

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

**Lead Drafter:** Cardona  
**Co-Drafters:** Langford  
**Meeting Date:** May 29 – 30, 2015

### I. CURRENT CALIFORNIA RULE

#### Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

### II. DRAFTING TEAM VOTE

There was a consensus among the drafting team members to recommend a proposed amended rule as set forth below.

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

We provide two different options below. The first option, which is our preference, incorporates into this rule responsibility concepts from ABA Model Rules 8.4(a), 8.4(e), 5.1, 5.2, and 5.3 that we believe (for reasons discussed in detail in the attached Drafting Team Comments & Discussion) are most appropriately included in a single rule defining members' responsibility for violations of the rules. This approach is also consistent with including the remaining unincorporated provisions from ABA Model Rules 5.1 and 5.3 (which define the independent duties to supervise, respectively, subordinate attorneys and non-attorney employees or agents) in a revised California Rule 3-110 (the accompanying discussion to this rule in its current form defines the duty of competence as including these duties to supervise). The second option would incorporate none of the responsibility concepts from ABA Model Rules 5.1, 5.2, and 5.3, leaving these responsibility concepts (which we believe should be included in the rules and were included in the rules proposed by the First Commission) for inclusion in a separate series of rules. We have annotated both options to show the ABA Model Rules from which particular language is derived.

#### Option 1 (preferred):

#### Rule 1-120 Responsibility For Violations

(a) A member shall not, directly or through the acts of another:

*["acts of another" from ABA MR 8.4(a)]*

(i) violate or attempt to violate these Rules or the State Bar Act;

*["attempt" from ABA MR 8.4(a) – contingent on defining "attempt" as discussed in attached Drafting Team Comments]*

(ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;

*[current Rule 1-120 with addition of "order" from ABA MR 5.1(c)(1), 5.3(c)(1)]*

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(iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or

*[from ABA MR 5.1(c)(1), 5.3(c)(1)]*

(iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

*[from ABA MR 8.4(e)]*

(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

*[from ABA MR 5.2(a)]*

(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

*[from ABA MR 5.2(b)]*

(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*[from ABA MR 5.1(c)(2)]*

(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*[from ABA MR 5.3(c)(2)]*

### **Discussion:**

[1] Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

*[from Comment 1 to ABA MR 5.2]*

[2] Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance can reasonably be answered only one way, the duty of both lawyers is clear and they are equally

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responsible for fulfilling it. However, if the question is reasonably arguable, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor's resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.

*[from Comment 2 to ABA MR 5.2]*

[3] Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which: (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm; and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed by the member's firm. Whether a member has direct supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension, consistent with the member's duty not to disclose confidential information under Business and Professions Code Section 6068(e).

*[from Comment 5 to ABA MR 5.1]*

[4] This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

*[from Comment 1 to ABA MR 8.4]*

[5] Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

*[from Comment 7 to ABA MR 5.1]*

[6] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.

*[from Comment 8 to ABA MR 5.1]*

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### Option 2 (not preferred):

#### Rule 1-120 Responsibility For Violations

- (a) A member shall not, directly or through the acts of another:  
*["acts of another" from ABA MR 8.4(a)]*
- (i) violate or attempt to violate these Rules or the State Bar Act;  
*["attempt" from ABA MR 8.4(a) – contingent on defining "attempt" as discussed in attached Drafting Team Comments]*
  - (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;  
*[current Rule 1-120]*
  - (iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.  
*[from ABA MR 8.4(e)]*

#### Discussion:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

*[from Comment 1 to ABA MR 8.4]*

## IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

### Option 1 (preferred):

#### Rule 1-120 ~~Assisting, Soliciting, or Inducing~~ Responsibility For Violations

- (a) A member shall not, directly or through the acts of another:
- (i) violate or attempt to violate these Rules or the State Bar Act;
  - (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;
  - (iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or
  - (iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

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(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Discussion:

[1] Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

[2] Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor's resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.

[3] Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which: (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm; and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed

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by the member's firm. Whether a member has direct supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension, consistent with the member's duty not to disclose confidential information under Business and Professions Code Section 6068(e).

[4] This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

[5] Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[6] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.

### Option 2 (not preferred):

#### Rule 1-120 ~~Assisting, Soliciting, or Inducing~~ Responsibility For Violations

(a) A member shall not, directly or through the acts of another:

(i) violate or attempt to violate these Rules or the State Bar Act;

(ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;

(iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.

### Discussion:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

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### V. PUBLIC COMMENTS SUMMARY

- To date, no public comments have been received except from OCTC, as specified below.

### VI. OCTC / STATE BAR COURT COMMENTS

- Mike Nisperos, OCTC, 2001: OCTC's recommendation is to expand the scope of rule 1-120 to include new standards that are derived from ABA model rule 8.4
- Jayne Kim, OCTC, April 20, 2015: OCTC does not recommend any revisions to Rule 1-120.<sup>5</sup> (Footnote 5 from April 20, 2015 memo: However, as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules and a requirement that members report the misconduct of others.)
- To date, no comments have been received from the State Bar Court.

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

#### **New York Rule 5.1 Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers**

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b)(1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(b)(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the

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other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

### **Illinois Rule 5.2 Responsibilities of a Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **New York Rule 5.3 Lawyer's Responsibility For Conduct Of Nonlawyers**

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

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### **Pennsylvania Rule 8.3 Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

### **Pennsylvania Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The ABA State Adoption Chart for Model Rule 5.1 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf)
- 28 states have adopted 5.1 verbatim (AZ, AR, CT, DE, HI, ID, IL, IN, IA, KS, KY, LA, MD, MA, MO, NE, NV, OK, PA, RI, SC, SD, TN, UT, WA, WV, WI, WY); 19 jurisdictions have adopted a variation of model rule 5.1 (AL, AK, DC, FL, ME, MN, MS, MT, NC, ND, NH, NJ, NM, NY, OH, OR, TX, VT, VA); and 4 states have not adopted a variation of model rule 5.1 (CA, CO, GA, MI).

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The ABA State Adoption Chart for Model Rule 5.2 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.authcheckdam.pdf)
- 41 states have adopted 5.2 verbatim (AL, AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, KS, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); 7 jurisdictions have adopted a variation of model rule 5.2 (CT, DC, FL, GA, NM, OH, TX); and 3 states have not adopted a variation of model rule 5.2 (CA, KY, VA).

The ABA State Adoption Chart for Model Rule 5.3 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.authcheckdam.pdf)
- 10 states have adopted 5.3 verbatim (AR, CT, DE, ID, IN, LA, MA, PA, WV, WY); 40 jurisdictions have adopted a variation of model rule 5.3 (AL, AK, AZ, CO, DC, FL, GA, HI, IL, IA, KS, KY, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, RI, SC, SD, TN, TX, UT, VT, VA, WA, WI); and 1 state has not adopted a variation of model rule 5.3 (CA).

The ABA State Adoption Chart for Model Rule 8.3 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf)
- 7 states have adopted 8.3 verbatim (ID, IA, MT, NE, PA, UT, WY); 43 jurisdictions have adopted a variation of model rule 8.3 (AL, AK, AR, AZ, CO, CT, DC, DE, FL, GA, HI, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, NH, NJ, NM, NV, NY, NC, ND, OH, OK, OR, RI, SC, SD, TN, TX, VT, VA, WA, WI, WV); and 1 state has not adopted a variation of model rule 8.3 (CA).

The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120. The chart is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf)
- 14 states have adopted 8.4 verbatim (AZ, AR, CT, DE, ID, MS, MT, NV, NM, OK, PA, SD, UT, WV); 33 jurisdictions have adopted something substantially similar to model rule 8.4 (AL, AK, CO, DC, HI, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, NE, NH, NJ, NY, NC, ND, OH, OR, RI, SC, TN, VT, VA, WA, WI, WY); and 4 states have adopted something substantially different to model rule 8.4 (CA, FL, GA, TX).

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The ABA provides a separate chart for Model Rule 8.4, Comment [3]:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4\\_cmt\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf)

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

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

- Implement change to govern “attempts” to violate the rules. (Options 1 & 2)
  - **Pros:** Comports with ABA MR 8.4(a)’s definition of professional misconduct as including attempts; increases public protection by explicitly holding members responsible for attempts to violate rules or the State Bar Act; assuming adoption of a provision defining “attempt” provides members with clear guidance regarding disciplinary standards; consistent with certain decisions applying rules or State Bar Act to attempts, *see, e.g., Walker v. State Bar* (1989) 49 Cal. 3d 1107, 1113 (“violated [6106] by willfully misappropriating or attempting to misappropriate funds from his client trust account”); *Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (violation of Rule 4-200(B) to “attempt” to collect unconscionable fee); *Matter of Scapa* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 (same).
  - **Cons:** There are no known cons to this proposed change.
  - **See:** More detailed discussion in attached drafting team comments.
- Implement change to incorporate provisions from ABA MR 5.2 making clear the responsibilities of subordinate lawyers (Option 1 only)
  - **Pros:** Comports with ABA MR 5.2; clarifies when subordinate lawyers may rely on directions from a supervisory attorney; increases public protection by making clear that, except in limited circumstances, subordinate lawyers remain responsible for violations of the rules even when acting at the direction of a supervising lawyer.
  - **Cons:** There are no known cons to the proposed change.
  - **See:** More detailed discussion in attached drafting team comments.
- Implement change to incorporate additional provisions from ABA MR 5.1(c), 5.3(c) defining responsibility for violations by other lawyers/nonlawyers (Option 1 only)
  - **Pros:** Comports with ABA MR 5.1(c) and 5.3(c); consistent with ABA MR 5.1(a), (b) and 5.3(a), (b) and current comment to California Rule RPC 3-110, which all recognize a duty to supervise; increases public protection by making explicit a member’s responsibility for violations by other lawyers/nonlawyers; clarifies when a member is responsible for violations by other lawyers/nonlawyers.
  - **Cons:** There are no known cons to the proposed change.
  - **See:** More detailed discussion in attached drafting team comments.

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

- Implement change to incorporate provisions governing a lawyer’s permissive or mandatory duty to report specified subsets of known violations of the rules.

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- Pros: Comports with ABA MR 8.3; improves public protection by requiring lawyer reporting of certain known violations of the rules.
- Cons: Requires interpretation of whether a known violation raises a substantial question as to (or implicates) the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; poses potential conflict with duty of confidentiality with respect to information learned in the course of representation of a client; poses potential conflict with duty of loyalty if reporting would adversely affect client's interests; creates new duty (akin to duty to supervise) that is more appropriately the subject of a separate independent rule rather than inclusion in a rule that addresses responsibility for violations of other rules.
- See: More detailed discussion in attached drafting team comments. Discussion of ABA MR 8.3 in open issues/concepts below.

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

The current rule applies to assisting, soliciting, or inducing violations. Consistent with ABA MR 8.4(a), both Options 1 and 2 for the proposed rule would add a provision holding members responsible for attempted violations of the rules. Consistent with ABA MR 8.4(e), both Options 1 and 2 for the proposed rule would add a provision holding members responsible for statements indicating an ability to achieve results through means that violate the rules. Option 1 for the proposed rule would incorporate additional provisions from ABA MR 5.1(c) and 5.3(c) defining when members are responsible for violations by other lawyers/nonlawyers. Finally, Option 1 for the proposed rule would incorporate provisions from ABA MR 5.2 to define the limited circumstances under which subordinate lawyers may rely on supervisory direction and to make explicit that absent these limited circumstances subordinate lawyers remain responsible for violations of the rules.

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

All of the proposed changes are substantive.

### **Alternatives Considered:**

- Keep current rule without changes (rejected).
- Keep current rule while adding only language to encompass attempts (rejected).
- Consistent with ABA MR 8.3(c), incorporate into rule or add stand-alone rule mandating reporting of all violations that "raise a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." (rejected pending further public comment – see more detailed discussion in attached drafting team comments and open issues/concepts below)
- Consistent with the modified version of ABA MR 8.3(c) proposed by the original Commission, incorporate into rule or add stand-alone rule requiring mandatory reporting of any violation that constitutes a felonious criminal act that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness, with permissive reporting of other violations that implicate the lawyer's fitness to practice. (rejected pending further public comment – see more detailed discussion in attached drafting team comments and open

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issues/concepts below)

- Leave the principles of responsibility for the conduct of other lawyers and nonlawyers set forth in ABA MR 5.1, 5.2, and 5.3 and suggested by the commentary to California Rule 3-110 for one or more separate new rules. (Option 2 for the rule)
- Incorporate into the modified rule additional provisions included in ABA MR 5.1(a), (b) and 5.3(a), (b), imposing independent duties to supervise, that is, to engage in reasonable efforts to ensure compliance with the rules by other lawyers/nonlawyers. (rejected – see open issues/concepts below)
- Incorporate into the modified rule additional provisions from ABA MR 8.4 (b)-(g) that define additional acts (beyond violations of the other ABA MR) constituting “professional misconduct” (rejected – see open issues/concepts below)

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

(1) If a Terminology Rule is recommended by the Commission, whether any of the following terms in proposed rule 1-120 should be defined in the Terminology Rule: “knowingly,” “attempt,” “ratifies,” “reasonable remedial action.” In this regard, the recommendation to include “attempts” within the proposed rule is contingent on adoption of a proposed definition of “attempt” that is discussed in detail in the attached drafting team comments.

(2) If the proposal to include “attempts” within proposed rule 1-120 is accepted, whether to drop specific attempt language from other rules.

(3) ABA MR 5.1 (other lawyers) and 5.3 (nonlawyers) each addresses two different concepts. Subsections (a) and (b) of each of the rules define duties to supervise other lawyers and nonlawyers, while subsection (c) of each of the rules defines responsibility for violations committed by other lawyers and nonlawyers. The second concept (from subsection (c)) is incorporated into Option 1 for proposed amended rule 1-120, which would serve as a single rule defining responsibility for violations and attempted violations of the rules, both as a result of the member’s own conduct and as a result of conduct engaged in by other lawyers and nonlawyers. The first concept (subsections (a) and (b)), which is currently referenced in the commentary to California Rule 3-110, does not appear to fit within such a rule, and is left for consideration as to whether it should be retained as a concept subsumed within competence or be the subject of one or more new stand-alone rules.

(4) ABA MR 8.4 similarly addresses (in broad terms) two different concepts. Subsections (a) and (e) define professional misconduct in relation to violations or attempted violations of the other ABA Model Rules. Subsections (b) through (g) define professional misconduct in relation to other duties and laws independent of the other ABA Model Rules. The first concept (from subsections (a) and (e)) is incorporated into proposed amended rule 1-120, which would serve as a single rule defining responsibility for violations and attempted violations of the rules, both as a result of the member’s own conduct and as a result of conduct engaged in by other lawyers and nonlawyers. The second concept (subsections (b) through (g)) does not appear to fit within such a rule, and is left for consideration as to whether similar provisions should be included in rule 1-100 (as additional grounds other than violations of the rules or the State Bar Act for the

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120

**Lead Drafter:** Cardona  
**Co-Drafters:** Langford  
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imposition of discipline) or in one or more new stand-alone rules.

(5) ABA MR 8.3 mandates reporting of all violations that “raise a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” As discussed in more detail in the attached drafting team comments, consideration of this or a modified reporting requirement does not appear to fit with Rule 1-120 and is left for consideration as a stand-alone requirement after the solicitation of additional public comment.

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

See attached Drafting Team Comments & Discussion.

### XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

#### **Recommendation (preferred):**

Adopt Option 1 for proposed amended rule 1-120.

#### **Alternative Recommendation:**

Adopt Option 2 for proposed amended rule 1-120.

#### **Proposed Resolution (preferred):**

RESOLVED: That the Commission adopts proposed amended rule 1-120 as set forth in this report as Option 1.

#### **Alternative Proposed Recommendation:**

RESOLVED: That the Commission adopts proposed amended rule 1-120 as set forth in this report as Option 2.

### XII. DISSENTING POSITION(S)

None.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120**

**Lead Drafter: Cardona**  
**Co-Drafters: Langford**  
**Meeting Date: May 29 – 30, 2015**

**XIII. FINAL COMMISSION VOTE/ACTION**

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]



**Introduction**

California Rule of Professional Responsibility 1-120 is the only current rule that holds members responsible for violations of the rules committed by others, prohibiting members from assisting in, soliciting, or inducing any violation of the rules. The only other provision of the current rules that arguably suggests additional responsibility for violations of the rules by others is the commentary to Rule 3-110, which notes that the duty of competency defined by that rule includes “the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”

The ABA Model Rules include a variety of provisions that expand the responsibility of members beyond actual violations committed by those members. Model Rule 8.4(a) states that it is professional misconduct to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Model Rule 8.4(e) states that it is professional misconduct to “state or imply an ability . . . to achieve results by means that violate the Rules of Professional Conduct or other law.” Model Rule 5.1(c) defines additional circumstances (beyond assisting or inducing a violation) under which a lawyer “shall be responsible for another lawyer’s violation of the Rules of Professional Conduct.” Model Rule 5.3(c) similarly defines additional circumstances under which a lawyer “shall be responsible for conduct of” a “nonlawyer employed or retained by or associated with a lawyer” that “would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.” And, Model Rule 5.2 makes clear that, except in limited circumstances, a subordinate lawyer remains responsible for violations of the rules committed under the direction of a supervisory lawyer.<sup>1</sup>

The First Commission adopted, with virtually no opposition or substantial public comment, the bulk of the Model Rule provisions referenced above. In particular, COPRAC and OCTC appear generally to have supported adoption of these provisions. Our preferred proposed revisions to Rule 1-120 (designated Option 1) incorporate these provisions into the rule, with the intention of arriving at a comprehensive rule that includes all provisions defining when members will be responsible, and may be disciplined, for conduct beyond actual violations of the Rules committed by those members themselves. We believe this approach is consistent with the charge to the Commission to retain the historical nature of the California Rules as a “clear and enforceable articulation of disciplinary standards.” As a less preferred alternative (designated Option 2), we propose revisions to Rule 1-120 that incorporate the responsibility provisions from Model Rule 8.4(a) and (e), but do not incorporate the responsibility provisions from Model Rules 5.1, 5.2, and 5.3, leaving the latter for consideration for inclusion in a separate series of rules.

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<sup>1</sup> Model Rules 8.4(b), (c), (d), and (f), 5.1(a) and (b), and 5.3(a) and (d) also create additional substantive obligations. As discussed in more detail in the text below, we believe these additional substantive duties are appropriately considered in conjunction with consideration of other rules, namely, Rule 3-110 (“Failure to Act Competently”) and Rule 1-100 (defining when a lawyer may be disciplined).

With respect to the particular proposed modifications to Rule 1-120:

**Proposed 1-120(a) – Two Options**

Text: (w/ annotations indicating source of modifications)

Option 1 (preferred):

- (a) A member shall not, directly or through the acts of another:
  - [“acts of another” from ABA MR 8.4(a)]*
  - (i) violate or attempt to violate these Rules or the State Bar Act;
    - [“attempt” from ABA MR 8.4(a) – contingent on defining “attempt” as discussed in attached Drafting Team Comments]*
    - (ii) knowingly order, assist in, solicit, or induce any violation of these Rules or the State Bar Act;
      - [current Rule 1-120 with addition of “order” from ABA MR 5.1(c)(1), 5.3(c)(1)]*
      - (iii) with knowledge of the specific conduct, ratify conduct constituting a violation of these Rules or the State Bar Act; or
        - [from ABA MR 5.1(c)(1), 5.3(c)(1)]*
        - (iv) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.
          - [from ABA MR 8.4(e)]*

Option 2 (not preferred):

- (a) A member shall not, directly or through the acts of another:
  - [“acts of another” from ABA MR 8.4(a)]*
  - (i) violate or attempt to violate these Rules or the State Bar Act;
    - [“attempt” from ABA MR 8.4(a) – contingent on defining “attempt” as discussed in attached Drafting Team Comments]*
    - (ii) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
      - [current Rule 1-120]*
      - (iii) state or imply that the member has an ability to achieve a result on behalf of a client by means that violate these Rules or the State Bar Act.
        - [from ABA MR 8.4(e)]*

Related Comments: (w/ annotations indicating source)

For both Option 1 and Option 2:

This rule does not prohibit a member from advising a client concerning action the client is legally entitled to take even if that action, if taken by a member, would constitute a violation of these rules or the State Bar Act.

*[from Comment 1 to ABA MR 8.4]*

Discussion:

The bulk of this proposed section reflects either language already in Rule 1-120 (solicit, induce, assist in) or language taken from ABA MR 5.1( c) and 5.3 ( c) (order and ratify) (Option 1 only) and 8.4(a) (acts of another, induce, assist in) (Options 1 and 2), that was not the subject of controversy when it was adopted by the First Commission and which appears appropriately to define the circumstances under which a member will be responsible for violations of the rules or State Bar Act that are actually committed not by the member but by others acting at the member's direction or encouragement or subject to the member's ratification. In comments provided in 2001, OCTC supported a similar incorporation of the additional standards from ABA MR 8.4(a), noting that it "makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules" and that this did "not change the purpose of the rule; it only provides greater detail and specificity."

The final clause of this proposed section (both Option 1 and Option 2) reflects language from ABA MR 8.4(e) (state or imply an ability to achieve a result) that similarly was not the subject of controversy when it was adopted by the First Commission and appears appropriately to define additional circumstances under which a member should be held accountable for conduct relating to violations of the rules or State Bar Act. In its 2001 comments, OCTC supported a similar incorporation of this standard from ABA MR 8.4( e).

We also recommend (both Option1 and Option 2) the inclusion in this proposed section of a general prohibition on attempts to violate the rules or State Bar Act. This is more controversial. The OCTC proposed to the First Commission the inclusion of general attempt language in its proposed version Rule 8.4, noting:

There is no sound reason to exclude this language, which protects clients and the public. An attempt to violate a rule goes to the character of an attorney and his or her fitness to practice law. The ABA's version [which includes attempt language] goes to the character of an attorney and his or her fitness to practice law. The

ABA's version better protects clients, the public, and the courts. It ensures that attorneys are and remain of good moral character.<sup>2</sup>

The First Commission nevertheless rejected the inclusion of attempt language, noting that it had “discussed making an ‘attempt’ to violate the rules an offense but determined that the issue of disciplining attempts to violate a rule was better left to a case-by-case determination.” COPRAC implicitly endorsed this approach by supporting the adoption of the rule as proposed by the First Commission.

On balance, we believe the OCTC's comments to the First Commission are well-taken, and that a provision extending the rules to cover attempts generally, rather than leaving this to a case-by-case determination, is appropriate. We believe that this is consistent with our charge to arrive at a “clear and enforceable articulation of disciplinary standards” since it will put members on notice that, as a general matter, attempts may subject them to discipline. We note the additional benefit that this will bring the California rules closer to conformity with the ABA Model Rules.

Our recommendation regarding attempts is contingent on the inclusion in the rules of an appropriate definition of what constitutes an “attempt” In this regard, we recommend a definition requiring that the member both (a) intend to engage in conduct that would violate the particular rule or State Bar Act provision; and (b) do something that constitutes a substantial step towards actually engaging in the conduct that would constitute the violation, that is, something beyond mere preparation that demonstrates that the violation would have occurred unless interrupted by independent circumstances. *See, e.g.*, Ninth Circuit Model Criminal Jury Instruction 5.3 (“Attempt”). We believe such a definition is necessary to provide a clear and enforceable articulation of a disciplinary standard governing attempts. It also appears consistent with the decisions in various cases that have addressed attempts under specific provisions of the rules or State Bar Act that already extend to attempts. *See, e.g., Walker v. State Bar* (1989) 49 Cal.3d 1107 [264 Cal.Rptr. 825] (petitioner correctly disciplined for “misappropriating or attempting to misappropriate funds from his client trust account” where he “knew that the two checks he wrote for a total of \$2,700 [one for \$1,700 to cover his own delinquency to a local car leasing agency, and the second a counter check for \$1,000 that petitioner cashed] were drawn on his client trust fund account” despite fact that one of the two checks was not honored, but was instead returned after petitioner's associate froze the client trust account); *Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (agreeing that despite his return of certain funds after his client disputed his entitlement to them, “respondent attempted to collect an

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<sup>2</sup> OCTC has provided updated comments to the Second Commission in which it states that it recommends no revisions to Rule 1-120, but indicates that “as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules.” Because we believe a provision addressing attempts would, if agreed on, appropriately be included in a modified Rule 1-120 (as opposed to elsewhere in the rules) we address such a provision now.

unconscionable fee from Ms. Otoya in violation of rule 4-200(A)” where he “attempted to collect more than was due him under his fee agreement”).

**Proposed 1-120(b) and (c) – Preferred Option 1 Only**

Text: (w/ annotations indicating source of modifications)

“(b) A member shall comply with these Rules and the State Bar Act notwithstanding that the member acts at the direction of another lawyer or other person.

*[from ABA MR 5.2(a)]*

“(c) A member acting as a subordinate to another lawyer does not violate these Rules or the State Bar Act if that member acts in accordance with the supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”

*[from ABA MR 5.2(b)]*

Related Comments: (w/ annotations indicating source)

“Paragraph (b) addresses the responsibility of subordinate lawyers. Although a member is not relieved of responsibility for a violation by the fact that the member acted at the direction of a supervisor, that fact may be relevant in determining whether a member has violated these rules or the State Bar Act.

*[from Comment 1 to ABA MR 5.2]*

“Paragraph (c) vests responsibility for professional judgments as to compliance with these rules or the State Bar Act in the supervisory lawyer. If a question regarding compliance can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, and if the supervisor and subordinate have taken reasonable steps to ensure that the supervisor has all the relevant facts, a subordinate may be guided by the supervisor’s resolution of the question, which should protect the subordinate professionally if that resolution is subsequently challenged.”

*[from Comment 2 to ABA MR 5.2]*

Discussion:

These two sections reflect provisions from ABA MR 5.2 (“Responsibilities of a Subordinate Lawyer”) that were not the subject of controversy when adopted by the First Commission and appear appropriately to (a) make clear that a subordinate lawyer generally will remain responsible for violations of the rules or State Bar Act even when acting under the direction of a

supervisory lawyer and (b) specify the limited circumstances in which a subordinate lawyer will not be responsible because he or she reasonably relied on a supervisor/s resolution of an arguable question regarding interpretation of the rules or State Bar Act. Both COPRAC and OCTC appear to have supported adoption of these provisions by the First Commission. OCTC expressed concern that the comments included by the First Commission were too long. OCTC also objected specifically to a sentence in one of the comments (also included in the comments to ABA MR 5.2) that stated as an example of the application of the rule that if a subordinate signed a frivolous pleading at the direction of a supervisor, the subordinate would not violate the rules unless the subordinate knew the document's frivolous character. We do not believe the comments we propose are excessively long, and we have removed from our proposed comment relating to section (b) the sentence to which OCTC objected on the belief that including one example is both unnecessary given the clear language of section (b) and the proposed comment and might give the improper impression that the one example represents the only set of circumstances under which a subordinate's reliance on directions from a supervisor would be relevant to a determination on discipline.

**Proposed 1-120(d) and (e) – Preferred Option 1 Only**

Text: (w/ annotations indicating source of modifications)

“(d) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which another lawyer practices, or has direct supervisory authority over the other lawyer, shall be responsible for the other lawyer's violation of these Rules of the State Bar Act if the member knows of the other lawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*[from ABA MR 5.1(c)(2)]*

“(e) A member who is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which a nonlawyer is employed, or has direct supervisory authority over a nonlawyer employed or retained by or associated with the member, shall be responsible for conduct of the nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a member if the member knows of the nonlawyer's conduct constituting the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

*[from ABA MR 5.3(c)(2)]*

**Related Comments:** (w/ annotations indicating source)

“Beyond the circumstances defined in paragraph (a) under which a member will generally be responsible for conduct of both lawyers and nonlawyers constituting a violation of these rules or the State Bar Act, paragraphs (d) and (e) define additional the circumstances under which (1) a member who is a partner or has comparable managerial authority in a law firm will be responsible for violations committed by lawyers and nonlawyers practicing in or employed by the firm and (2) a member who has direct supervisory authority over the performance of specific legal work by another lawyer or nonlawyer will be responsible for violations committed by that lawyer or nonlawyer, whether or not that lawyer or nonlawyer practices in or is employed by the member’s firm. Whether a member has direct supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has direct supervisory responsibility for the work of other lawyers engaged in the matter, whether or not members of the firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension, consistent with the member’s duty not to disclose confidential information under Business and Professions Code Section 6068(e).

*[from Comment 5 to ABA MR 5.1]*

“Apart from this Rule, a member does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a member may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

*[from Comment 7 to ABA MR 5.1]*

“This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct.”

*[from Comment 8 to ABA MR 5.1]*

**Discussion**

These two sections reflect provisions from ABA MR 5.1(c) (“Responsibilities of Partners, Managers, and Supervisory Lawyers”) and 5.3( c) (“Responsibilities Regarding Nonlawyer Assistants”) that were not the subject of controversy when adopted by the First Commission and appear appropriately to define additional circumstances in which a member who (a) is a partner

or comparable or equivalent manager in a law firm is responsible for violations committed by lawyers or nonlawyers employed by the law firm or (b) is a direct supervisor of a lawyer or nonlawyer is responsible for violations committed by the supervised lawyer or nonlawyer, Both OCTC and the State Bar's Law Practice Management & Technology Section supported the First Commission's adoption of its proposed Rule 5.1, which included a provision similar to our proposed 1-120(d). Both COPRAC and OCTC supported the First Commission's adoption of its proposed Rule 5.3, which included a provision similar to our proposed 1-120(e). OCTC noted in both instances that it believed the proposed rule was "simply a codification of existing California law." OCTC objected to the length and number of comments to the First Commission's proposed Rule 5.1 and sought specifically the striking of comment 3 to the First Commission's proposed Rule 5.3. The comments we propose are significantly shorter, do not include the comment specifically objected to by OCTC, and include a comment (the last above) that was specifically supported by OCTC (comment 15 to the First Commission's proposed Rule 5.1).

**ABA Model Rule 8.3 – Reporting Requirements**

Model Rule 8.3 provides:

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
  
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
  
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a

violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

As reflected above, ABA MR 8.3 mandates reporting of any violation of the rules that raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer. The First Commission proposed a modified version of this rule that was partly permissive and partly mandatory. The First Commission's proposed rule set a standard of

permissive reporting for general misconduct that implicates a lawyer's fitness to practice but mandated reporting where another lawyer committed a felonious criminal act that raised a substantial question as to that lawyer's honesty, trustworthiness or fitness. The Board of Governors rejected the First Commission's proposed rule. This rejection appeared to reflect two concerns. First, the Board seemed to be concerned that lawyers might find it difficult to comply with a rule that appeared to assume expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of the First Commission that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. In accordance with the Board of Governors' determination, a California counterpart to Model Rule 8.3 was not recommended for adoption.

In connection with rule 1-120, the Second Commission has received no public comments addressing ABA MR 8.3. OCTC has stated, however, that it plans to provide comments on whether the Second Commission should adopt a requirement that members report the misconduct of others.

On balance, while it is a close call, we tend to agree with the Board's prior decision not to recommend a reporting requirement. The pros of adopting a reporting requirement (whether in the mandatory form of ABA MR 8.3 or a hybrid permissive/mandatory form along the lines of the First Commission's proposed rule) include: (1) improving public protection by requiring lawyer reporting of certain known violations of the rules; and (2) bringing California's rules closer to the ABA Model Rules. There are also significant cons to a reporting requirement, including that either of the two forms of such a requirement would: (1) require interpretation of whether a known violation raises a substantial question as to (or implicates) the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects sufficient to trigger the reporting requirement; (2) despite the recognition that reporting could be trumped by the duty of confidentiality with respect to information learned in the course of representation of a client, pose a potential for conflict with that rule, or with the attorney-client relationship, to the extent lawyers might feel obligated to discuss waiver of confidentiality to further reporting interests of the lawyer rather than the client's own interests; and (3) pose a potential for conflicts with a lawyer's duty of loyalty if reporting posed a risk of adversely affecting a current or former client's interests. On balance, we tend to agree that the cons outweigh the pros,

particularly given that California has not had such a reporting requirement, and that the interpretations required for lawyers to determine the scope of any reporting requirement seems inconsistent with this Commission's charge to retain the historical nature of the California Rules as a "clear and enforceable articulation of disciplinary standards."

Equally important to our decision not to recommend adoption of a reporting requirement at this time, is that we believe consideration or adoption of such a requirement should not be part of the consideration of our proposed modifications to Rule 1-120. As discussed above, current Rule 1-120 addresses responsibility for other violations of the existing rules, and we have proposed two options for modifications to Rule 1-120 that accord with this general approach. Adoption of a reporting requirement would impose a new duty under the rules that we believe should be the subject of a stand-alone rule rather than incorporation into Rule 1-120. Given this, we believe consideration of a reporting requirement should be postponed until more robust public comment on the relative pros and cons can be solicited, including anticipated comments from OCTC and the State Bar Court.



## COMMISSION ASSIGNMENT DOCUMENT

### **CURRENT CALIFORNIA RULE 1-120** **“Assisting, Soliciting, or Inducing Violations”**

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

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

(There is no Discussion section to this rule.)

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

Rule 1-120 was originally a part of the comprehensive proposed rules considered by the Board in 1987. Rule 1-120 was entirely new and had not been contained in the original proposal of the first Commission. Therefore, no public comment had been solicited on the rule. Based on the recommendation of a Board committee, the full Board determined to withdraw the rule from the comprehensive proposal and circulate it for a 90-day public comment period. (At that time, the rule was numbered as proposed new rule 1-110. It was later renumbered as rule 1-120 when another proposal was adopted by the Board as rule 1-110.) The comment period extended from August 29, 1987, through November 30, 1987. Three comments were received on the rule.

The Bar Association of San Francisco stated that “[t]he Board of Directors adopted the position of the Association’s Ethics Committee in support of the rule itself.” The second comment was received from Robert C. Fellmeth, State Bar Discipline Monitor. Mr. Fellmeth urged adoption of the proposed rule. Mr. Fellmeth stated that in his position as Discipline Monitor, he had seen time and time again that a major cause of attorney misfeasance was the refusal to self-enforce ethical standards. Mr. Fellmeth believed that adoption of the rule would signal to the public that attorneys are taking steps necessary to identify and prohibit misconduct and that attorneys must not be a party to another attorney’s misconduct. The third comment, from the Los Angeles County Bar Association, stated that, “[t]he LACBA Board of Trustee approved this rule as proposed.”

Following discussion of the public comments, the Commission recommended that the rule be adopted in the form in which it was circulated for public comment. The Board Committee considered the recommendation of the Commission at its May 6, 1988 meeting and recommended that the Board adopt the rule as proposed by the Commission. At its June 18, 1988 meeting, the Board adopted the rule in the form recommended by the Commission and directed that the rule be forwarded to the California Supreme Court with a request that the Court approve the rule. (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. 16 – 19.)

COMMISSION ASSIGNMENT DOCUMENT

**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 1-120:

OCTC recommends expanding rule 1-120 to include additional conduct:  
Remove:

~~A member shall not knowingly assist in solicit or induce any violation of these rules or the State Bar Act~~

and replace with:

A member shall not:

(a) violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules re gulating the practice of law , knowingly assist or induce another to violate or attempt to violate the Rules of Professional Conduct or the State Bar Act or other rules regulating the practice of law, or do so through the acts of another;

(b) commit a criminal act;

(c) engage in conduct involving moral turpitude, dishonesty, corruption, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply that the m ember has an ability to influence a governmental agency or official or to achieve a result on behalf of a client by means that violate the Rules of Professional Conduct, the State Bar Act, or other law;

(f) knowingly assist, solicit, or induce a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law;

(g) engage in conduct that is unbecoming a member of the bar.

OCTC COMMENTS:

OCTC is suggesting that this rule be broadened and made more like ABA Model Rule 8.4.

Section (a) is similar to current rule 1-120, but makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar

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Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules.

This proposal, thus, does not change the purpose of the rule; it only provides greater detail and specificity. It will also prohibit suspended, resigned, inactive, or disbarred attorneys from attempting to use other entities such as law corporations to get around their suspensions or disbarments. As written, the current law corporation rules could be used by unscrupulous attorneys to avoid the consequences of their suspension by keeping their practice running with another attorney until the suspended attorney can return to practicing law. The new proposal would make such assistance more problematic.

Section (b) would codify two principles established by the Supreme Court case law, but which is not always evident from the language of Business and Professions Code Sections 6068(a), 6101, and 6102. Under existing case law, an attorney can be disciplined when the attorney is convicted of a felony or misdemeanor which involves moral turpitude or other misconduct warranting discipline. (See e.g. *In re Larkin* (1989) 48 Cal.3d 236, 245.) However, the statute only speaks of moral turpitude. This change would clarify the rules so it is clear that any conviction may be the basis for disciplinary action. (See e.g. Business and Professions Code Sections 6101(a).) This section would also make clear that even if an attorney is not convicted of a crime the State Bar can prosecute him for committing the act. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224.) Again, this section is not changing existing law, but only codifying it.

Section (c) already exists. See Business & Professions Code section 6106. It is only provided here so that major bases for discipline are set forth in one place.

Section (d) also codifies existing law. The ABA also uses the section to prevent bias, which is prejudicial to the administration of justice.

Section (e) prohibits using or asserting undue influence in proceedings or in connection with public officials and prohibits using means that violate the Rules of Professional Conduct or the State Bar Act.

Section (f) should be added to this rule. Current rule 1-700 of the Rules of Professional Conduct prohibits a member, who is a candidate for judicial office, from violating the Code of Judicial Conduct. In addition, current rule 1-710 of the Rules of Professional Conduct prohibits an attorney acting as temporary judge, referee, or court-appointed arbitrator from violating Canon 6D of the Code of Judicial Conduct. However, no rule prohibits an attorney from assisting someone in violating the judicial canons. Yet, current rule 1-120 prohibits a member from assisting in a violation of the Rules of Professional Conduct or the State Bar Act. Hence, proposed section (f) fills in the gap between rule 1-120 and 1-700 and prohibits an attorney from assisting, soliciting, or inducing a judge to violate the canons.

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Section (g) provides a basis for disciplining a member who engages in conduct that is unbecoming a member of the bar. In *In the Matter of Wensch* (9th Cir. 1996) 84 Fed.3d 1110 the Ninth Circuit declared the provision prohibiting offensive personality by members of the bar as codified in Business & Professions Code Section 6068(f) unconstitutionally vague. The Wensch decision has meant that certain conduct that many lawyers and the bar believe is improper could not be prosecuted. The language “conduct unbecoming a member of the bar” has been approved by the Ninth Circuit and it has been found to meet constitutional requirements. (See *United States v. Hearst* (9th Cir. 1981) 638 Fed.2d 1190, 1197.)

### 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 Section III above for OCTC’s recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA Model Rule 8.4.

B. Professional Competence staff observes that rule 1-120 does not impose a duty on a lawyer to report any unprivileged knowledge of another attorney’s misconduct that raises a substantial question as to that attorney’s honesty, trustworthiness or fitness as a lawyer. (See San Diego County Bar Association Ethics Opinion No. 1992-2 in which the San Diego Bar Association’s Ethics Committee opines that: “there is no ethical duty imposed by the California Rules of Professional Conduct upon California attorneys to report the misconduct of other attorneys. This is true regardless of the nature or magnitude of such misconduct.”). Attached is an excerpt from the first Commission’s report on “Rules and Concepts that were Considered but are Not Recommended for Adoption.” This report summarizes the State Bar’s consideration of ABA Model Rule 8.3 (“Reporting Professional Misconduct”) in connection with the work of the first Commission. Regardless of the prior consideration, the drafting team may want to take a fresh look at whether Rule 1-120 should be expanded to impose a permissive or mandatory duty to report another lawyer’s misconduct. This possible change could be viewed as an enhancement that promotes greater confidence in the legal profession and administration of justice in furtherance of the self-regulation responsibilities of a mandatory State Bar.

## V. **California Context:**

A. Professional Competence is not aware of any provisions in California law that are directly related to rule 1-120. However, there are some provisions that appear to be consistent with the general policy that a lawyer should be subject to regulation when assisting, soliciting or inducing another person’s actions.

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Examples include: (1) a lawyer's use of a "runner" or "capper" to procure clients (Business and Professions Code section 6150 et. seq.); (2) a lawyer aiding in the unauthorized practice of law (rule 1-300(B)); (3) a lawyer's association with, or employment of, a disciplined attorney (rule 1-311 and Business and Professions Code section 6133); (4) a lawyer's duty to supervise other lawyers and nonlawyers (rule 3-110 (and case law cited in the Discussion section)); and (5) a lawyer's role in special admissions (MJP) circumstances (such as serving as the attorney of record in a non-California lawyer's application to appear as counsel pro hac vice pursuant to Rule 9.40 of the California Rules of Court). Regarding the duty to report another person's misconduct, the California Code of Judicial Ethics includes a provision concerning a judge's possible reporting of misconduct by another judge (Canon 3D(1)) and a provision on a judge's possible reporting of lawyer misconduct (Canon 3D(2)).

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

A. See Section III above for OCTC's recommendation to expand the scope of rule 1-120 to include new standards that are derived from ABA Model Rule 8.4. The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120 as well as other provisions referenced in OCTC's recommendation. The chart is posted at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf)

The ABA provides a separate chart for Model Rule 8.4, Comment [3]:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4\\_cmt\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf)

B. See Section IV.B above for Professional Competence staff's discussion of a lawyer's duty to report the misconduct of another attorney. The ABA State Adoption Chart for Model Rule 8.3 is posted at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_3.authcheckdam.pdf)

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

A. The clean text of a proposed new rule 8.4 (including paragraph (a) which is the direct counterpart to rule 1-120) drafted by the first Commission and adopted by the Board to replace the provisions of rule 1-120 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although this proposed rule is much broader than rule 1-120, the drafting team may consider to what extent, if any, the public comments received might offer helpful information in analyzing the current rule and/or the OCTC recommendations.

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To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-120 is also enclosed with the public comments 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 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 team 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 the concept of prohibited "attempts" to violate the rules should be considered in connection with rule 1-120.

(2) Whether a duty to report known violations of the rules should be considered in connection with rule 1-120.

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

#### ***Cases that Might be Helpful in Considering Rule 1-120:***

- [\*McIntosh v. Mills\*](#) (2004) 121 Cal.App.4th 333, 350 [17 Cal.Rptr.3d 66]
- [\*Kitsis v. State Bar\*](#) (1979) 23 Cal.3d 857, 866 [153 Cal.Rptr. 836]
- [\*In re Arnoff\*](#) (1978) 22 Cal.3d 740, 744-745 [150 Cal.Rptr. 479]

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### **Cases that Might be Helpful in Considering the Issue of an Attempted Violation of a Rule.**

- [Walker v. State Bar](#) (1989) 49 Cal.3d 1107 [264 Cal.Rptr. 825]
- *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752
- *In the Matter of Scapa* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr.
- *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838
- *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47
- [Davis v. State Bar](#) (1983) 33 Cal.3d 231 [188 Cal.Rptr. 441]

### **Ethics Opinions that Might be Helpful in Considering the Issue of a Duty to Report Another Lawyer's Misconduct:**

- [San Diego County Bar Association Ethics Opinion No. 1992-2](#)
- Los Angeles County Bar Association Formal Opinion No. 440 (not available on the LACBA website, contact staff for a copy)
- [Bar Association of San Francisco Ethics Opinion No. 1977-1](#)

### **Cases Referenced in the First Commission's Proposed Rule 8.4:**

- [In re Kelley](#) (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]
- [In re Rohan](#) (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] (wilful failure to file a federal income tax return)
- [In re Morales](#) (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] (twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer)
- [Gassman v. State Bar](#) (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]
- [Jackson v. State Bar](#) (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]
- *In the Matter of Myrdall* (Review Dept. 1995 ) 3 Cal. State Bar Ct. Rptr. 363 (habitual disregard of clients' interests)
- [Grove v. State Bar](#) (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]
- [Martin v. State Bar](#) (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]
- [Selznick v. State Bar](#) (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]
- *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 (pattern of misconduct)
- [In re Calaway](#) (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805] (act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings)
- [In re Craig](#) (1938) 12 Cal.2d 93 [82 P.2d 442]
- [Ramirez v. State Bar](#) (1980) 28 Cal. 3d 402, 411 [169 Cal. Rptr. 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth)

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- *In the Matter of Anderson* (Review Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment)
- [\*Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman\*](#) (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice)

### ***Selected State Bar Act Sections:***

1. [Business and Professions Code § 6068\(a\)](#)
2. [Business and Professions Code § 6103](#)
3. [Business and Professions Code § 6106](#)