3d 590 [2006 OK 18] and *In re Clark* (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827].

ABA Model Rule Rule 8.4 Misconduct	Commission's Proposed Rule* Rule 8.4 Misconduct	Explanation of Changes to the ABA Model Rule
(d) engage in conduct that is prejudicial to the administration of justice;	(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;	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~~these 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.

ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
(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).

ABA Model Rule **Rule 8.4 Misconduct** **Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct** **Comment**	**Explanation of Changes to the ABA Model Rule**
	Paragraph (a)	Headings have been added to the Comment for clarity.
[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.	[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.~~	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.
	Paragraph (b)	
[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	[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

ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
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., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)	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.

ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
	[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)	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	This comment has no counterpart in Model Rule 8.4. 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

ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
	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.	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.
	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, § 2 of the California Constitution. See, e.g. *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *Matter of Anderson* (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).	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.

ABA Model Rule **Rule 8.4 Misconduct Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct Comment**	**Explanation of Changes to the ABA Model 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, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.	[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age~~,~~ or sexual orientation~~ or socioeconomic status~~, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this rule~~paragraph (d).	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. *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996). However, courts have expressly approved the concept of Model Rule 8.4(d). See: *In re Stanbury* (Minn. 1997) 561 N.W.2d 507; and *State v. Nelson* (Kan. 1972) 504 P.2d 211.
[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~~Testing 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~~regarding the regulation of the practice of law.	Model Rule 8.4, cmt. [4], has been revised for brevity and clarity. This Comment is intended as a cross-reference to another rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended. The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. & Prof. Code section 6068(a), and overly broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.
[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust	[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~~held by the ~~professional role of lawyers. The same is true of~~lawyer or abuse of	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

ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.	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.	prohibited by this Rule" – does not suffer the same vagueness of the Model Rule clause ("can suggest an inability to fulfill the professional role of lawyers.")
	[6] 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.	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 ~~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] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (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. But see Rule 1.2(d). "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 (d).

[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] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979)

23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (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. But see Rule 1.2(d). "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 (d).

[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 = 2 Agree = 1 Disagree = _ Modify = 1 NI = _
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 8.4 and the Comments to the Rule.	No response required.
2	Office of Chief Trial Counsel	M	Yes	8.4(a)	OCTC generally supports this Rule. However, OCTC still believes that the Model Rules version of subparagraph (a) is less ambiguous, 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, which protects clients and the public. An attempt to violate a rule goes to the character of an attorney and his or her fitness to practice law. The ABA's version better protects clients, the public, and the courts. It ensures that attorneys are and remain of good moral character.	The Commission disagrees. The Commission is unaware that the language in paragraph (a), which is taken verbatim from current rule 1-120, has failed to serve its purpose in providing adequate protection to the public. As explained in the Rule Comparison Chart, the Commission discussed making an "attempt" to violate the rules an offense but determined that the issue of disciplining attempts to violate a rule was better left to a case-by-case determination.
				8.4(f)	OCTC still believes that subparagraph (f) should "prohibit an attorney from soliciting or inducing a judge or judicial officer to engage 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	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.

[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 = 2	Agree = 1
	Disagree = _
	Modify = 1
	NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					no sound reason for the differences between the language in subsections (a) and (f).	
					Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions.	The Commission believes that the Comments are essential to a full comprehension of the rule.
					OCTC supports Comments [2A], [2B] and [6].	No response required.
				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 apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. Thus, the comment appears to be at odds with established law and the Supreme Court's position on this. OCTC recommends that this Comment be stricken or clarified.	The Commission disagrees that Comment [3] is overly broad or is at odds with established law. The case cited by the commenter, *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634, states only that a State Bar court can take judicial notice of facts found in an underlying proceeding. The Comment does not state that findings of fact are inadmissible. Rather, it states that "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (d)."
				Comment [6]	OCTC disagrees with the last sentence of Comment [6], which states "This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act." This Comment is beyond the scope of the Rules and Comments. There is no comparable comment in the ABA Rule and no	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

Rule 8.4 Misconduct.
[Sorted by Commenter]

***TOTAL* = 2** **Agree = 1** **Disagree = _** **Modify = 1** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					need for it in our rules. This Comment invades the prosecutorial 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. The Supreme Court rejected the notion that it objected to duplicative charging. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 fn. 2 ["We do not wish 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 after a hearing, but other times it does not, although it gives them no additional weight. OCTC asks that this sentence be stricken.	guidance to both OCTC and State Bar Court judges. The Supreme Court itself has observed that "little, if any, purpose is served by duplicative allegations of misconduct" (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060). If the Supreme Court approves the last sentence of Comment [6], then the resultant guidance will help avoid litigation of an unnecessary issue.
				Comment [2C]	OCTC is very concerned about new Comment [2C], which attempts to address the difficult and thorny issue of the attorney's role in undercover investigations in light of the attorney's ethical obligations, especially the prohibition against dishonesty, fraud, deceit, or misrepresentation. It attempts to codify by Comment a controversial area of law that has	The Commission appreciates the concerns expressed by the commenter but believes that the comment is necessary to permit lawyers to supervise covert investigations, so long as neither the lawyer nor those supervised by the lawyer engage in conduct that is unlawful or in violation of the Rules of Professional Conduct. The Commission believes that these latter limitations, together with

Rule 8.4 Misconduct.
[Sorted by Commenter]

***TOTAL* = 2** **Agree = 1** **Disagree = _** **Modify = 1** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					no consensus and is still evolving. This Comment may be the most controversial Comment in the entire set of rules. It attempts to carve out an exception to rule 8.4(c) not specifically stated in the rule. It creates an overly broad exception to rule 8.4(c)'s honesty rule. It also attempts to simplify in one paragraph a complicated and very controversial area of ethics law. Further, the Proposed Rule gives no guidance as to the limits of covert investigations or an attorney's advice and supervision of such activities; whether private lawyers and their investigations may behave like government investigations; how far these activities can violate law, people's privacy rights and their rights under attorney-client privilege; and how far attorneys can be involved in such activities. Whether lawyers should have any involvement in such activities is a disputed and controversial issue. The Proposed Comment does not take into account those situations where the conduct would violate the State Bar Act or other law. While the Comment uses the term "lawful covert activity," the Proposed Rule does not	the fact that the comment does not immunize lawyers from either criminal or civil liability, will act to assuage the commenter's concerns over possible misconduct by dissuading lawyers from engaging in or advising illegal activity in covert investigations. Finally, Rule 1.2(d), which is referenced in the Comment, generally prohibits a lawyer from advising or assisting a client to violate the law.

Rule 8.4 Misconduct.
[Sorted by Commenter]

***TOTAL* = 2** **Agree = 1** **Disagree = _** **Modify = 1** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					define that term. The Comment also does not define that term. The term "lawful covert activity" and its limitations are vague. The Comment may not address issues such as trespass, illegal tape recording, using pretense or deceit to obtain non-public records or serve subpoenas on witnesses, access to people's computer records without consent, the rights of other persons, and the obligation to avoid seeking that clients waive their attorney-client communications. OCTC recognizes that this comment is in Oregon's rule. (See Oregon's Rules of Professional Conduct, Rule 8.4(b).) However, in Oregon, this is the rule, not a Comment. OCTC believes that if there is to be a rule regarding covert activities or an exception to rule 8.4(c) it should be in the Rule, not a Comment. OCTC believes the Commission should consider a Rule imposing limits on covert actions similar to those limits suggested by New York's ethics opinion on this subject. We believe this is necessary before we can even consider a Rule or Comment carving out an exception to the misrepresentation rules. New York's ethics opinion states:	

Rule 8.4 Misconduct.
[Sorted by Commenter]

TOTAL = 2	Agree = 1
	Disagree = _
	Modify = 1
	NI = _

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					"Non-governmental attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to DR-7-104, the no-contact rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege." (New York Ethics Opinion NYCLA Committee on Professional Ethics Formal Opinion No. 737, pp. 5-6.) New York's opinion would have to be tailored to our rules, the State Bar Act, and California law. The Commission might want to cover	

Rule 8.4 Misconduct.
[Sorted by Commenter]

***TOTAL* = 2** **Agree = 1** **Disagree = _** **Modify = 1** **NI = _**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					more subjects than the New York opinion covers, but that opinion seems like a good starting point for a discussion on this subject. The current Comment is just too vague, uncertain, and creates too many problems regarding the rights of third persons. It is too broad in its exception to the honesty rule. It also creates too many problems regarding the enforcement of the rule.	

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(i), which relates to sexual conduct with a client and provides that a lawyer shall not engage in sexual conduct with a client ‘‘or a representative of a client.‘‘ See the Selected Variations following Rule 1.8 for more detail.

Finally, the Florida Supreme Court has promulgated Rule 3-4.7, which provides:

> Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida is ground for disciplinary action. Membership in, alliance with, or support of any organization, group, or party advocating or dedicated to the overthrow of the government by violence or by any means in violation of the Constitution of the United States or constitution of this state shall be a violation of the oath.

Georgia deletes ABA Model Rule 8.4(b) in favor of two subparagraphs making it a violation to be ‘‘convicted of a felony‘‘ or to be ‘‘convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.‘‘ Rule 8.4(a)(4) — Georgia’s equivalent to ABA Model Rule 8.4(c) — makes it improper to engage in ‘‘professional‘‘ conduct involving dishonesty, fraud, deceit or misrepresentation. Georgia adds a Rule 8.4(a)(5) that makes it improper for a lawyer to ‘‘fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten (10) days after the time appointed in the order or judgment.‘‘ A Rule 8.4(d) provides that Rule 8.4(a)(1) ‘‘does not apply to Part Six of the Georgia Rules of Professional Conduct‘‘ (which covers pro bono work, court appointments, legal service organizations, and law reform organizations). Georgia deletes ABA Model Rules 8.4(d), (e), and (f).

For Georgia attorneys seeking guidance on their ethical conduct, Georgia Supreme Court Rule 4-401 authorizes the Georgia State Bar’s Office of General Counsel to ‘‘render Informal Advisory Opinions concerning the Office of the General Counsel’s interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts.‘‘ However, the rule cautions that an Informal Advisory Opinion is merely ‘‘the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia.‘‘ Rule 4-403 describes the procedures by which the Supreme Court of Georgia issues Formal Advisory Opinions and describes the weight to be given to Formal Advisory Opinions in various circumstances.

Illinois: 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.