

**RRC2 – Rule 1-120 [5.1, 5.2, 5.3, 8.3, 8.4]  
E-mails, etc. – Revised (5/26/15)  
Drafting Team: Cardona (Lead), Langford**

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## **Intra-Commission Emails Following Agenda Mailing:**

**May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:**

I have the following thoughts on your proposed draft ---

1) I disagree with your inclusion of "attempt" in proposed paragraph (a)(i). It was the consensus of the first Commission that the possibility of discipline for an attempted violation should be examined on a Rule by Rule basis, and it therefore did not include attempts in its Rule 8.4 (and this was approved by the Board of Governors). A prohibition on attempted violations is a fine example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid. Here is an example of my concerns: Lawyer miswords a fee agreement so that it provides for a fee that exceeds the statutory limits set in Bus. & Prof. C. § 6146 and therefore calls for a fee that is "illegal" within the meaning of Rule 1.5/4-200. However, Lawyer catches her drafting error before the client has signed the fee agreement and offers a corrected proposal that the client does sign. Lawyer has not violated the Rule 1.5/4-200 prohibition b/c she did not "enter into an agreement for, charge, or collect an illegal .... fee." I do not believe Lawyer should be involved in the disciplinary system in these circumstances. I think the recommendation to include attempted violations in this Rule is based on a misunderstanding of the first Commission's reasoning. Beginning at p. 3 of the Comments & Discussion memo, it is explained that including attempts would provide "clear and enforceable articulation of disciplinary standards", but that follows from the idea that the first Commission rejected including attempted violations so that they could be considered on a case-by-case basis. I don't believe the first Commission ever suggested that the disciplinary authorities should have the authority to decide on their own whether to charge an attempted violation, and there was no proposed Rule that gave that authority. The idea was that there should be a Rule-by-Rule decision on whether an attempt should be violated. I believe the result of this was that the first Commission did not include attempted violations in any Rule it sent to the Board of Governors or that was approved by the Board.

2) I disagree with your inclusion of "ratify" in proposed paragraph (a)(iii). This concept comes from MRs 5.1 and 5.3, which is where I believe it should be addressed. I think the same is true of proposed paragraphs (b), (c), (d), and (e). Among other things, placing Rule 5.1-5.3 in Rule 8.4/1-120 would make them more difficult to locate and would make them harder to understand by mixing them with the distinct Rule 8.4 concepts. B/c of the possibility that the Commission will decide to add the supervising and subordinate lawyer concepts to this Rule, I have attached for your information a Memo I did to the Rule 1.1/3-110 drafting team that includes an analysis of Rules 5.1-5.3. This is an initial draft on which the drafting team has not commented.

3) I disagree with proposed paragraph (a)(iv) in two ways:

a. Unlike the first Commission's proposed Rule 8.4(e) (and the MR version) it does not prohibit a lawyer from saying that she has "an ability to influence improperly a government agency or official". I believe it should, and I do not see any explanation for why this was not included.

b. The (a)(iv) prohibition is limited to "these Rules or the State Bar Act." The first Commission in its Rule 8.4(e) included "other law". I do not see any reason for not prohibiting a lawyer from saying that she can achieve a result in violation of other legal prohibitions, and I do not see any explanation for this.

4) Although this report refers to MR 8.4, its only explanation for not including any version of the first Commission's Rule 8.4(b), (c), (d), or (f) is in the attached Comments & Discussions memo, which argues that they should be in rule 3-110/1.1 (competence) or in rule 1-100. As to the former, I do not see that any of these paragraphs necessarily implicate the competence of a lawyer's representation of a client, and any of them can be violated where there is no lack of competence. Furthermore, attempting to squeeze them into the competence rule would twist it out of any recognizable shape and leave uncertainty about what is meant by competence. My attached Memo provides my preliminary thoughts about Rule 1.1/3-110. As far as placing those four paragraphs in rule 1-100, doing so would alter the rule, which currently does not contain substantive disciplinary provisions.

5) I would replace this proposal with the first Commission's proposed Rule 8.4, including its title.

6) I have not considered the proposed Comments (nor have I reconsidered the first Commission's Rule 8.4 Comments), an exercise that I think should wait until we have a fix on the content of the Rule.

7) I would not accept or reject MR 8.3 in the context of Rule 8.4/1-120. MR 8.3 raises complex and difficult issues that caused a great deal of sometimes passionate debate on the first Commission. The first Commission ultimately voted to approve a modified version of MR 8.3, but it was rejected by the Board of Governors. MR 8.3 needs to be considered, but this should be in isolation so that it is the focus of our attention. Although Rules 5.1-5.3 were not as controversial at the first Commission, I urge that not be considered as an afterthought to Rule 8.4.

8) The first sentence of the drafting teams attached Comments & Discussion memo is not correct in saying that rule 1-120 "is the only current rule that holds members responsible for violations of the rules committed by others". See, e.g., rules 1-300 and 1-311 and Bus. & Prof. C. § 6090.5.

Attached:

RRC2 - [3-110][1-1][1-3][5-1][5-2][5-3] - 04-18-15 Kehr Email to Drafting Team.doc

**Excerpt from Kehr Memo to Rule 3-110 Drafting Team re Model Rules 5.1, 5.2 & 5.3:**

3. Should a lawyer's duty to supervise others be separated from the competence rule, as is done in MRs 5.1, 5.2, and 5.3?

The first paragraph of the *Discussion* to current CRPC 3-110 cites to a long line of California disciplinary cases that stand for the proposition that a lawyer's duties "include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." The fact that lawyers are subject to discipline and have been disciplined for failing to supervise makes it arguable that MRs 5.1 and 5.3 are not needed. Despite this, I recommend the adoption of versions of these two MRs, and of MR 5.2. My reasoning is as follows:

- CRPC 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that a lawyer's individual responsibility is reasonably

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clear. It is not at all clear how it would be applied in larger law firms. This is a concern because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty lawyers working on a major project?<sup>1</sup>

- MRs 5.1 and 5.2 extend beyond the duty to supervise that is implicit in CRPC 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent not just to competent representation but representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures and a firm culture that assures compliance with those procedures in order to avoid conflicts of interest. MRs 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of CRPC 3-110.
- CRPC 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except to be competent. MR 5.2 addresses the broader meaning of MR 5.1 – the managing lawyers' duty to assure ethical conduct - by making clear that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor.<sup>2</sup>
- California's current Rules have no equivalent to MR 5.2. However, it is consistent with existing California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Adding a version of MR 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions. Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, MR 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.

**May 26, 2015 Cardona Email to Kehr, cc Langford, Difuntorum, Mohr & Lee:**

Thank you for the comments. Attached is a memo with the drafting team's responses. I hope this clarifies our positions on some of the points you raise. As noted, I think our differences pose some basic issues that will need to be resolved by the Commission as a whole.

Attached:

RRC2 - [1-120] - 05-26-15 Drafting Team Response to 05-19-15 Kehr Email.pdf

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<sup>1</sup> All other jurisdictions have adopted a version of MR 5.1. I will discuss possible changes later in this Memo.

<sup>2</sup> All other jurisdictions except Kentucky and Virginia have adopted a version of MR 5.2 and only a few with any change.

[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)

**May 26, 2015 Drafting Team Memo Response to May 19, 2015 Kehr Email:**

**Drafting Team Response to Comments from Mr. Kehr**

(Mr. Kehr's comments in italics, followed by drafting team response)

- 1) *I disagree with your inclusion of “attempt” in proposed paragraph (a)(i). It was the consensus of the first Commission that the possibility of discipline for an attempted violation should be examined on a Rule by Rule basis, and it therefore did not include attempts in its Rule 8.4 (and this was approved by the Board of Governors). A prohibition on attempted violations is a fine example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid. Here is an example of my concerns: Lawyer miswords a fee agreement so that it provides for a fee that exceeds the statutory limits set in Bus. & Prof. C. § 6146 and therefore calls for a fee that is “illegal” within the meaning of Rule 1.5/4-200. However, Lawyer catches her drafting error before the client has signed the fee agreement and offers a corrected proposal that the client does sign. Lawyer has not violated the Rule 1.5/4-200 prohibition b/c she did not “enter into an agreement for, charge, or collect an illegal .... fee.” I do not believe Lawyer should be involved in the disciplinary system in these circumstances. I think the recommendation to include attempted violations in this Rule is based on a misunderstanding of the first Commission’s reasoning. Beginning at p. 3 of the Comments & Discussion memo, it is explained that including attempts would provide “clear and enforceable articulation of disciplinary standards”, but that follows from the idea that the first Commission rejected including attempted violations so that they could be considered on a case-by-case basis. I don’t believe the first Commission ever suggested that the disciplinary authorities should have the authority to decide on their own whether to charge an attempted violation, and there was no proposed Rule that gave that authority. The idea was that there should be a Rule-by-Rule decision on whether an attempt should be violated. I believe the result of this was that the first Commission did not include attempted violations in any Rule it sent to the Board of Governors or that was approved by the Board.*

Our recommendation that we include attempt is not based on a misunderstanding of the first Commission’s reasoning, but on our belief that it makes sense to permit discipline for attempts to violate the rules as a general matter, rather than on a rule by rule basis. This conclusion is, as we indicated in our draft, premised on the assumption that an appropriate definition of “attempt” will be included in the rules to limit discipline for attempts to violate the rules to those instances where a lawyer’s conduct demonstrates both that the lawyer intends to engage in conduct that would constitute a violation and does something beyond mere preparation that demonstrates that the violation would have occurred unless interrupted by independent circumstances. Under such circumstances, we believe it appropriate for an attorney to face discipline for her attempt to violate any rule, even though her conduct does not result in an actual violation of the particular rule at issue. Moreover, we believe including a general prohibition on attempts, as defined in this way, is not merely aspirational, provides additional clarity to attorneys, and furthers public protection.

With a definition of “attempt” as we propose, we do not believe that a general prohibition on attempts can correctly be characterized as an “example of the aspirational nature of the Model Rules that we are directed by the Supreme Court to avoid.” The hypothetical you pose would not fall within such a proscription on attempts because the lawyer’s conduct indicates that there was neither an intent on the part of the lawyer to violate the rule nor anything to indicate that the violation of the rule would have occurred unless interrupted by independent circumstances – to the contrary, this was an unintentional “miswording” of a fee agreement that constituted a “drafting error” and was corrected by the lawyer herself.

On the other hand, a slightly modified hypothetical demonstrates, we think, the need for a general prohibition on attempts. Here is the modified example: Lawyer intentionally includes in a fee agreement a fee that would be illegal or unconscionable under Rule 4-200, drafting the agreement in such a way that it is difficult to discern the true nature of the fee it calls for. Lawyer presents the agreement to the client. Unbeknownst to lawyer, client asks a close friend who is also a lawyer to review the fee agreement. This friend advises the client that the fee called for is illegal. As a result, client does not sign the agreement. Under these circumstances, we believe it is entirely appropriate to discipline the lawyer for her attempt to enter into the illegal fee agreement. Our general inclusion of a proscription on attempts, with the definition for “attempt” that we propose, would accomplish this.

We could construct similar hypotheticals under a variety of other rules to demonstrate attempted violations of those rules that should merit discipline. But the general point is this – if we define attempt in the way we have proposed, we believe that, with respect to the rules in general, conduct constituting an attempt to violate the rules under that definition would merit discipline.<sup>1</sup>

The application by the courts of the rule underlying your hypothetical, Rule 4-200, also demonstrates the need for increased clarity in the rules as to whether or not attempts may be the subject of discipline.

Rule 4-200 does not itself contain language extending its scope to cover attempts to collect illegal or unconscionable fees. Nevertheless, the State Bar Court has upheld discipline where “respondent attempted to collect[] an unconscionable fee.” Matter of Kroff (1998) 3 Cal. State Bar Ct. 838, 1998 WL 182802 at \* 17; see also Matter of Scapa (1993) 2 Cal. State Bar Ct. (1993) 635, 646, 652 (upholding “hearing judge’s conclusions that respondents willfully violated the rules of professional conduct prohibiting attempts to charge an unconscionable fee” where attorneys “sought to charge an unconscionable fee as proscribed by rule 2-107 and its successor, rule 4-200”).

On the other hand, another court upheld a finding that a lawyer was “not culpable of violating rule 3-400(A) by his attempt to limit his liability for professional malpractice” in part “because the rule does not prohibit an *attempt* to limit liability.” Matter of Fonte (1994) 2 Cal. State Bar Ct. Rptr. 752, 760. In reaching this conclusion, the court noted that the prior rule (former rule 6-102) “prohibited a member from attempting to limit liability” and that the State Bar’s comments to the Supreme Court on submission of the amended rule “indicated that the redrafted rule 3-44(A) ‘continues the prohibition . . . on attorneys attempting to exonerate themselves from or limit liability.... [emphasis added],’ but concluded that the language of the current rule was “unambiguous” in prohibiting only “contracts, not attempts to contract.” Id.

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<sup>1</sup> We believe a general proscription on attempts would also be consistent with the approach of courts that have recognized that attempts to engage in certain conduct may constitute acts involving moral turpitude. See Walker v. State Bar (1989) 49 Cal. 3d 1107, 1113 (upholding finding that attorney “violated Business and Professions Code Section 6106 by willfully misappropriating or attempting to misappropriate funds from his client trust account”). That is, putting attorneys on notice that, as a general matter, attempts to violate the rules may result in discipline would be consistent with the approach that attempts to engage in certain types of conduct may be viewed as conduct involving moral turpitude that may result in discipline.

We believe that the possibility that courts will, as these did, in the absence of explicit language in the rule proscribing attempts, take different approaches in interpreting individual rules as encompassing or not encompassing attempts, poses a lack of clarity to both attorneys and the State Bar in attempting to understand what is and is not within the scope of the rules. We would resolve this by adding a general provision proscribing attempts.<sup>2</sup>

2) *I disagree with your inclusion of “ratify” in proposed paragraph (a)(iii). This concept comes from MRs 5.1 and 5.3, which is where I believe it should be addressed. I think the same is true of proposed paragraphs (b), (c), (d), and (e). Among other things, placing Rule 5.1-5.3 in Rule 8.4/1-120 would make them more difficult to locate and would make them harder to understand by mixing them with the distinct Rule 8.4 concepts. B/c of the possibility that the Commission will decide to add the supervising and subordinate lawyer concepts to this Rule, I have attached for your information a Memo I did to the Rule 1.1/3-110 drafting team that includes an analysis of Rules 5.1-5.3. This is an initial draft on which the drafting team has not commented.*

See discussion under your comment 5 below. In sum, we believe that placing all of the provisions regarding responsibility for violations of rules committed by others (including responsibility for violations committed by lawyers and/or nonlawyers acting under a member’s supervision) will make these provisions easier to find.

3) *I disagree with proposed paragraph (a)(iv) in two ways:*

- a. *Unlike the first Commission’s proposed Rule 8.4(e) (and the MR version) it does not prohibit a lawyer from saying that she has “an ability to influence improperly a government agency or official”. I believe it should, and I do not see any explanation for why this was not included.*
- b. *The (a)(iv) prohibition is limited to “these Rules or the State Bar Act.” The first Commission in its Rule 8.4(e) included “other law”. I do not see any reason for not prohibiting a lawyer from saying that she can achieve a result in violation of other legal prohibitions, and I do not see any explanation for this.*

See discussion under your comment 5 below. In sum, we believe that these principles from 8.4, which create new substantive violations independent of the rules themselves, do not belong in a rule that defines responsibility for violations of the other rules, but rather are appropriately placed in a new rule creating the new substantive obligations.

4) *Although this report refers to MR 8.4, its only explanation for not including any version of the first Commission’s Rule 8.4(b), (c), (d), or (f) is in the attached Comments & Discussions memo, which argues that they should be in rule 3-110/1.1 (competence) or in rule 1-100. As to the former, I do not see that any of these paragraphs necessarily implicate the competence of a lawyer’s representation of a client, and any of them can be violated where there is no lack of competence. Furthermore, attempting to squeeze them into the competence rule would twist it out of any recognizable shape and leave uncertainty about*

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<sup>2</sup> If the opposite conclusion is reached, and the determination is made to proscribe attempts only for particular rules, we believe the rules should make this clear and state (whether in rule or comment) that an attempt to engage in particular conduct can constitute a violation of a particular rule only if that particular rule includes language extending the rule to cover attempts.

*what is meant by competence. My attached Memo provides my preliminary thoughts about Rule 1.1/3-110. As far as placing those four paragraphs in rule 1-100, doing so would alter the rule, which currently does not contain substantive disciplinary provisions.*

See discussion under your comment 5 below. In sum, the only provisions that we believe should be included in Rule 3-110 (competence) are the portions of ABA MR 5.1 and 5.3 that define the duty to supervise lawyers and nonlawyers, a supervisory duty already currently included in the commentary to Rule 3-110 as falling within the duty of competence. The other provisions you cite from ABA MR 8.4 create new substantive obligations independent of the rules; accordingly, we believe they do not belong in a rule that defines responsibility for violations of the other rules, but rather are appropriately placed in a new rule creating the new substantive obligations.

5) *I would replace this proposal with the first Commission's proposed Rule 8.4, including its title.*

Your comments 2-5 all present a significant substantive issue that I think will need to be resolved, namely, is our plan: (a) to move to a system of rules that, while incorporating principles from both the current California rules and ABA model rules, analogizes more closely to the ABA model rules; or (b) stick to the current system of rules but incorporate into those rules principles from the ABA model rules as appropriate. Our draft is premised on the latter approach, as explained in more detail below. If we take this approach, we believe that our draft makes sense.<sup>3</sup>

As explained in our drafting comments, when we look at current Rule 1-120, we see a rule that does not itself define particular substantive conduct as constituting a violation of the rules, but rather sets out the circumstances under which a member will be responsible for substantive violations of the other rules that are not committed solely by that member, but involve another's conduct as well. In this sense, Rule 1-120 is analogous to 18 U.S.C. § 2 of the federal criminal code, which does not define a substantive crime, but rather states the circumstances under which a defendant can be responsible for criminal conduct committed by others, that is, by aiding or abetting in the commission of, or causing another to commit, any of the substantive crimes defined in the other sections of the criminal code. Our draft attempts to adhere to this general approach of current Rule 1-120 by (a) not incorporating into Rule 1-120 any prohibitory language that would create a substantive violation independent of the other rules and (b) incorporating into the rule those additional principles from the ABA model rules that relate to a member's responsibility for violations of the other rules committed by others.

Putting aside any differences that may exist over the merits of the particular substantive provisions, it is in accordance with principle (a) above that we have not incorporated into our draft of a proposed new Rule 1-120 the following substantive provisions from ABA Model Rules 5.1, 5.3, and 8.4, all of which create new substantive duties/violations, and which we have

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<sup>3</sup> If we were to make the move to a system of rules that tracks more closely the organization and approach of the ABA model rules (as the First Commission did), then your suggestion that Rule 1-120 be converted into something more akin to ABA Model Rule 8.4 (after appropriate discussion and review of the various additional substantive prohibitions contained within that rule) and leaves ABA Model Rules 5.1, 5.2, and 5.3 for independent adoption, might be more appropriate.

assumed would (to the extent their adoption is desired by the Commission) either be incorporated into other of the current rules (as redrafted) or be the subject of new rules:

- (1) ABA Model Rule 5.1(a), (b): recognize an independent substantive duty to supervise other lawyers *[appear appropriate for incorporation into Rule 3-110, which already references this duty in its comments as falling within the concept of competence]*;
- (2) ABA Model Rule 5.3 (a), (b): recognize an independent substantive duty to supervise other non-lawyers *[appear appropriate for incorporation into Rule 3-110, which already references this duty in its comments as falling within the concept of competence]*;
- (3) ABA Model Rule 8.4(b): makes it a substantive violation of the rules to commit a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer *[new substantive rule along with the provisions from 8.4(c), (d), (e) (portions), and (f)]*;
- (4) ABA Model Rule 8.4(c); makes it a substantive violation of the rules to engage in conduct involving dishonesty, fraud, deceit or misrepresentation *[new substantive rule along with the provisions from 8.4(b), (d), (e) (portions), and (f)]*;
- (5) ABA Model Rule 8.4(d): makes it a substantive violation of the rules to engage in conduct that is prejudicial to the administration of justice *[new substantive rule along with the provisions from 8.4(b), (c), (e) (portions), and (f)]*;
- (6) ABA Model Rule 8.4(e) (portions): makes it a substantive violation of the rules to state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate laws other than the rules *[new substantive rule along with the provisions from 8.4(b), (c), (d), and (f)]*
- (7) ABA Model Rule 8.4(f): makes it a substantive violation of the rules to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law *[new substantive rule along with the provisions from 8.4(b), (c), (d), and (e) (portions)]*.

On the other hand, it is in accordance with principle (b) above that we have incorporated into our draft of a proposed new Rule 1-120 the following provisions from ABA Model Rules 5.1, 5.2, 5.3, and 8.4 that do not create new substantive duties/violations, but instead relate to either (a) responsibility for violations of the other substantive rules committed, in whole or part, by others or (b) conduct relating to violations of the other substantive rules that may result in discipline:

- (1) ABA Model Rule 5.1(c): responsibility for violations of the substantive rules committed by other lawyers (including ordering or ratifying such violations);
- (2) ABA Model Rule 5.2(a): responsible for violations of the substantive rules even if acting at direction of another lawyer or other person;
- (3) ABA Model Rule 5.2(b): not responsible for violations of the substantive rules if acting in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty;
- (4) ABA Model Rule 5.3(c): responsibility for violations of the substantive rules committed by other nonlawyers (including ordering or ratifying such violations);
- (5) ABA Model Rule 8.4(a): responsible for violations or attempted violations committed directly or through the acts of another;
- (6) ABA Model Rule 8.4(e) (portions): violation to state or imply an ability to achieve a result on behalf of a client by means that violate the other substantive rules.

We also believe that incorporating these "responsibility" provisions in one rule provides a clarity and ease of use benefit, in that it enables attorneys to look at a single rule containing all the

provisions under which, as a general matter, they may be held responsible for violations of the rules committed by others.<sup>4</sup>

- 6) *I have not considered the proposed Comments (nor have I reconsidered the first Commission's Rule 8.4 Comments), an exercise that I think should wait until we have a fix on the content of the Rule.*

We agree that consideration of the comments should be put off until we straighten out what approach we should be taking with respect to the Rule itself.

- 7) *I would not accept or reject MR 8.3 in the context of Rule 8.4/1-120. MR 8.3 raises complex and difficult issues that caused a great deal of sometimes passionate debate on the first Commission. The first Commission ultimately voted to approve a modified version of MR 8.3, but it was rejected by the Board of Governors. MR 8.3 needs to be considered, but this should be in isolation so that it is the focus of our attention. Although Rules 5.1-5.3 were not as controversial at the first Commission, I urge that not be considered as an afterthought to Rule 8.4.*

We agree that ABA MR 8.3 should be the subject of additional consideration since it poses difficult issues. As we have indicated in our proposal, in response to the request in our assignment memo that we consider this rule, our initial inclination is that a reporting obligation should not be adopted, but there are pros and cons that certainly merit further discussion, and we agree that consideration 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. In addition, we agree that ABA MR 8.3 would not fit as part of Rule 1-120 (whether as we have drafted it or if converted to an analogue to ABA MR 8.4 as you suggest), and this is another reason we agree its consideration should be postponed.

- 8) *The first sentence of the drafting teams attached Comments & Discussion memo is not correct in saying that rule 1-120 "is the only current rule that holds members responsible for violations of the rules committed by others". See, e.g., rules 1-300 and 1-311 and Bus. & Prof. C. § 6090.5.*

See Discussion in footnote 4 under your comment 5 above.

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<sup>4</sup> In this regard, as you have pointed out (see your comment 8 below) there are two other rules that contain prohibitions, in specific circumstances, on aiding another in certain conduct. Rule 1-300 states that a member shall not "aid" an person or entity in the unauthorized practice of law. Rule 1-311(B) states that, with certain exceptions set forth in subsection (C) a member shall not "aid" a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform certain specified activities. These are provisions of limited application. Rule 1-120 is the only current rule that sets out, for general application, principles on which members are responsible for violations of the rules committed, in whole or in part, by others. Our proposal incorporates into this rule other responsibility principles of general applicability.