DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-300

Lead Drafter: Mark Tuft
Co-Drafters: Jeffrey Bleich, Hon. Karen Clopton
Meeting Date: May 29-30, 2015

I. CURRENT CALIFORNIA RULE

Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Discussion:

None

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.

III. PROPOSED RULE (CLEAN)

Rule 1-300 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(A) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) assist a person or entity in the unauthorized practice of law.

(B) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (A) prohibits the unauthorized practice of law by a lawyer admitted to practice law in California, whether through the lawyer's own conduct or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (B)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court 9.40 [counsel pro hac vice], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program], 9.44 [registered foreign legal consultant]; 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services].

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-300)

Rule 1-300 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(A) A ~~member~~ lawyer admitted to practice law in California shall not:

(~~B~~)(1) practice law in a jurisdiction ~~where to do so would be~~ in violation of ~~regulations~~ the regulation of the legal profession in that jurisdiction; or

(~~A~~)(2) ~~aid~~ assist ~~any~~ a person or entity in the unauthorized practice of law.

(B) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (A) prohibits the unauthorized practice of law by a lawyer admitted to practice law in California, whether through the lawyer's own conduct or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (B)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court 9.40 [counsel pro hac vice], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program], 9.44 [registered foreign legal consultant]; 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services].

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V. PUBLIC COMMENTS SUMMARY

- Mr. Gerald McNally, a member of the State Bar, submitted a comment as an individual, (attached), that complained about the substandard legal services that are being provided by paralegals and provided an example of such work. (See Concepts Rejected, discussion re Comment [2], for Drafting Team's Response).

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 4/20/2015:**

  Rule 1-300(B) should be amended to prohibit not only the practice of law in a jurisdiction where to do so would be in violation in that jurisdiction, but also holding oneself out as entitle to practice law in a jurisdiction where one is not entitled to do so. This would clarify rule 1-300(B) and conform it to Business and Professions Code, sections 6125 and 6126.

- No Comment was received from the State Bar Court.

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

Adoptions of Model Rule 5.5. As discussed below in the section on state adoptions of Model Rule 5.5, most jurisdictions have adopted some version of current Model Rule 5.5 that includes the model rule's multijurisdictional practice provisions.

- Illinois Rule 5.5 is representative of how Model Rule 5.5 has been adopted or revised in the various jurisdictions:

  Illinois Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

  (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

  (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

  (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

  (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

  (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Jurisdictions that have not adopted Model Rule 5.5's MJP Provisions. As noted below under state adoptions of Model Rule 5.5, there are four jurisdictions, that have rules substantially similar to California Rule 1-300. They are:

- **Hawaii Rule 5.5**

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

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- **Mississippi Rule 5.5**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Montana Rule 5.5**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Texas Rule 5.05**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The ABA State Adoption Chart for Model Rule 5.5, which is analogous to rule 1-300, was last revised on May 5, 2015, and is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.authcheckdam.pdf [Last visited 5/7/15]

In addition, the ABA has issued an Adoption Chart regarding the various jurisdictions' adoption of the multijurisdictional practice (MJP) principles contained in Model Rule 5.5, last revised on April 28, 2014. It is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf [Last visited 5/10/15]

- 14 jurisdictions have adopted a rule of professional conduct identical to Model Rule 5.5 (AK, AR, IL, IN, IA, MD, MA, NE, NH, RI, UT, VT, WA, WV);

- 30 jurisdictions have adopted a rule of professional conduct substantially similar to Model Rule 5.5 (AL, AZ, CO, CT, DE, FL, GA, ID, KS, KY, LA, ME, MI, MN, MO, NV, NJ, NM, NC, ND, OH, OK, OR, PA, SC, SD, TN, VA, WI, WY);

- Two jurisdictions (CA, DC[1]) have rules of court that address substantially the same issues as are addressed in Model Rule 5.5;

- Four jurisdictions have adopted a rule of professional conduct substantially different from Model Rule 5.5 (HI, MS, MT, TX); these jurisdictions have retained their version of Model Rule 5.5 that pre-dates the 2002 Ethics 2000 revisions to Model Rule 5.5, as well as the 2003 ABA MJP Commission revisions to Model Rule 5.5, and are similar to current California Rule 1-300.

- One jurisdiction has a recommendation before its highest court to adopt a rule substantially similar to Model Rule 5.5 (NY).

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

Concepts Accepted (Pros and Cons):

- Changing the title of the current rule by adding "Multijurisdictional Practice of Law"
  - Pros: Consensus of drafting team is it more accurately describes the content of the proposed rule if the Commission agrees that paragraph (B) should added to the current rule. More important, because California addresses multijurisdictional practice ("MJP") in Rules of Court, (e.g., Rules 9.40 – 9.48) but the ABA Model Rules and most jurisdictions address MJP in their Rules of Professional Conduct, proposed rule 1-300 would apply to out-of-state lawyers authorized to practice in California and would provide such lawyers (who would naturally expect to find the MJP rules in the CRPC's) with an important point of reference for locating the relevant California regulations concerning MJP.
  - Cons: Drafting team did not identify any cons so long as Commission agrees to include paragraph (B).
- Substitute the term "lawyer" for the term "member".
  - Pros: The rule's use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term "lawyer." More important, using "lawyer" is particularly apt in proposed rule 1-300, which addresses in paragraph (B) the concept of multijurisdictional practice, i.e., the practice of law in California by lawyers who by definition are *not admitted* in California. It is more accurate to draw a distinction between a "lawyer admitted to practice law in California" (paragraph (A)) and a "lawyer who is not admitted to practice law in

[1] See D.C. App. Rule 49, available at: http://www.dccourts.gov/internet/documents/rule49.pdf [Last visited 5/10/15]

California" (paragraph (B)) than to have the distinction rest on a term, "member," that is familiar only in California.
    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
- Add the phrase "admitted to practice law in California"
    - Pros: See Pros for substituting "lawyer" for "member," above. Implied in the decision to substitute "lawyer" for member is the need to add the phrase "admitted to practice law in California" to demarcate that paragraph (A) applies to lawyers who are "admitted" to practice law in California, i.e., members of the California bar.)
    - Cons: Drafting team did not identify any cons so long as Commission agrees to substitute "lawyer" for "member."
- Reverse the order of current rule 1-300(A) and (B) in the proposed rule as proposed paragraphs (A)(2) and (A)(1), respectively.
    - Pros: First, addressing the lawyer's own unauthorized practice (current paragraph (A)) logically should be addressed in the rule before the lawyer's assisting another person's unauthorized practice. Second, this logic was apparently recognized by the ABA in 1983 when the Kutak Commission similarly reversed the order of the concepts when it revised ABA Code of Professional Responsibility ("ABA Code"), DR 3-101, from which Rule 1-300 is derived, and renumbered it MR 5.5. Third, it removes an unnecessary difference between California and the trend in nearly every other jurisdiction to first address the lawyer's own violation and then address the lawyer assisting in a violation. Fourth, a non-substantive change is to place current (A) and (B) as subparagraphs (2) and (1) of proposed paragraph (A), respectively. This latter change tracks the organization of Model Rule 5.5, with proposed paragraph (A) applying to lawyers "admitted" in California and proposed paragraph (B) applying to lawyers "not admitted" in California and would provide less confusion if the Commission agrees that the concept of multijurisdictional practice should be addressed in rule 1-300. Finally, setting out the provisions in Model Rule 5.5(a) as subparagraphs provides for better clarity.
    - Cons: Drafting team did not identify any cons so long as Commission agrees to substitute "lawyer" for "member."
- In proposed paragraph (A)(1) [current 1-300(B)], substitute the language of the first clause of Model Rule 5.5(a) for the language of current rule 1-300(B).
    - Pros: First, the change is not substantive but merely an updating of the language to conform to the changes to MR 5.5 made by the ABA Ethics 2000 Commission in 2002. The current California language is verbatim from ABA Code, DR 3-101(B) that was revised by Ethics 2000. The Ethics 2000 revisions have been adopted by a substantial majority of jurisdictions. Second, the Ethics 2000 language reduces the number of words and eliminates awkward phrasing (i.e., "where to do so would").
    - Cons: Drafting team did not identify any cons.

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- In proposed paragraph (A)(2) [current 1-300(A)], substitute the word "assist" for "aid" in current rule 1-300(A).
  - Pros: No substantive change in meaning is intended or likely to result from changing "aid" to "assist." Current rule 1-300's wording is derived from the ABA Code, DR 3-101(A), which used the word "aid." The ABA substituted "assist" for "aid" in 1983 with no known adverse consequences. Moreover, a substantial majority of jurisdictions have followed suit and adopted the 1983 Model Rule word change. Further, conforming the language of proposed paragraph 1-300(A)(2) to that of the model rule and the substantial majority of jurisdictions is warranted for the same reasons outlined above, i.e., proposed rule 1-300 (together with a rule similar to Model Rule 8.5 [current rule 1-100(D)) functions as an the entry point to the California Rule for out-of-state lawyers.
  - Cons: There is a remote possibility that changing "aid" to "assist" would generate litigation over whether the change is substantive.
- In proposed paragraph (A)(2) [current 1-300(A)], substitute the word "a" for "any."
  - Pros: No change in meaning is intended or likely. Substituting the article "a" for the adjective "any" is simply a modern, preferred convention for writing rules.
  - Cons: The drafting team did not identify any cons.
- Add proposed paragraph (B) [based on Model Rule 5.5(b)], which applies concepts regarding UPL/MJP to out-of-state lawyers and parallels the prohibitions stated in Bus. & Prof. Code § 6126.
  - Pros: ***First***, as noted, proposed rule 1-300, together with a rule similar MR 8.5, functions as an entry point for out-of-state lawyers. The rule should alert such lawyers to limitations on their ability to practice even if they are authorized under one of the MJP rules of court. Derived from MR 5.5(b), proposed paragraph (B) contains two prohibitions on lawyers not admitted in California who seek to practice in California: (1) prohibits such lawyers from establishing or maintain a resident office – or any other systematic or continuous presence in California unless the lawyer is authorized to do so, e.g., if the lawyer is a registered legal services lawyer (Rule of Court 9.45); registered in-house counsel (Rule of Court 9.46); or registered foreign legal consultant (Rule of Court 9.44); and (2) prohibits all non-admitted lawyers, *including* those *authorized* to practice in California under Rules of Court 9.40 – 9.48, from holding himself or herself out to the public or otherwise representing that he or she is *admitted* to practice law in California.
    Second, proposed rule 1-300(B)(2) is the drafting team's best response to OCTC's recent request that: "Rule 1-300(B) should be amended to prohibit not only the practice of law in a jurisdiction where to do so would be in violation in that jurisdiction, but also holding oneself out as entitle to practice law in a jurisdiction where one is not entitled to do so. This would clarify rule 1-300(B) and conform it to Business and Professions Code, sections 6125 and 6126." (See 4/20/15 OCTC Memo [Kim] to Chair & Commission. To the extent OCTC appears to have requested that the prohibition be applied to State Bar members

(current paragraph (B) applies to "members" engaging in extrajurisdictional practice), the request was confusing for two reasons: First, although OCTC stated such a provision would conform current 1-300(B) to sections 6125 and 6126, section 6125 in fact only states that a "person shall not practice law in California unless the person is an active member of the State Bar." By definition, a "member" to whom current 1-300(B) applies is not covered by section 6125. Further section 6126 prohibits lawyers not admitted or authorized to practice law in California from holding themselves out as "practicing or being entitled to practice" unless they are "an active member of the State Bar." Again, by definition, a "member" to whom current 1-300(B) applies is not covered by section 6125. The proposed amendment would not conform the rule to the statute sections. Second, the drafting team is not aware of any jurisdiction that has such a prohibition, i.e., prohibits lawyers admitted in the regulatory authority's jurisdiction from holding themselves out as being admitted in another jurisdiction. To the extent there is a prohibition on "holding out," it is the host jurisdiction that prohibits the conduct of "out-of-state" lawyers holding themselves out to be admitted in the host jurisdiction. Such a prohibition is the intent of proposed paragraph (B)(1). It is more aligned with the host jurisdictions interest in protecting its residents, i.e., the "public," than is the proposed OCTC request.

Third, the construction of proposed paragraph (B) affords public protection. Proposed paragraph (B)(1) recognizes that in certain situations, (e.g., pursuant to Rules 9.44, 9.45 and 9.46) lawyers not admitted to practice in California nevertheless can establish or maintain an office but prohibits lawyers not so authorized from doing so. Further, proposed paragraph (B)(2), by not containing a savings clause as in (B)(1) ("except as authorized"), prohibits even lawyers otherwise authorized to practice in California from holding themselves out as being "admitted to practice" in California.

Fourth, proposed paragraph (B) serves as a necessary predicate in the black letter of the rule for proposed comment [2], which provides important information about California's regulatory structure for MJP which, as noted, differs substantially from that in other jurisdictions and which regulate MJP through their Rules of Professional Conduct.

Fifth**,** proposed paragraph (B) tracks Model Rule 5.5(b), which a substantial majority of the states have adopted.

Drafting Team Note: Please refer to Section 1 (OPEN ISSUES/Concepts for the commission to consider) for a recommendation regarding MJP regulation in California.

- Cons: The drafting team did not identify any cons.

- In proposed paragraph (B)(1), add the word "resident" as a modifier of "office," add the phrase "or maintain," and insert the conjunction "or" between the terms "systematic" and "continuous presence."
  - Pros: Although Model Rule 5.5 does not contain any of the modifications listed, the drafting team made those revisions to MR 5.5(b)(1) to conform proposed

paragraph (B)(1) to the language used in Rules of Court 9.47 [Attorneys practicing law in California as part of litigation] and 9.48 [Non-litigating attorneys temporarily in California to provide legal services]. Although the drafting team determined that the use of "or" is not only inconsistent with the Model Rule and rules in most jurisdictions and can cause mischief for out-of-state lawyers, the team concluded that the rule's language should be conformed to the language of the Rules of Court.

Drafting Team Note: Regarding the inconsistencies between California's MJP regulatory structure and that in a substantial majority of jurisdictions, please refer to Section IX (OPEN ISSUES/Concepts for the commission to consider) for a recommendation regarding MJP regulation in California.

  - Cons: The aforementioned inconsistency of language between California and a substantial majority of other jurisdictions operates to undermine the attainment of a national standard in this area and will likely continue to be a source of confusion.

- 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.
- Add Comment [1] to the proposed rule.
  - Pros: Based on a comment to RRC1's proposed rule 5.5. Although current rule 1-300 does not have any comments, the draft team consensus was that this comment provided helpful orientation regarding the application of proposed paragraph (A) only to lawyers who are *admitted* to practice in California. In tandem with Comment [2], which expressly states it applies to lawyers who are *not admitted* in California, the comments help clarify the regulatory scope of each proposed paragraph.
  - Cons: Proposed comment [1] does not clarify the rule so much as it restates the rule.
- Add Comment [2] to the proposed rule.
  - Pros: As noted, proposed rule 1-300(B) applies to out-of-state lawyers who are authorized to practice in California and comment [2] is intended to provide a useful entry point for out-of-state lawyers unfamiliar with California law to the regulatory framework of MJP in California. Although the savings clause (B)(1) ("except as authorized") in the black letter of proposed paragraph (B)(1) informs such lawyers that an MJP framework exists in California, there is no explanation of what that framework is and where it might be located. Proposed Comment [2] provides that information by referencing readers to specific Rules of Court that establish the framework. Alerting out-of-state lawyers to the California Rules of Court requirements enhances public protection. Further, by listing the relevant

Rules of Court with their subject matter, the comment clarifies what is meant by the phrase, "authorized by these Rules or other law."

- Cons: Proposed paragraph (B)(1), if adopted, would merely inform a lawyer of the existence of an MJP regulatory framework in California. A set of minimum standard disciplinary rules is not the place to provide guidance on where to find the relevant law that establishes that framework.

Concepts Rejected (Pros and Cons):

- Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
  - 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. A substantial majority of jurisdictions have been successful in converting to the Model Rule numbering system without apparent adverse consequences. California lawyers are familiar with the ABA Model Rule numbering system in having to pass the MPRE to be admitted to practice law in California. The number of lawyers admitted to practice in ABA Model Rule states and authorized to practice in California has increased significantly since California's rules were last updated.
  - 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.
  - **Drafting Team Note**: The drafting team is not necessarily opposed to considering the adoption of, or even adopting, the ABA rule numbering and formatting approach but recommends that the decision whether to do so be deferred to a time when the Commission addresses the rule numbering system in general.
- In proposed rule 1-300(A)(2) [current 1-300(B)], include the word "knowingly" to modify "assist."
  - Pros: Including "knowingly" in the rule would apply a mens rea requirement for assisting a person in the unauthorized practice of law. RRC1 included "knowingly" is its version of the rule, which OCTC approved and the Board adopted. If the Model Rule definition of "know" or "knowing" were to be adopted,

actual knowledge could be inferred from the surrounding circumstances. (Model Rule 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."
    - Cons: Including the word "knowingly," which would require actual knowledge, would narrow the rule's application and make it less enforceable. Also, the term "knowingly" is not used in the rule adopted by any other jurisdiction.
- In proposed rule 1-300(A)(2) [current 1-300(B)], substitute the clause, "in the performance of activity that constitutes the unauthorized practice of law" for the phrase "the unauthorized practice of law."
    - Pros: This clause, which has been adopted by several jurisdictions,[2] is a more precise description of the conduct that is prohibited under the rule.
    - Cons: The extra verbiage adds nothing to the rule's scope or application. The substantial majority of jurisdictions do not use it.
- Add new paragraph (A)(3) which would have provided that a lawyer admitted in California shall not "hold out to the public or otherwise represent that the lawyer is admitted or authorized to practice in another jurisdiction unless the lawyer is entitled to do so."
  Note: This issue has already been addressed under Concepts Accepted. Please refer to the discussion concerning proposed new paragraph (B).
- Add to proposed comment [2] a reference to Business & Professions Code §§ 6450 – 6456 (regulation of paralegals).
  Note: this issue was addressed in consideration of a public comment received as part of the Commission's outreach with a 45-day public comment period ending on June 16, 2015. Without determining the pros or cons of including such a reference, the drafting team determined that including the reference in a set of *lawyer* disciplinary rules was beyond the scope of the Commission's charge.
- Add a comment, similar to Discussion ¶. 1 in current rule 1-311, a comment that provides guidance on what constitutes the practice of law.
    - Pros: Would provide guidance to lawyers on conduct that is viewed as the unauthorized practice of law. Current rule 1-311 includes a comment that provides references to California cases that have addressed what constitutes the practice of law in California.
    - Cons: Defining the practice of law has proven to be an elusive endeavor, the ABA having abandoned a project to do so over a dozen years ago. See http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html Moreover, the California Supreme Court in *Birbrower Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 129, held that the determination of what constitutes the practice of law "in" California must be decided on the facts of each case.

[2] There are six jurisdictions that have adopted this language: Alabama, Colorado, Hawaii, Mississippi, New Jersey and Texas.

Nevertheless, as noted, current rule 1-311 includes a comment that provides references to California cases that have addressed what constitutes the practice of law in California. If the Commission were so inclined, a cross-reference to that comment might be provided in rule 1-300.

Changes in Duties/Substantive Changes to the Current Rule:
[Insert summary of Changes in Duties or Substantive Changes Here]

- Adding proposed paragraph (B) and its subparts is a substantive change to the extent that neither current rule 1-300 nor any other California rule of professional conduct addressed the conduct described in the paragraph. However, paragraph (B)(1) reflects the current state of the law regarding multijurisdictional practice as regulated by Rules of Court 9.40 – 9.41 and 9.43 – 9.48. In addition, paragraph (B)(2) conforms the rules of professional conduct to Business and Professions Code § 6126 and the rule in a substantial majority of the other states. Therefore, it is arguable that there has been no change in lawyer duties by the inclusion of paragraph (B) in the rule.

Non-Substantive Changes to the Current Rule:
[Insert summary of Non-Substantive Changes] [E.g., changing passive voice to active voice, substituting "must" for "shall," etc.]

- Substituting "lawyer admitted to practice in California" is a non-substantive change. It is merely another way of stating "member of the State Bar," who would be admitted to practice in California. It provides a counterpoint to the term "lawyer not admitted to practice in California" which is the object of regulation in proposed paragraph (B).
- In proposed paragraph (A)(1), substituting the model rule language for the language in current rule 1-300(B) is intended as a non-substantive change. It is merely an update of the language of 1-300(B), which is nearly verbatim from the 1969 ABA Code.
- In proposed paragraph (A)(2), substituting "assist" for "aid," and "a" for "any" are also intended as non-substantive. See Concepts Adopted, above.
- Changing the name of the "Discussion" section to "Comment" is a non-substantive change, recommended to remove unnecessary differences between the California rules and the rules in other jurisdictions, as well as the Code of Judicial Conduct.
- Adding comments [1] and [2] are not intended as substantive changes except to the extent comments have been added to a rule that previously had no comments. They are explanatory and clarify the rules' scope. They do not extend the scope of the rule or provide for an exception to the rule that is not in the black letter rule itself.

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Alternatives Considered:

- Whether to request the Supreme Court to revisit the MJP Regulatory Framework currently in existence in California. See discussion in Section IX. OPEN ISSUES/Concepts for the commission to consider.

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 that this issue be deferred to a time when the Commission addresses the rule numbering system in general.

- Changing "member" to "lawyer" throughout the rules. The drafting team recommends that "lawyer" be substituted for "member" in proposed rule 1-300 and throughout the entire set of rules.

- Whether to request the Supreme Court to revisit the MJP Regulatory Framework currently in existence in California. Although the drafting team agrees that rule 1-300 should track the current MJP rules in language, (see Concepts Accepted, discussion re rule 1-300(B)(1)), this raises several concerns. One recurring problem a drafting team member has experienced is advising out-of-state lawyers whose law firms have "resident" offices in California. It is difficult to advise the inquiring firm on the extent to which its lawyers may utilize the California office while practicing in this state "temporarily." Similar issues are raised for in-house counsel from other states who are not admitted or registered to practice in California and who temporarily work in a resident corporate law office or law department. In addition, most jurisdictions follow the Model Rule 5.5(b)(1) in prohibiting a non-admitted lawyer from establishing an office "or other systematic **and** continuous presence in the host jurisdiction, whereas California's Rules of Court employs the term "systematic **or** continuous presence. What is meant by use of "or" instead of "and" is undecided and has been a source of confusion not only among out-of-state lawyers, but also by California admitted lawyers who frequently associate with out-of-state lawyers in practicing law in California and who are concerning about not aiding the unauthorized practice of law.

  The drafting team consensus is that the Commission recommend that the Supreme Court appoint a committee to assess the MJP situation in California since the adoption of CRC 9.45- 9.48 over 10 years ago. The Supreme Court of California Multijurisdictional Practice Implementation Committee's Final Recommendations and Proposed Rules (March 10, 2004) includes the recommendation that a committee be created to "monitor the multijurisdictional practice of law in California and throughout the United States; assess the effects of the proposed rules in California and of similar rules in other jurisdictions; and report to the Supreme Court on these matters within five years after implementation of the proposed rules." This recommendation should be implemented.

There are other reasons for recommending a fresh look at the four MJP situations (Rules 9.45 – 9.48) for enabling out-of-state lawyers to practice in California, including other similar provisions that "authorize" lawyers not admitted in California to practice here (e.g., registration of foreign lawyers temporarily practicing in California, military spouses, major disasters, etc.).

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

- None

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

Adopt proposed amended rule 1-300.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed amended rule 1-300 as set forth in this report.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

CURRENT CALIFORNIA RULE 1-300
"Unauthorized Practice of Law"

I. Text of Current Rule:

Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(There is no Discussion section to this rule.)

II. Background/Purpose:

The current rule 1-300 originated in 1928 as a part of former rule 3. Pursuant to then section 29 of the State Bar Act, the rule became operative on July 24, 1928. (See The State Bar Journal (July 1928) Vol. III, No. 1, p. 17.) The pertinent part of rule 3 originally read: "A member of the State Bar shall not . . . directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom."

For the purposes of clarification, the State Bar of California amended rule 3 in September, 1942. The Supreme Court approved the amendments which became operative on December 1, 1944. The amendments included dividing rule 3 into two sentences and revising the pertinent part of the rule to read: "A member of the State Bar shall not . . . directly or indirectly aid or abet any person not so licensed, or any association or corporation, to practice law or to receive compensation therefrom." (See The State Bar Journal (November-December 1944) Vol. XIX, No. 6, p. 416 & 418.)

In 1972, the State Bar of California's Special Committee to Study the ABA Code of Professional Responsibility recommended implementing the numbering system and format of the ABA Code of Professional Responsibility as adopted by the American Bar Association on February 24, 1970. This recommendation included renumbering rule 3 as rule 3-101, and entitling it "Aiding Unauthorized Practice of Law". Proposed rule 3-101 contained two subparts. Subpart (A) provided: "A member of the State Bar shall not aid any person, association, or corporation in the unauthorized practice of law." Subpart (B) provided: "A member of the State Bar shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." Proposed rule 3-101 became operative on January 1, 1975.

In 1989, rule 3-101 was amended and renumbered as rule 1-300 as part of a comprehensive revision and renumbering of the entire California Rules of Professional Conduct. Rule 1-300 was titled "Unauthorized Practice of Law." Under subpart (A), the words "association, or corporation" were replaced with "or entity." The rule was further amended by deleting the phrase "of the State Bar" from both subpart (A) and (B). The amended rule became operative May 27, 1989. Rule 1-300 has not since been amended.

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 1-300:[1]

OCTC recommends clarifying the rule pertaining to the unauthorized practice of law. The proposed new language is as follows:

. . .

> (C) A member must not practice law with or in the form of a law corporation or association authorized to practice law for a profit if:
>
> > (1) a non-lawyer, or suspended or disbarred or resigned or inactive member owns any interest therein;
> >
> > (2) a non-lawyer, or suspended or disbarred or resigned or inactive member, or an individual not licensed in California has the right to direct or control the professional judgment of the member.

OCTC COMMENTS:

OCTC recommends no changes to sections (A) and (B) of rule 1-300, but does recommend a new section (C), which will be applicable to law corporations. Law corporations are entitled to practice law in this state so long as they meet the requirements set forth in the law corporation rules. While the law corporation rules prohibit non-lawyers from owning or directing such entities, there is no stated consequence for the individuals who participate in such an operation. This new section, then, would attempt to fill that gap and make clear that lawyers who participate in such activity will be considered to have aided in the unauthorized practice of law, whether or not they have any ownership interest in the entity. It will also help prevent a suspended or disbarred attorney from directly or indirectly controlling a law corporation when they are not entitled to practice. As currently written, some suspended attorneys could attempt to control a law corporation and its employees while ineligible to practice law.

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.)

[1] OCTC's 2001 comment on rule 1-300 has also been provided to the Commission's rule 1-310 ("Forming a Partnership with a Nonlawyer") drafting team because it may be relevant to that team's consideration of possible rule revisions to rule 1-310.

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC.

B. Lack of case law citations describing what conduct constitutes the practice of law. Professional Competence staff observes that compliance with this rule involves an understanding of what conduct constitutes the practice of law in California. Rule 1-300 provides no definition (but compare the third paragraph of the Discussion section to rule 1-311 that provides case law citations). Case law provides a generalized definition. (See, e.g., *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P. 363] "(A)s the term is generally understood, the practice of the law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.") Of this case law definition, the Supreme Court has said "It must be conceded that ascertaining whether a particular activity falls within this general definition may be a formidable endeavor." (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [86 Cal.Rptr. 673].)

In light of the foregoing discussion, the drafting team may want to consider whether rule 1-300 should be amended to include a Discussion section that provides a reference to case law that describes what conduct constitutes the practice of law. This could be implemented by adding case citations to rule 1-300 or by adding a cross reference to updated case citations in the existing Discussion section to rule 1-311. This is a possible deficiency in the current rules because Supreme Court case law concerning the unauthorized practice of law has been published since rule 1-300 was last revised. (See, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 130 [70 Cal.Rptr.2d 858], in which the Court disapproved a prior case and its progeny to the extent that those prior cases were inconsistent with the Court's refinement of the definition of the practice of law.) The Commission is charged with considering revisions that are necessary to address changes in the law.

V. California Context:

A. Aiding in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See, *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also, Opinion of the California Attorney General No. 93-303 (August 30, 1993).) Similar to the approach taken in rule 1-300(A), rule 1-311 regulates an attorney's employment or professional association with a disbarred,

suspended, resigned, or involuntarily inactive member. Underlying both rules is the policy of protecting the public from lawyers or nonlawyers deemed unqualified to provide legal services.

B. Corporations practicing law. Rule 1-300(A) includes a prohibition against aiding an *entity* in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code sections 6160 et. seq. (re law corporations) and sections 6174 and 6174.5 (re limited liability partnerships).) Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].)

C. Practicing law in violation of another jurisdiction's regulation of the profession in that jurisdiction. Other laws regulate a California lawyer's professional conduct in another jurisdiction. The statutory duties of an attorney include a duty to report to the State Bar the "imposition of discipline against the attorney by a professional. . . disciplinary agency, whether in California or elsewhere." (Business and Professions Code section 6068(o)(6).) A California lawyer may be subject to expedited disciplinary proceedings in California if it is determined that the California lawyer committed professional misconduct in another jurisdiction. A certified copy of a final order from that jurisdiction is conclusive evidence of the lawyer's culpability. (Business and Professions Code section 6049.1.)

VI. Approach In Other Jurisdictions (National Backdrop):

A. Other jurisdictions. Similar to rule 1-300(A), other jurisdictions prohibit a lawyer from assisting another in the unauthorized practice of law. Similar to rule 1-300(B), other jurisdictions prohibit a lawyer from practicing in a jurisdiction in violation of the regulations of the legal profession in that jurisdiction. A counterpart to both of these subjects is found in ABA Model Rule 5.5(a). The ABA State Adoption Chart for ABA Model Rule 5.5 is found at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.authcheckdam.pdf

ABA Model Rule 5.5 addresses both unauthorized practice of law and multijurisdictional practice. The latter topic is addressed in California Rules of Court, rules 9.45 to 9.48.

B. Anticompetitve implications. A state's prohibition of conduct constituting the unauthorized practice of law may be subject to challenge as anticompetitive activity not covered by state action immunity. (See *Surety Title Insurance Agency, Inc. v. Virginia State Bar* (E.D. Va. 1977) 431 F.Supp. 298, rev. on other grounds 571 F.2d 205, cert. denied 98 S.Ct. 2838. Cf. *North Carolina Board of Dental Examiners v. FTC* (2015) 135 S.Ct. 1101 [15 Cal. Daily Op. Serv. 1880].)

C. Federal preemption. A state's prohibition of conduct constituting the unauthorized practice of law may be subject to federal preemption. In particular, practice of law before a federal tribunal cannot be prohibited by state prohibitions against the unauthorized practice of law. (See *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322] in which the United States Supreme Court held that Florida could not enjoin a lawyer, who was not a member of the Florida Bar, but was registered to practice before the U.S. Patent Office, from preparing and prosecuting patent applications in Florida, notwithstanding that such activity constituted the practice of law in Florida. See also *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 [38 Cal.Rptr.3d 759].)

VII. Public Comment Received by the First Commission:

The clean text of a proposed new rule 5.5 drafted by the first Commission and adopted by the Board to replace rule 1-300, together with the synopsis of public comments received on that proposed rule and the full text of those comments are attached. Although this proposed rule differs from rule 1-300, 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, a redline comparison of the proposed rule showing changes to rule 1-300 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 issue that the drafting team might consider.

> Whether the rule should be revised to add references to case law that address conduct constituting the practice of law in California. (See, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858].)

The drafting team need not address this issue. 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 decision by the first Commission and the Board to address the issue. (Note: The issue listed above may have already been mentioned earlier in this assignment document. 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.)

IX. Research Resources:

- *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858]
- *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896
- Business and Professions Code sections 6125 et. seq.
- Business and Professions Code sections 6132 and 6133
- Business and Professions Code sections 17200 – 17208
- California Rules of Court, rules 9.45 – 9.48, 9.40, 9.41, 9.43 & 9.44 (re multijurisdictional practice)
- *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]
- *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334
- 28 U.S.C. sections 515-519, 530C(c)(1)
- 35 U.S.C. section 32(b)(2)(D)