

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-100

**Lead Drafter:** Raul Martinez

**Co-Drafters:** Danny Chou, Howard Kornberg, Hon. Dean Stout

**Meeting Date:** May 29-30, 2015

### I. CURRENT CALIFORNIA RULE

#### Rule 1-100 Rules of Professional Conduct, in General

##### (A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

##### (B) Definitions.

###### (1) "Law Firm" means:

- (a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or
- (b) a law corporation which employs more than one lawyer; or
- (c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or
- (d) a publicly funded entity which employs more than one lawyer to perform legal services.

###### (2) "Member" means a member of the State Bar of California.

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(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) “Associate” means an employee or fellow employee who is employed as a lawyer.

(5) “Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

### (C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

### (D) Geographic Scope of Rules.

#### (1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

#### (2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

### **Discussion:**

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears*,

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*Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.

### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. PROPOSED RULE(S) (CLEAN)

#### Rule 1-100 Purpose And Function Of The Rules Of Professional Conduct

(A) Purpose.

The following rules are intended to regulate conduct of members through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to promote confidence in the legal profession and the administration of justice, and ensure adequate protection for the public. These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all members.

(B) Function.

(1) A willful violation of any of these rules is a basis for discipline.

(2) The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.).

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(3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(C) Purpose of Comments.

The comments contained in the Comment of the rules, while they do not add an independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) These rules may be cited and referred to as the “California Rules of Professional Conduct.”

### **Comment:**

[1] The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of the rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

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

[3] In addition to the sources of guidance identified in paragraph (B)(2), opinions of ethics committees in California, although not binding, should be consulted by members for guidance on proper conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

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### IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 1-100)

#### Rule 1-100 Purpose And Function Of The Rules Of Professional Conduct, ~~In~~ ~~General~~

##### (A) Purpose ~~and Function~~.

The following rules are intended to regulate ~~professional~~ conduct of members ~~of the State Bar~~ through discipline. They have been adopted by the Board of ~~Governors~~ Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to ~~protect the public and to~~ promote ~~respect and~~ confidence in the legal profession. and the administration of justice, and ensure adequate protection for the public. These rules together with any standards adopted by the Board of ~~Governors~~ Trustees pursuant to these rules shall be binding upon all members ~~of the State Bar~~.

##### (B) Function.

(1) For a willful ~~breach~~ violation of any of these rules, ~~the Board of Governors has the power to~~ is a basis for discipline ~~members as provided by law~~.

(2) The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) ~~and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

(3) These rules are intended to create new civil causes of action. A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers non-disciplinary consequences of violating such a duty. Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

##### ~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~

~~(b) a law corporation which employs more than one lawyer; or~~

~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business~~

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~~entity; or~~

~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

~~(2) "Member" means a member of the State Bar of California.~~

~~(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~

~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

(C) Purpose of ~~Discussions~~Comments.

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the~~The comments contained in the ~~Discussions~~Comment of the rules, while they do not add an independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

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~~(E)(D)~~ These rules may be cited and referred to as “the “California Rules of Professional Conduct of the State Bar of California.”

### **Discussion- Comment:**

[1] The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489].) ~~The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication adverse party).) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of the rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).~~

~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~

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

[3] In addition to the sources of guidance identified in paragraph (B)(2), opinions of ethics committees in California, although not binding, should be consulted by members for guidance on proper conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

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### V. PUBLIC COMMENTS SUMMARY

None.

### VI. OCTC / STATE BAR COURT COMMENTS

- **MIKE NISPEROS, OCTC, 9/27/2001:**

Rule 1-100(B). Definitions.

OCTC recommends adding a phrase to the definition of the word “associate” to clarify its meaning: The proposed new language is as follows:

...

(4) “Associate” means an employee or fellow employee of the same law firm who is employed as a lawyer.

OCTC also recommends that a definition for informed consent be added to the definitions. The proposed new definition is as follows:

...

(6) “Informed consent” means an agreement by a person to a proposed course of conduct after the member has provided to the person adequate information and made a full disclosure of the material risks and reasonable alternatives to the proposed course of conduct.

OCTC also further clarifies the definition of the word “associate” in the Discussion section of rule 1-100. The proposed additional language to the Discussion section is as follows:

Discussion

... To be an associate of another attorney means the two attorneys work in the same law firm. It does not refer to lawyers working on the same case but employed by different law firms. They are co-counsel, not associates.

Also, OCTC suggests adding to the Discussion section of rule 1-100(B) further information to assist members in understanding what is meant by the phrase “informed consent.” The proposed new language is as follows:

Informed consent requires that the member disclose all the information he or she has about the risks and reasonable alternatives of any course of action.

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### OCTC Comments:

The recommendations proposed with regard to the term “associate” removes any doubt that the term applies only to those working in the same law firm and not to lawyers from different firms who may be sharing profits, expenses, and liabilities with regard to a given case. In 2001, the California courts of appeal rendered conflicting opinions as to what the term “associate” means. In *Sims v. Charness* (2001) 86 Cal.App.4th 884, the court of appeals applied the term to two attorneys working in different law firms but on the same case. However, in *Chambers v. Kay* (2001) 88 Cal.App.4th 903, the court rejected that interpretation. It should be noted that the California Supreme Court recently granted certiorari and will hear the Chambers case.<sup>1</sup> OCTC believes that the Chambers interpretation is correct, but for the sake of complete clarity recommends that the current rule be changed to eliminate any doubt.

### • JAYNE KIM, OCTC, 4/20/2015:

1. Rule 1-100 states that the rules are “intended to regulate professional conduct of the members of the State Bar through discipline.” This statement is appropriate.<sup>2</sup> However, the rules would be enhanced by articulating additional reasons for their implementation. While rule 1-100 states that the rules have been adopted and approved by the Supreme Court to protect the public and promote respect and confidence in the legal profession, the rules also serve to promote and enforce the highest professional standards among attorneys. The Supreme Court has held that the primary purposes of imposing discipline include maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514; and Standard 1.1 of the Standards for Attorney Sanctions for Professional Misconduct.) The goal of maintaining the highest professional standards is worthy of inclusion in rule 1-100 as an express purpose of the rules.

2. The definitional section of rule 1-100, subsection (B), should be clarified or expanded to expressly state that the rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40,

<sup>1</sup> *Chambers v. Kay*, SO 98007, 2001 WL 826073. [NOTE: The California Supreme Court subsequently affirmed the holding of the Court of Appeal. See *Chambers v. Kay* (2003) 29 Cal.4th 142, 153-154.]

<sup>2</sup> This is also consistent with the September 19, 2014 letter from the Supreme Court to the then Executive Director of the State Bar authorizing the creation of the Commission. In that letter, the Supreme Court wrote that the rules should “remain a set of minimum disciplinary rules.”

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9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

Further on this thought, rule 1-100(D) does not expressly address whether all non-members authorized to practice law in California are subject to discipline by California under California's rules. This is likely due to the fact that many of the rules authorizing non-members to practice law in California did not exist in 1992 when the current rule 1-100(D) was last amended.<sup>3</sup> Be that as it may, OCTC notes that Model Rule 8.5(a) provides that a lawyer not admitted to practice law in a particular jurisdiction is subject to the disciplinary authority of that jurisdiction in some situations.<sup>4</sup> OCTC is not suggesting that Model Rule 8.5 be adopted in whole, but rather that the Commission consider the concepts captured in the Model Rule.

3. OCTC will not offer a position on whether a violation of the rules can or should be used to state a civil cause of action or whether a violation of a rule may be considered as evidence of a breach of a civil standard of care. OCTC views the rules only in the context of its responsibility to regulate attorneys through the State Bar's disciplinary system.

- No Comment was received from the State Bar Court.

### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Proposed rule 1-100 addresses the purpose and scope of the rules. The closest analog to rule 1-100 nationally is found in two introductory sections to rules, modeled on the introductory sections of the ABA Model Rules designated as the "Preamble and Scope," some version of which have been adopted by nearly every other jurisdiction. An example of a jurisdiction's Preamble and Scope is that of Minnesota:

#### **Minnesota Rules of Professional Conduct Preamble: A Lawyer's Responsibilities**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

<sup>3</sup> Additionally, there are legal, procedural and practical issues to be considered regarding how California would enforce a disciplinary order imposed upon a non-member.

<sup>4</sup> Model Rule 8.5 states in relevant part: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."

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[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 4-1.12 and 4-2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 4-8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. All lawyers, therefore, should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar

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regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of

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Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

### Scope

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are, thus, partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[3] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[4] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 4-1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 4-1.18. Whether a

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client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[5] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[6] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[7] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

[8] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

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Only two states have adopted a numbered rule that is arguably similar to the content of rule 1-100, Michigan and Nevada. For example, Nevada Rule 1.0A provides:

**Rule 1.0A. Guidelines for Interpreting the Nevada Rules of Professional Conduct.** The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments. The following guidelines for interpreting and applying the Nevada Rules of Professional Conduct are hereby adopted:

(a) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.

(b) For purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as the duty of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

(c) Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

(d) Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other

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nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

See also Michigan Rule 1.0, which provides:

### **Rule 1.0 Scope and Applicability of Rules and Commentary<sup>5</sup>**

(a) These are the Michigan Rules of Professional Conduct. The form of citation for this rule is MRPC 1.0.

(b) Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

(c) The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule.

The ABA has two charts that report separately on the implementation of the "Preamble" and the "Scope." Each chart reports on implementation in fifty-one United States jurisdictions (including California and the District of Columbia). One chart is captioned: "ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities" and was last updated October 21, 2010.

- <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.authcheckdam.pdf>. (Last accessed on May 6, 2015.)

<sup>5</sup> Michigan includes sections titled "Preamble" and "Scope" as part of the comment to Rule 1.0.

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The second chart is captioned: “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Scope” and was last updated May 4, 2015.

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_scope\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope_authcheckdam.pdf). (Last accessed on May 6, 2015.)

Regarding the “Preamble” provisions, twenty-seven states have adopted text that is either the same<sup>6</sup> or substantially similar<sup>7</sup> to the Model Rule “Preamble.” Seven states do not have any preamble text.<sup>8</sup> Seventeen states take a different approach by implementing unique language or a significantly revised version of the Model Rule “Preamble.”<sup>9</sup>

Regarding the “Scope” provisions, twenty-six states have adopted text that is either the same<sup>10</sup> or substantially similar<sup>11</sup> to the Model Rule “Scope.” Six states do not have any scope text.<sup>12</sup> Nineteen states take a different approach by implementing unique language or a significantly revised version of the Model Rule “Preamble.”<sup>13</sup>

Based on these two charts, a majority of states implement “Preamble and Scope” provisions that are either identical or substantially similar to the Model Rules.

<sup>6</sup> These states are: Delaware; Iowa; Maryland; Minnesota; Missouri; Nebraska; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Vermont; and Wisconsin.

<sup>7</sup> These states are: Alaska; Arizona; Arkansas; Colorado; Connecticut; Idaho; Indiana; Kansas; Kentucky; Mississippi; New Mexico; North Dakota; Tennessee; Washington; and Wyoming.

<sup>8</sup> These states are: District of Columbia; Louisiana; Nevada; New Hampshire; New Jersey; North Dakota; and Tennessee.

<sup>9</sup> These states are: Alabama; California; Florida; Georgia; Hawaii; Illinois; Maine; Massachusetts; Michigan; Montana; New York; North Carolina; Ohio; Texas; Utah; Virginia; and West Virginia.

<sup>10</sup> These states are: Colorado; Idaho; Iowa; Rhode Island; and Utah.

<sup>11</sup> These states are: Alaska; Arizona; Arkansas; Delaware; Illinois; Indiana; Kansas; Kentucky; Maine; Maryland; Minnesota; Missouri; Nebraska; New Mexico; New York; North Carolina; Ohio; South Carolina; Vermont; Wisconsin; and Wyoming.

<sup>12</sup> These states are: Louisiana; Nevada; New Hampshire; New Jersey; Oregon; and South Dakota.

<sup>13</sup> These states are: Alabama; California; Connecticut; District of Columbia; Florida; Georgia; Hawaii; Massachusetts; Michigan; Mississippi; Montana; North Dakota; Oklahoma; Pennsylvania; Tennessee; Texas; Virginia; Washington; and West Virginia.

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In addition, similar to proposed rule 1-100 (see proposed Comment [1]), one state, Maryland, refers to specific case law authority on the use of the rules in a non-disciplinary proceeding. Paragraph [20] of the Maryland “Scope” section cites to *Post v. Bregman* (1998) 349 Md. 142 (holding that enforcement of the Rule of Professional Conduct dealing with splitting of fees among lawyers who are not part of the same firm is not limited to disciplinary proceedings). Comment [1] to proposed rule 1-100 cites to this Court’s decision in *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] that likewise involves application of a rule of professional conduct to decide a question of the civil enforceability of a fee division agreement between lawyers who are not in the same law firm.

Proposed rule 1-100 also includes an updated discussion of the use of the rules in non-disciplinary proceedings. That issue is also addressed in paragraph [7] of the Minnesota Rule, above (the corresponding paragraph is [20] of the Model Rule “Preamble and Scope.”) The last sentence in paragraph [7] provides, in part, that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” Based on the ABA chart concerning implementation of paragraph [20] of the Model Rule “Scope,” thirty states<sup>14</sup> have adopted language that is either the same or substantially similar to the last sentence of paragraph [7] of the Minnesota Rule “Scope.” Twenty-one states<sup>15</sup> either do not have any scope text or, if they do, they have deleted or significantly changed the last sentence in paragraph [7]. Thus, addressing the use of the rules in non-disciplinary proceedings is the approach taken in a majority of states and proposed rule 1.0 promotes this national standard.

A final aspect of national uniformity is the approach taken in every jurisdiction, all of which either have a separate terminology section or a separate rule containing the definitions of common terms used throughout the rules, and also have a separate rule, modeled on Model Rule 8.5, which addresses geographic scope and choice of law. The recommendation to relocate the provisions in paragraphs (B) and (D) of current rule 1-100, (See Section VIII, below), would conform the California Rule to that national approach. Current rule 1-100(B) provides definitions of terms used throughout the current rules and rule 1-100(D) addresses geographic scope principles.

<sup>14</sup> These states are: Alaska; Arizona; Arkansas; Colorado; Connecticut; District of Columbia; Florida; Idaho; Illinois; Indiana; Iowa; Kentucky; Maine; Maryland; Minnesota; Mississippi; Nebraska; New Hampshire; New Mexico; New York; North Carolina; North Dakota; Ohio; Rhode Island; South Carolina; Tennessee; Utah; Virginia; Wisconsin and Wyoming.

<sup>15</sup> These states are: Alabama; California; Delaware; Georgia; Hawaii; Kansas; Louisiana; Massachusetts; Michigan; Missouri; Montana; Nevada; New Jersey; Oklahoma; Oregon; Pennsylvania; South Dakota; Texas; Vermont; Washington; and West Virginia.

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### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### Concepts Accepted (Pros and Cons):

- Changing the title of the current rule.
  - Pros: The change in title more accurately describes the content of the rule as amended, i.e., the amended rule only sets out the purpose and function of the rule and no longer contains other general concepts, i.e., global definitions and the geographic scope of the rule. It should facilitate the ability of a lawyer who is trying to find a rule topic by scanning the table of contents.
  - Cons: No apparent cons. However, if the full Commission disagrees with the recommendation to carve out as separate rules current paragraphs (B) [definitions] and (D) [geographic scope of the rules], then perhaps the current title should be retained.
- Proposed paragraph (A) of current rule 1-100 (Purpose and Function [of the rules]) has been divided into paragraph (A) [Purpose], retain the concept in current (A), subparagraph 1, and paragraph (B) [Function], retaining the concepts in current (A), subparagraphs (2)-(4).
  - Pros: Clarifies which aspects of current paragraph (A) are intended to describe the purposes of the rules and which aspects clarify the function of the Rules, each of which is relevant in interpreting them.
  - Cons: The concepts described in one paragraph might also be susceptible to being viewed as a concept in the other and thus the division of the concepts might cause confusion. For example, it could be argued that the purpose of the rules “to regulate conduct of members through discipline” might also be viewed as a “function” of the rules. On balance, however, the drafting teams concluded the division of current paragraph (A) into two paragraphs provided better guidance for lawyers in interpreting their duties under the rules.
- In proposed paragraph (A), delete the phrase “of the State Bar”.
  - Pros: The term “member” is defined as “a member of the State Bar of California.” Deleting the phrase “of the State Bar” removes a redundancy and shortens the rule. Even if the Commission agrees that there should be a global terminology section/rule, if the term “member” is retained throughout the rules, it will likely need to be defined there.
  - Cons: The drafting team did not identify any cons.
- In proposed paragraph (A), delete the adjective “professional” as a modifier of “conduct”.
  - Pros: Deleting “professional” more accurately describes the scope of conduct for which lawyers can be disciplined. The rules are not limited to regulating a lawyer’s conduct in his or her professional capacity. See, e.g., rules 3-100 (Confidential Information of a Client); 3-120 (Sexual relations with clients); 3-320 (Relationship with other party’s lawyer);

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4-300 (Purchasing property at a foreclosure of a sale subject to judicial review); and 4-400 (Gifts from client). See also *In re Scott* (1991) 52 Cal.3d 968 [inherent power of the Supreme Court to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession].

- **Cons:** Broadens the application of the rules unnecessarily given that most charges against lawyers concerning conduct outside professional capacity are brought under the State Bar Act.
- **In proposed paragraph (A),** substitute the language in Principle 1 of the Commission's Charter ("The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.") for the language in current paragraph (A), subparagraph 1 ("to protect the public and to promote respect and confidence in the legal profession.")
  - **Pros:** Retains the same concepts found in the current rule and adds the concept of promoting the administration of justice, which highlights a lawyer's role as an officer of the court.
  - **Cons:** There is no evidence that the current language is lacking. But see "Concepts Rejected," concerning OCTC's request that rule 1-100 include a purpose of the rules "to promote and enforce the highest professional standards among attorneys."
- **In proposed paragraph (B)(1),** amend current rule 1-100(A), subparagraph 2, to provide: "A willful violation of any of these rules is a basis for discipline." In particular, note the substitution of the term "violation" for "breach."
  - **Pros:** The revised language is a more succinct and accurate statement of the consequences of violating a rule than is the current statement ("For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.") First, use of the amended language avoids the problem of distinguishing exactly what the BOT has authority to do – reprimands vs. suspensions & disbarments. It reduces the language that would otherwise be required to more accurately describe the relative allocation of authority, i.e., only S.Ct. has authority to suspend or disbar. Second, as to the substitution of "violation" for "breach," the consensus on the drafting team is that "breach" is suggestive of a breach of duty, a concept in malpractice. Use of "violation" more accurately describes the basis for discipline, a rule violation.
  - **Cons:** The drafting team is unaware of evidence suggesting that the current language has caused problems. Further, as to the substitution of "violation" for "breach," the rules do state mandatory duties of lawyers and there is no evidence that the use of the term "breach" has caused problems.

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- In proposed paragraph (B)(2), retain the first two sentences of current rule 1-100(A), subparagraph 3, which provide: “The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts,” except delete the phrase, “and opinions of California courts.” (See next bullet point for a discussion of this last recommendation.)
  - Pros: The first two sentences it provide important information about how lawyers are regulated in California, i.e., lawyers are subject not only to the Rules of Professional Conduct, as is true in other jurisdictions, but also subject to the provisions of the State Bar Act.
  - Cons: The drafting team did not identify any cons. See next bullet point concerning the deletion of the phrase, “and opinions of California courts.”
- In proposed paragraph (B)(2), delete the phrase “and opinions of California courts.”
  - Pros: The notion that lawyers can be disciplined for not acting in consonance with a California appellate court opinion (which may be wrong) is worrisome. Lawyers can debate all day long what a court of appeal opinion means. Further, this rule language is not a black letter standard but a vague incorporation-by-reference of a universe of appellate opinions which may or may not be grounded on the Rules of Professional Conduct. In addition, the legal effect of an opinion is established under principles *stare decisis*, law of the case, *res judicata*, etc. The concept is used to define the precedential effect of an opinion on other courts. But opinions in the abstract do not “bind”. Finally, the phrase might even be construed to apply to trial court opinions, which themselves do not even have precedential effect. (See also “Non-Substantive Changes,” re proposed paragraph (B)(2), below.)
  - Cons: *First*, the language has been in the current rule for over 25 years. There is no compelling reason to delete it. There is no evidence that the language has caused overreaching by the State Bar in discipline cases. *Second*, current 1-100’s language also encompasses discipline common law from the Supreme Court. If the language is deleted, the rule’s “legislative history” must clarify that the State Bar does not recommend any change to a lawyer’s duty to comply with attorney conduct standards that have evolved as discipline common law in Supreme Court and State Bar Court decisions (see, e.g., *In the Matter of Respondent C*, 1 Cal. State Bar Ct. Rptr. 439, 450-451, 1991 WL 63249 (Rev. Dept. 1991), which describes the common law duty to communicate that predates both rule 3-500 and B&P sec. 6068(m)).<sup>16</sup> This tradition of common law

<sup>16</sup> The Court observed:

Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client.

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discipline is a part of the minimum standards of discipline that the rules should continue to recognize. *Third*, the phrase would also apply to opinions of the Review Department of the State Bar opinions, which provide important insight into the application of the rules in a disciplinary context and other court opinions provide important guidance concerning the application of the rules in non-disciplinary contexts. (See discussion of proposed Comment [1], below.)

- In proposed paragraph (B)(2), delete the last two sentences, of current rule 1-100(A), subparagraph 3, which provide: “Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.” Further, place the sentences in a comment to the rule. (See Comment [3], below.)
  - Pros: The use of the word “should” with respect to California ethics opinions (aspirational) and “may” with respect to opinions from other jurisdictions (permissive) indicates that the sentences should be relegated to a comment. The sentences are not a disciplinary standard but guidance. Such aspirational guidance should be included in a comment if it is to appear in the rules. A lawyer’s failure to consult such ethics opinions should not by itself be a basis for discipline. (Compare Commission Charter, Principle 2, that the Commission should “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.”) See also discussion re Comment [3], below.
  - Cons: Ethics opinions provide such important guidance on proper conduct that the clause should be in the black letter because lawyers often limit their reading to the black letter and would miss the guidance in a comment. New lawyers or lawyers from other jurisdictions are more likely to pay attention to this guidance if it is in the rule. Further, the sentences have been in the current rule for over 25 years without any

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Nevertheless, the Supreme Court has long held that the “[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)” (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor v. State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124-127.) This “common law” duty to communicate has been recently affirmed in *Aronin v. State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney’s failure to communicate with a client, which occurred prior to the enactment of section 6068(m), as falling within the parameters of an attorney’s oath and \*\*451 duties, under the general provisions of sections 6068(a) (duty to support the laws). (See e.g., *Taylor v. State Bar, supra*; *Aronin v. State Bar, supra*.)

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problems having been identified; there would appear to be no reason to make a change.

- In proposed paragraph (B)(3) [current rule 1-100(A), subparagraph 4], substitute the following language for the first sentence: “A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule.”
  - Pros: The replacement statement is derived from *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097, which is well-settled California law. The current statement is misleading because courts since the rule was promulgated in 1989 have held that a violation of a rule can be used as evidence of a breach of duty in a malpractice cause of action. The rule should more accurately reflect the decisions in case law.
  - Cons: The current sentence is not inaccurate. It provides: “These rules are not intended to create new civil causes of action.” The Rules are *intended* as disciplinary rules, not a basis for creating a new cause of action.
- In proposed paragraph (B)(3) [current rule 1-100(A), subparagraph 4], substitute the following language for the second sentence: “Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.”
  - Pros: The proposed amended sentence is a clearer and more succinct statement about the intended effect of the rules on law regarding lawyer liability.
  - Cons: The drafting team did not identify any cons.
- Delete current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules (e.g., member, lawyer, law firm) and refer consideration of including a global terminology section to another drafting team.
  - Pros: This is the approach that is taken in the California Code of Judicial Ethics, the Model Rules, and the rules in every other jurisdictions. A global terminology rule would provide convenient and ready access in one place for State Bar members and other lawyers practicing in California as permitted by the various rules of court that regulate multijurisdictional practice. See, e.g., California Rules of Court, rule 9.40 (Counsel pro hac vice); 9.41 (Appearances by military counsel); 9.43 (Out-of-state attorney arbitration counsel); 9.44 (Registered foreign legal consultant); 9.45 (Registered legal services attorneys); 9.46 (Registered in-house counsel); 9.47 (Attorneys practicing law temporarily in California as part of litigation); and 9.48 (Nonlitigating attorneys temporarily in California to provide legal services).
  - Cons: The drafting team did not identify any cons.

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- Change the name of the “Discussion” section to “Comment”.
  - Pros: The Code of Judicial Ethics refers to its explanatory sections as “*Commentary of the Advisory Committee.*” (Emphasis added). The ABA Model Rules and every other jurisdiction that has adopted the Model Rule approach of including comments to their rules, refers to the explanatory comment sections of each rule as “Comment.”
  - Cons: The drafting team did not identify any cons.
- In proposed paragraph (C), delete the first clause in current rule 1-100, paragraph (C), which provides: “Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, ...”
  - Pros: The clause is surplus exposition and does not belong in the black letter of rules that are intended to “set forth a clear and enforceable articulation of disciplinary standards.”
  - Cons: The drafting team has no knowledge that inclusion of this explanatory clause has caused any problems with enforcing or complying with the rules.
- Delete current rule 1-100, paragraph (D) [Geographic scope of the rules] and refer to a separate drafting team the consideration of a standalone rule, similar to Model Rule 8.5, which addresses geographic scope of rules and choice of law.
  - Pros: Including the topic in a separate rule would be similar to the approach taken in the Model Rules and every other jurisdiction. Placing the geographic scope in a separate rule would help lawyers from other jurisdictions who are authorized to practice in California to determine the extent to which the California rules would apply to them.
  - Cons: The drafting team did not identify any cons other than the fact that the geographic scope section has been in rule 1-100 for over 25 years.
- In proposed paragraph (D) [current rule 1-100(E)], change the preferred citation of the rules to the “California Rules of Professional Conduct.”
  - Pros: The proposed language is more succinct than the current “Rules of Professional Conduct of the State Bar of California.”
  - Cons: The current statement more accurately describes the rules as those “of the State Bar of California.”
- Change the term “Discussion” to “Comment” in the title of the Discussion section. See discussion above re proposed paragraph (C).
  - Pros: See above.
  - Cons: See above.
- Number the comment sections.
  - Pros: This is done in two current rules, rule 1-650 and rule 3-100, both of which were promulgated after 2003. Numbering the comments facilitates references in opinions and briefs, as well as cross-references within the rules. More immediately, numbering comment sections will facilitate discussion during the Commission’s deliberations.

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- Cons: The drafting team did not identify any cons.
- In Comment [1], replace the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (B)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts.
  - Pros: See discussion of proposed paragraph (B)(3), above.
  - Cons: See discussion of proposed paragraph (B)(3), above.
- In Comment [1], which is based on current rule 1-100, Discussion ¶.1, include pin cites in the case citations in the comment.
  - Pros: Will provide a precise reference point for a lawyer who wants to review a more in-depth analysis of the proposition for which the case is cited.
  - Cons: The drafting team did not identify any cons.
- Add Comment [2], which explains a willful violation of a rule does not require that a lawyer intend to violate the rule. Comment [2] is derived from the first Commission's proposed Rule 1.0, cmt. [2].
  - Pros: The drafting team consensus was to include this comment because it provides important clarification regarding the requisite intent contemplated in paragraph (B)(1), which provides that a willful violation of any rule is a basis for discipline.
  - Cons: The drafting team did not identify any cons.
- Add Comment [3], which is a nearly verbatim restatement (see next point) of current rule 1-100(A), subparagraph 3.
  - Pros: See discussion re proposed paragraph (B)(2).
  - Cons: See discussion re proposed paragraph (B)(2).
- In Comment [3], delete "professional" as a modifier of "conduct"; current rule 1-100(A), subparagraph 3 has "professional" as a modifier.
  - Pros: See discussion re proposed paragraph (A).
  - Cons: See discussion re proposed paragraph (A). In addition, a reason for retaining "professional" in the context of this comment is that One reason for retaining "professional" here is that if an ethics opinion addresses private conduct outside the practice of law, the analysis in that opinion would explain why that conduct has disciplinary consequences.
- Administrative/grammatical changes: (1) Changing "Board of Governors" to "Board of Trustees" in proposed paragraph (A); (2) inserting "an" before phrase "independent basis" in proposed paragraph (C).
  - Pros: It is appropriate.
  - Cons: None.

### **Concepts Rejected (Pros and Cons):**

- Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

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- Pros: It would facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It would also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system. Further, for this rule, which numbering system is used is irrelevant, because the analogous "rule" in most jurisdictions is not a rule but instead two unnumbered sections called the "Preamble" and "Scope."
- Substitute the term "lawyer" for the term "member".
  - Pros: The rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. In addition, OCTC requested that paragraph (B) be changed to clarify that the rules apply to all lawyers who are authorized to practice in California:
    2. The definitional section of rule 1-100, subsection (B), should be clarified or expanded to expressly state that the rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades. Notwithstanding OCTC's request, there is a question whether rules of court can confer authority to discipline non-members. Notwithstanding the fact that some of the aforementioned rules expressly provide that a lawyer appearing pursuant to them agrees the lawyer is subject to the authority of the State Bar (e.g., Rule 9.40(f) states that *pro hac vice* attorneys "will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance."), a question arises whether a rule of court is sufficient to abrogate B&P Code sections 6077-6078. B&P Code section 6077 provides that the Rules of Professional Conduct are binding upon all

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“members” of the State Bar. Given the limitation contained in section 6077, how does the State Bar Act extend that jurisdiction over nonmember lawyers? (See also 5/7/15 Martinez email to Drafting Team, cc Difuntorum, Mohr, A. Tuft & McCurdy.)

Note: Notwithstanding the foregoing, the principal reason the Drafting Team retained “member” is that it did not want the Commission to get bogged down in a lengthy discussion during the first substantive Commission meeting. The drafting team is not opposed to using “lawyer” instead of “member.”

(See Section IX. OPEN ISSUES/Concepts for the commission to consider)

- Include in proposed paragraph (A) [current rule 1-100(A), subparagraph 1] that a purpose of the rules is “to promote and enforce the highest professional standards among attorneys.” (4/20/2015 OCTC [Kim] Memo to Chair & Commission), Rule 1-100, ¶1.1.)
  - Pros: The California Supreme Court has stated that held that the primary purposes of imposing discipline include maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514.)
  - Cons: Including such a goal or purpose would take away from the more grounded goals identified in proposed paragraph (a), i.e., “to promote confidence in the legal profession and the administration of justice, and ensure adequate protection for the public.” Employing the term “highest standards” would also appear inappropriate in light of the Commission’s charge to “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.” See Charter, Principle 3. The concept of maintaining the highest professional standards would appear to be purely aspirational in a set of disciplinary standards that sets out the base level of conduct that will be tolerated before discipline is imposed.
- In proposed paragraph (B)(3), add the clause “for enforcement of a rule or” so that the first sentence would read “A violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule.”
  - Pros: Adding the clause would make paragraph (B)(3) more accurate. For example, in a fee splitting dispute, the cause of action brought by the lawyer who did not receive any of the fee typically is a claim for breach of the fee agreement between the fee splitting lawyers. The lawyer who refuses to share the fee in accordance with the agreement, typically asserts a rule 2-200 violation as a defense, i.e., asks the court to enforce the rule. Similarly in disqualifying a lawyer, California courts typically cite to a violation of a specific rule, e.g., rule 3-310(E) or rule 2-100, as the

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- basis for granting the motion.
- Cons: The additional language is unnecessary. Fee splitting disputes often assert causes of action for violation of Rule 2-200. Conflict rules are often enforced by a separate cause of action (e.g., for injunctive relief) to disqualify lawyers (as opposed to by a motion).
- In paragraph (C), delete the clause that states the discussion sections in the rule are intended to provide guidance for “practicing in compliance with the rules.”
  - Pros: Deleting the clause would strictly comply with the Commission Charter directs that the comments “should be used sparingly to elucidate, and not to expand upon, the rules themselves,” see Charter, Principle 5.
  - Cons: It is the consensus of the Drafting Team that the comments can and should also provide guidance for complying with the rules so long as the comment does not expand the scope of the rule itself. See also Commission Charter, Principle 4 (“The Commission’s work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”)
- OCTC’s request that the Commission make certain changes or additions to the definitions in current rule 1-100, paragraph (B), as identified by OCTC in both its 2001 and 2015 memos. (See Section VI., above.) The Drafting Team notes that it recommends that paragraph (B) be deleted and the consideration of a global terminology section be referred to a separate drafting team. See discussion re deletion of paragraph (B), above.
  - Pros: See discussion re deletion of paragraph (B) in Concepts Accepted, above.
  - Cons: See discussion re deletion of paragraph (B) in Concepts Accepted, above.
- OCTC’s request that the 1-100 Drafting Team consider the concepts captured in Model Rule 8.5. (See 4/20/2015 OCTC Memo, ¶1.2.) The Drafting Team notes that it recommends that paragraph (B) be deleted and the consideration of Model Rule 8.5 be referred to a separate drafting team. See discussion re deletion of paragraph (D), above.
  - Pros: See discussion re deletion of paragraph (D) in Concepts Accepted, above.
  - Cons: See discussion re deletion of paragraph (D) in Concepts Accepted, above.
- Referring the term “willful” to the terminology section/rule drafting team for possible inclusion in the rule.
  - Pros: Would provide lawyers with a better understanding of what is required for a willful violation of a rule.
  - Cons: The word “willful” is not a term that is used throughout the rules. It is used only in rule 1-100. The drafting has recommended including

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comment [2] because it provides important clarification regarding the requisite intent contemplated in paragraph (B)(1), which provides that a willful violation of any rule is a basis for discipline. Paragraph (B)(1) carries forward the same concept that is currently found in rule 1-100(A), subparagraph 2.

- In Comment [3], add as a qualifier to the statement that a lawyer may consider ethics opinions and rules and standard in other jurisdictions the clause, “to the extent they are consistent with these rules and the State Bar Act.”
  - Pros: This qualifying clause places an important limitation on the relevance of opinions and rule approaches in other jurisdictions.
  - Cons: There is no evidence that the language in current rule 1-300(A), paragraph 3 regarding consideration of ethics opinions from outside of California has caused any problems. Absent such evidence, the language should not be qualified or otherwise modified.

### **Changes in Duties/Substantive Changes to the Current Rule:**

- In proposed paragraph (A), deleting the adjective “professional” as a modifier of “conduct” is a substantive change, as it expressly expands the scope of coverage of the rules. On the other hand, because there are rules in the current rules that already apply to a lawyer’s conduct when acting in a non-professional capacity, it is arguably a clarifying change. See proposed paragraph (A) discussion in Concepts Accepted. The same reasoning would also apply to the deletion of “professional” as a modifier of “conduct” in proposed comment [3].
- In proposed paragraph (A), substituting the language in Principle 1 of the Commission’s Charter (“The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.”) for the language in current paragraph (A), subparagraph 1 (“to protect the public and to promote respect and confidence in the legal profession”) is not intended as a substantive change except to the extent that the phrase “administration of justice” arguably reflects a lawyer’s role as an officer of the legal system, a concept that has not been expressed in the rule previously.
- In proposed paragraph (B)(1), amending current rule 1-100(A), subparagraph 2, to provide: “A willful violation of any of these rules is a basis for discipline” is not intended as a substantive change. However, the substitution of the term “violation” for “breach” might be viewed as such.
- In proposed paragraph (B)(3) [current rule 1-100(A), subparagraph 4], substituting the new language for the first sentence (“A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule”) is a substantive change because it updates the law concerning the effect of the rules in civil cases. See Pros & Cons for this change in Concepts Accepted.

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- Deleting current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules and referring consideration of including a global terminology section to another drafting team is a substantive change, pending action by a terminology drafting team.
- Deleting current rule 1-100, paragraph (D) [Geographic scope of the rules] and referring to a separate drafting team the consideration of a standalone rule, similar to Model Rule 8.5, is a substantive change, pending action by a rule 8.5 drafting team.
- In Comment [1], replacing the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (B)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts, is a substantive change for the reasons provided regarding proposed paragraph (B)(3).
- In Comment [3], adding as a qualifier to the statement that a lawyer may consider ethics opinions and rules and standards in other jurisdictions the clause, “to the extent they are consistent with these rules and the State Bar Act,” is a substantive change as it places a limitation on the availability of those sources for consultation that is not present in current rule 1-100(A), subparagraph 3.

### **Non-Substantive Changes to the Current Rule:**

- Changing the title is not intended as a substantive change. It is intended simply to provide a better description of the rule’s content, especially in light of the recommended deletion of current paragraphs (B) and (D).
- Dividing current rule 1-100(A) [Purpose and Scope] into paragraph (A) [Purpose], and paragraph (B) [Function] and numbering the subparagraphs of proposed paragraph (B) is not intended as a substantive change. It is a formatting change to intended to make the rule more user-friendly.
- In proposed paragraph (A), deleting the phrase “of the State Bar” is a non-substantive change, intended simply to remove a redundancy.
- In proposed paragraph (B)(1), amending current rule 1-100(A), subparagraph 2, to provide: “A willful violation of any of these rules is a basis for discipline” is not intended as a substantive change. Although the substitution of the term “violation” for “breach” might be viewed as a substantive change, it is the drafting team’s position that it is merely a clarifying change. See Pros concerning this change in Concepts Accepted.
- In proposed paragraph (B)(2), retaining the first two sentences of current rule 1-100(A), subparagraph 3, except for the deletion of the phrase, “and opinions of California courts,” should not change any duties of lawyers. To the extent the language of the first two sentences is carried forward from the current rule, there is no change in duties. Even the deletion of the phrase, “and opinions of California courts” should not change lawyer’s duties. As explained in “Concepts Accepted,” the inclusion of the phrase is misleading

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and overinclusive. Moreover, the legal effect of an opinion is established under principles *stare decisis*, law of the case, *res judicata*, etc. and the proposed deletion of the existing language in rule 1-100 cannot reasonably be construed to alter those principles. The concept of “binding” is used to define the precedential effect of an opinion on other courts. But opinions in the abstract do not “bind.” Opinions interpret codified laws, rules or common law duties applicable to attorney conduct but it is the underlying laws, rules or common law duties that command a lawyer’s conformance rather than the concept of a “binding” effect of any particular court decision.

- In proposed paragraph (B)(2), the deletion of the last two sentences in the same paragraph arguably is a substantive change because it moves black letter in the current rule into a comment. However, as discussed in the Pros for this change in Concepts Accepted, the change is non-substantive because the relocated black letter was either aspirational (“should”) or permissive (“may”).
- In proposed paragraph (B)(3) [current rule 1-100(A), subparagraph 4], substituting language for the second sentence (“Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others”) is non-substantive change intended as a clearer and more succinct statement of the current rule’s sentence. See Pros in Concepts Accepted.
- Changing the name of the “Discussion” section to “Comment” is a non-substantive change, simply bringing the rules in line with other jurisdictions and the California Code of Judicial Ethics.
- In proposed paragraph (C), deleting the first clause in current rule 1-100, paragraph (C), which provides: “Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, ...” is a non-substantive change for the reasons provided in Pros in Concepts Accepted.
- In proposed paragraph (D) [current rule 1-100(E)], changing the preferred citation of the rules to the “California Rules of Professional Conduct” is a non-substantive change for the reasons given in Concepts Accepted.
- Numbering the comment sections is non-substantive for the reasons given in Concepts Accepted.
- Adding pin cites to the case citations in proposed comment [1] is a non-substantive change, intended to provide lawyers with ready access to the an in-depth discussion of the point for which the relevant case is being cited.
- Adding Comment [2], which explains that a willful violation of a rule does not require that a lawyer intend to violate the rule, is a nonsubstantive change because it merely clarifies proposed rule (B)(1).
- Adding Comment [3], which is a nearly verbatim restatement of current rule 1-100(A), subparagraph 3, is a non-substantive change for the same reasons deletion of those sentences from the black letter is non-substantive.

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See discussion of (B)(2) in this section, above.

- Both (1) changing “Board of Governors” to “Board of Trustees” in proposed paragraph (A); and (2) inserting “an” before phrase “independent basis” in proposed paragraph (C) are non-substantive administrative or grammatical changes.

### **Alternatives Considered:**

- There were no alternatives, e.g., policy issues, the drafting team considered.

## **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

- Rule numbering. Changing the rule numbers to track the ABA Model Rule numbering system, and also adopt the ABA formatting (i.e., lower case for section letters, numbering comments, etc.) The drafting team recommends deferring this issue for now so as not to bog down discussion during the early Commission meetings.
- Changing “member” to “lawyer” throughout the rules. This issue might be ripe for early consideration. (See discussion re “member” to “lawyer” under “Concepts Rejected.”)
- OCTC Reference to “highest standards” as a purpose of the rules in proposed paragraph (A). Should the rule state that one of the purposes of the rules is to promote the “highest professional standards” among lawyers as requested by OCTC?
- Deleting paragraph (B) (definitions used throughout the rules) from the current rule and refer consideration to a separate drafting team of a standalone global terminology rule or section, similar to all other jurisdictions, the Code of Judicial Ethics, and the ABA Model Rules. The drafting team envisions that each rule drafting team should also consider which terms within their rules would be candidates for a global terminology rule/section.
- Deleting paragraph (D) (geographic scope of rules) from current rule and referring consideration of a standalone rule similar to Model Rule 8.5 (geographic scope & choice of law). Does the Commission agree with the drafting team’s recommendation?
- Ethics opinions. Should the reference to ethics opinions in current rule 1-100(A), subparagraph 3, be retained in the black letter, relegated to a comment, or deleted?
- Case law citations in comments. Should the Discussion paragraphs include citations to California case law? If yes, should the citations be limited to decisions of the California Supreme Court or should citations from California Courts of Appeal be included? Should citations from the Review Department of the State Bar Court be included?

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### X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

- **April 23, 2015 Email to Drafting Team, cc Difuntorum & Mohr:** Identifies nine issues for consideration during the Drafting Team's First Conference Call. (See attached email compilation).
- **May 2, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, A.Tuft & McCurdy:** Circulated in advance of Drafting Team's second conference call, includes seven comments/suggestions re Discussion Draft 2 of proposed rule, which had been prepared pursuant to discussion during first conference call.
- **May 6-7, 2015 Email Exchange among Drafting Team members and State Bar staff:** Addressed the issue of changing "member" to "lawyer" in the proposed rule and throughout the entire set of rules. Consensus was not to change term but to refer the matter to the entire Commission. (See attached email compilation and "Concepts Rejected" section.)  
**May 12-13, 2015 Email Exchange among Drafting Team members and State Bar staff:** Addressed whether to delete the phrase "and opinions of California courts" in proposed paragraph (B)(2) [current rule 1-100(A), Paragraph 3] and to include the phrase "for enforcement of a rule or" in proposed paragraph (B)(3).

### XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-100 in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-300 in the form attached to this Report and Recommendation.

### XII. DISSENTING POSITION(S)

None.

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**XIII. FINAL COMMISSION VOTE/ACTION**

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

**CURRENT CALIFORNIA RULE 1-100**  
**“Rules of Professional Conduct, in General”**

***I. Text of Current Rule:***

**Rule 1-100 Rules of Professional Conduct, in General**

(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) “Law Firm” means:

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

(b) a law corporation which employs more than one lawyer; or

(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

(d) a publicly funded entity which employs more than one lawyer to perform legal services.

(2) “Member” means a member of the State Bar of California.

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(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) “Associate” means an employee or fellow employee who is employed as a lawyer.

(5) “Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

### (C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

### (D) Geographic Scope of Rules.

#### (1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

#### (2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

### **Discussion:**

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts.

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(See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)

### **II. Background/Purpose:**

The purpose and function of the rules were stated in the rules originally promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) In relevant part, former rule 1 provided that:

. . . [T]hese rules shall be binding upon all members of the State Bar, and the willful breach of any of these rules shall be punishable by suspension from the practice of law . . . . The specification in these rules of certain conduct as unprofessional is not to be interpreted as approval of conduct not specifically mentioned. In that connection, the Canons of Ethics of the American Bar Association are commended to the members of the State Bar. Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

As part of a comprehensive revision of all of the rules, in 1975 rule 1 was revised and renumbered 1-100. The reference to ABA provisions was deleted, apparently because the State Bar believed the 1975 California revisions, based in large part on a consideration of the then-prevailing ABA Code, struck an appropriate balance between conforming the rules to the ABA Code and conforming them to applicable California statutes and case law, rendering a reference to the ABA Code unnecessary and potentially misleading.

Operative May 27, 1989, rule 1-100 was revised as part of another comprehensive revision of all of the rules. Provisions comparable to current paragraphs (B)-(D) were added. Amendments added a reference to Business and Professions Code sections 6076 and 6077 (the statutory provisions providing for Board adoption of rule amendments and the sanctions for a violation) and a statement that the rules serve to “protect the public and to promote respect and confidence in the legal profession.” The 1989 version also added (i) an aspirational clause that provided members “should” consult “opinions of ethics committees in California” and (ii) a permissive clause

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concerning other guidance resources, i.e., that member “may” consider opinions of ethics committees and rules promulgated by other jurisdictions and bar associations.

The 1989 revisions replaced the following sentence, “Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof,” with two new sentences stating:

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, September 1988, at pp. 13 – 15 (“1988 Supplemental Memorandum”).)

The new language, developed in part from discussions with Robert Fellmeth, State Bar Disciplinary Monitor, was explained as follows:

The amendments are intended to clarify that the Rules of Professional Conduct do not create new civil causes of action, but rather are for purposes of assessing the duties of an attorney in the context of attorney discipline. The amendments also make clear that the new rules are not intended to disrupt the already existing body of law relating to the duties of attorneys in non-disciplinary contexts.

(1988 Supplemental Memorandum at p. 15.)

Operative September 14, 1992, rule 1-100 was further amended to revise the definition of “lawyer” in paragraph (B) and clarify the geographic scope of the rules in paragraph (D).

### ***III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. In a 2001 Letter to the First Commission, OCTC Provided the Following Comment on Rule 1-100(B):

Rule 1-100(B). Definitions.

OCTC recommends adding a phrase to the definition of the word “associate” to clarify its meaning: The proposed new language is as follows:

. . .

(4) “Associate” means an employee or fellow employee [of the same law firm](#) who is employed as a lawyer.

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OCTC also recommends that a definition for informed consent be added to the definitions. The proposed new definition is as follows:

...

(6) "Informed consent" means an agreement by a person to a proposed course of conduct after the member has provided to the person adequate information and made a full disclosure of the material risks and reasonable alternatives to the proposed course of conduct.

OCTC also further clarifies the definition of the word "associate" in the Discussion section of rule 1-100. The proposed additional language to the Discussion section is as follows:

Discussion

... To be an associate of another attorney means the two attorneys work in the same law firm. It does not refer to lawyers working on the same case but employed by different law firms. They are co-counsel, not associates.

Also, OCTC suggests adding to the Discussion section of rule 1-100(B) further information to assist members in understanding what is meant by the phrase "informed consent." The proposed new language is as follows:

Informed consent requires that the member disclose all the information he or she has about the risks and reasonable alternatives of any course of action.

OCTC Comments:

The recommendations proposed with regard to the term "associate" removes any doubt that the term applies only to those working in the same law firm and not to lawyers from different firms who may be sharing profits, expenses, and liabilities with regard to a given case. In 2001, the California courts of appeal rendered conflicting opinions as to what the term "associate" means. In *Sims v. Charness* (2001) 86 Cal.App.4th 884, the court of appeals applied the term to two attorneys working in different law firms but on the same case. However, in *Chambers v. Kay* (2001) 88 Cal.App.4th 903, the court rejected that interpretation. It should be noted that the California Supreme Court recently granted certiorari and will hear the Chambers case.<sup>1</sup> OCTC believes that the Chambers interpretation is correct, but for the sake of complete clarity recommends that the current rule be changed to eliminate any doubt.

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<sup>1</sup> *Chambers v. Kay*, SO 98007, 2001 WL 826073. [NOTE: The California Supreme Court subsequently affirmed the holding of the Court of Appeal. See *Chambers v. Kay* (2003) 29 Cal.4th 142, 153-154.]

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OCTC believes that the term “informed consent” should be clarified to assist members in understanding the duty being imposed.

### B. New Comments from OCTC:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

## IV. **Potential Deficiencies in the Current Rule:**

### A. See above input from OCTC.

B. Professional Competence staff observes that the last paragraph of rule 1-100(A) may require updating to account for case law published since the rule was last revised in 1992. Currently, rule 1-100(A), in part, states that: “Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive duty of lawyers or the non-disciplinary consequences of violating such a duty.” The drafting team may want to consider whether this statement remains true in light of case law holding that a violation of a rule may be evidence of breach of a lawyer’s fiduciary duty or other substantive duty in a non-disciplinary context. See *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]; and *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. See also, *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (a California Supreme Court decision in a non-disciplinary context that refers to noncompliance with a rule in evaluating the propriety of lawyer conduct and whether a fee sharing agreement between lawyers should be enforced.) These decisions suggest a possible deficiency in the current rule because the Commission is charged with addressing changes in the law and with eliminating ambiguities and uncertainties.

## V. **California Context:**

A. Rule 1-100(A). Regarding the statement of the purpose and function of the rules, the drafting team could consider reviewing and comparing the California Code of Judicial Ethics Preamble. Link to Code:

[http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf)

B. Rule 1-100(B). Regarding definitions of terms used throughout the rules, the drafting team could consider reviewing and comparing the terminology provision in the California Code of Judicial Ethics. Link to Code:

[http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf)

C. Rule 1-100(C). Regarding the purpose of the Discussion sections, consider the extent to which the Code of Judicial Ethics employs explanatory commentary. The Preamble to the Code of Judicial Ethics describes the commentary section

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prepared by the Supreme Court Advisory Committee on the Code of Judicial Ethics as follows: “The commentary, by explanation and example, provides guidance as the purpose and meaning of the canons. The commentary does not constitute additional rules and should not be so construed.” (Code of Judicial Ethics Preamble, paragraph two.)

D. Rule 1-100(D). Regarding the applicability of the rules to the conduct of non-California lawyers in California, the drafting team could consider reviewing provisions of statutory law and the California Rules of Court that provide for such regulation (e.g., “special admission categories” and multijurisdictional practice (“MJP”) rules). Concerning special admission categories, see, for example: an application to appear as counsel *pro hac vice* under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules. Concerning the MJP rules, see: proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; regulation of attorneys practicing law temporarily in California as part of litigation under Rule of Court 9.47; and regulation of non-litigating attorneys temporarily in California to provide legal services in a transaction or other non-litigation matter under Rule of Court 9.48.

### **VI. Approach In Other Jurisdictions (National Backdrop):**

A. Rule 1-100(A). Other jurisdictions differ in structure from California in that the purpose and function of the rules are stated in two sections preceding the rules, one entitled “Preamble” and the other entitled “Scope.” Regarding a Preamble section, see ABA State Adoption Chart at:

<http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.authcheckdam.pdf>

Regarding a Scope section, see ABA State Adoption Chart at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_scope.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope.authcheckdam.pdf)

Two other states have a separate rule on purpose and scope, similar to California’s approach.<sup>2</sup>

Twenty-seven jurisdictions<sup>3</sup> have adopted the model rule “Preamble”<sup>4</sup> or something substantially similar.<sup>5</sup> Seven jurisdictions have no preamble text.<sup>6</sup>

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<sup>2</sup> Michigan (Michigan rule 1.0) and Nevada (Nevada rule 1.0A).

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Seventeen jurisdictions implemented unique language or a substantially revised version of the model rule “Preamble.”<sup>7</sup>

Twenty-six jurisdictions have adopted the model rule “Scope”<sup>8</sup> or something substantially similar.<sup>9</sup> Six jurisdictions have no scope text.<sup>10</sup> Nineteen jurisdictions implemented unique language or a substantially revised version of the model rule “Scope.”<sup>11</sup> Although proposed rule 1.0 is not identical or substantially similar to the model rule “Preamble and Scope,” it nevertheless conforms to a national standard of incorporating provisions on the purpose and scope of the rules as a key component.

B. Rule 1-100(B). Regarding definitions of terms and phrases used in the California rules, other jurisdictions differ in structure from California by utilizing a dedicated terminology rule or section at the beginning of the rules (typically numbered as rule 1.0). In addition, many jurisdictions define more terms and phrases than rule 1-100(B). Also, the drafting team might consider to what extent, if any, there should more defined terms in rule 1-100(B). See ABA State Adoption Chart at:

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<sup>3</sup> The information in the following paragraphs has been gleaned from two ABA charts that report on the implementation of the “Preamble” and the “Scope,” respectively, in the various jurisdictions, including the District of Columbia and California. One chart, “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities” was last updated October 21, 2010. (<http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.authcheckdam.pdf>.) (Last accessed on January 16, 2013 and a copy is on file with the State Bar.)

The second chart, “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Scope” was last updated October 21, 2010. ([http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_scope.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope.pdf).) (Last accessed on January 6, 2013 and a copy is on file with the State Bar.)

<sup>4</sup> Delaware; Iowa; Maryland; Minnesota; Missouri; Nebraska; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Vermont; and Wisconsin.

<sup>5</sup> Alaska; Arizona; Arkansas; Colorado; Connecticut; Idaho; Indiana; Kansas; Kentucky; Mississippi; New Mexico; North Dakota; Tennessee; Washington; and Wyoming.

<sup>6</sup> District of Columbia; Louisiana; Nevada; New Hampshire; New Jersey; Oregon; and South Dakota.

<sup>7</sup> Alabama; California; Florida; Georgia; Hawaii; Illinois; Maine; Massachusetts; Michigan; Montana; New York; North Carolina; Ohio; Texas; Utah; Virginia; and West Virginia.

<sup>8</sup> Colorado; Idaho; Iowa; Rhode Island; and Utah.

<sup>9</sup> Alaska; Arizona; Arkansas; Delaware; Illinois; Indiana; Kansas; Kentucky; Maine; Maryland; Minnesota; Missouri; Nebraska; New Mexico; New York; North Carolina; Ohio; South Carolina; Vermont; Wisconsin; and Wyoming.

<sup>10</sup> Louisiana; Nevada; New Hampshire; New Jersey; Oregon; and South Dakota.

<sup>11</sup> Alabama; California; Connecticut; District of Columbia; Florida; Georgia; Hawaii; Massachusetts; Michigan; Mississippi; Montana; North Dakota; Oklahoma; Pennsylvania; Tennessee; Texas; Virginia; Washington; and West Virginia.

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[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_0.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_0.authcheckdam.pdf)

See also, the Terminology section in the California Code of Judicial Ethics.

C. Rule 1-100(C). Regarding the purpose of the Discussion sections, other jurisdictions that have adopted “Comments” to their rules differ in structure from California by including a paragraph (patterned after Model Rule, Scope, ¶. [21]),<sup>12</sup> in their Scope section that explains the purpose of the Comments. See supra, ABA State Adoption Chart at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_scope.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope.authcheckdam.pdf)

D. Rule 1-100(D). Regarding the applicability of the rules to California lawyer conduct in other jurisdictions and the applicability of the rules to the conduct of non-California lawyers in California, other jurisdictions differ in structure from California by utilizing a dedicated rule (typically numbered as rule 8.5). The working group might also consider to what extent, if any, the substance of these standards in other jurisdictions differ from the substance of rule 1-100(D). See ABA State Adoption Chart at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf)

### ***VII. Public Comment Received by the First Commission:***

The clean text of proposed new rules 1.0 (“Purpose and Scope of the Rules of Professional Conduct”), 1.0.1 (“Terminology”), and 8.5 (“Disciplinary Authority; Choice of Law”), drafted by the first Commission and adopted by the Board to replace the provisions of rule 1-100 are enclosed with this assignment, together with the synopsis of public comments received on these proposed rules and the full text of those comments. Although these proposed rules differ from rule 1-100(A), the drafting team may consider to what extent, if any, the public comments received might offer helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, redline comparison versions of each of the proposed rules showing changes to rule 1-100(A) are also enclosed with the public comment received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the

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<sup>12</sup> ABA Model Rules, Scope, ¶. [21], provides:

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

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first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

### ***VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:***

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple references in this assignment document to a particular issue do not necessarily warrant the drafting team taking action on an issue and recommending a rule change.)

(1) Whether to update existing references to the use of rules in non-disciplinary settings (e.g., to address whether a violation of a rule may be considered as evidence of a breach of a civil standard of care).

(2) Whether to revise the "long-arm"/choice of law language (stating the extraterritorial reach of rules to State Bar member conduct occurring outside of California) to be consistent with language used by other jurisdictions (compare ABA MR 8.5(a) ["long arm"] and (b) [choice of law]).

(3) Whether to recommend a new separate Terminology Rule (similar to the California Code of Judicial Ethics terminology section; see also, ABA Model Rule 1.0 "Terminology") and, if so, which words and phrases should be included and what should be the respective definitions for each of them.

(4) Whether to clarify the disciplinary concept of what constitutes a "willful violation" for purposes of the rules. A clarification may facilitate compliance and enforcement because the concept of a "willful" violation can be confused with issues of specific intent.

### ***IX. Research Resources:***

- [\*In re Attorney Discipline System\*](#) (1998) 19 Cal.4th 582, 593-597 [79 Cal.Rptr.2d 836]
- [\*Howard v. Babcock\*](#) (1993) 6 Cal.4th 409, 418 [25 Cal.Rptr.2d 80]

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- *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]
- *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617]
- Business and Professions Code § 6100
- *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]
- *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]
- *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355]
- *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification)
- *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files)
- *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien)
- *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement)
- *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party)
- *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346] (willful violation does not require intended violation of the rule)
- Business and Professions Code § 6049.1 (MJP and Disciplinary Authority)