

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-100(B) [1.0.1]

Lead Drafter: Chou
Co-Drafters: Bleich, Langford, Zipser
Meeting Date: January 22 – 23, 2016

I. CURRENT CALIFORNIA RULE

Rule 1-100(B) Rules of Professional Conduct, in General

* * * * *

(B) Definitions.

(1) “Law Firm” means:

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

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

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

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

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

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Discussion:

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

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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

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

III. PROPOSED RULE (CLEAN)

Rule 1.0.1 Terminology

- (a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) [Reserved]
- (c) "Firm" or "law firm" means a law partnership; a professional law corporation; a sole proprietorship; an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable adverse consequences and material risks of the proposed conduct and[, where appropriate,] the reasonably available alternatives to the proposed conduct.
- (e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) "Person" means a natural person or an organization.
- (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that

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the belief is reasonable.

- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- [(k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.]
- [(l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.]
- (m) “Tribunal” means: a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Firm or Law Firm

[1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve.

[2] Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm will also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the law firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification but not for purposes of fee division. Compare *People*

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ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.]

[[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.]

Fraud

[5] When the terms “fraud” or “fraudulent” are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud or avoid a lawyer assisting in the perpetration of a fraud, see Rules 1.2, 1.13, 1.16, 3.3, or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent conduct. See Rules 1.5 and 8.4.

Informed Consent and Informed Written Consent

[6] Many of the rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. Compare, for example, Rules [1.2(c) and 1.6(a)] (informed consent) with Rules [1.7, 1.8.1 and 1.9] (informed written consent). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent. In determining whether the information and explanation provided to the client are reasonably adequate to ensure the client’s consent is informed, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of “writing” and “written.”

Screened

[8] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to

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whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

[9] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

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

Rule ~~1-100(B)~~ 1.0.1 ~~Rules of Professional Conduct, in General~~ Terminology

* * * * *

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) ~~Definitions:~~ [Reserved]
- (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a sole proprietorship; an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- ~~(1) “Law Firm” means:~~
- ~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~
 - ~~(b) a law corporation which employs more than one lawyer; or~~
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 - ~~(d) a publicly funded entity which employs more than one lawyer to perform legal~~

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- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable adverse consequences and material risks of the proposed conduct and[, where appropriate,] the reasonably available alternatives to the proposed conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- ~~(2) “Member” means a member of the State Bar of California.~~
- ~~(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~
- ~~(4) “Associate” means an employee or fellow employee who is employed as a lawyer.~~
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- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
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reasonable prudence and competence would ascertain the matter in question.

- [(k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.]
- [(l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.]
- [(m) “Tribunal” means: a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.]
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Discussion: Comment

* * * * *

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

Firm or Law Firm

[1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve.

[2] Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm will also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close,

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personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the law firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification but not for purposes of fee division. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.]

[[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.]

Fraud

[[5] When the terms “fraud” or “fraudulent” are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud or avoid a lawyer assisting in the perpetration of a fraud, see Rules 1.2, 1.13, 1.16, 3.3, or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent conduct. See Rules 1.5 and 8.4.

Informed Consent and Informed Written Consent

[[6] Many of the rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. Compare, for example, Rules [1.2(c) and 1.6(a)] (informed consent) with Rules [1.7, 1.8.1 and 1.9] (informed written consent). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent. In determining whether the information and explanation provided to the client are reasonably adequate to ensure the client’s consent is informed, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

[[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of “writing” and “written.”

Screened

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[8] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

[9] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

* * * * *

V. PROPOSED RULE 1.0.1 (REDLINE TO MODEL RULE 1.0)

Rule ~~1.0~~1.0.1 Terminology

- (a) “Belief” or “believes” ~~denotes~~means that the person involved actually ~~supposed~~supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) ~~“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~[Reserved]
- (c) “Firm” or “law firm” ~~denotes a lawyer or lawyers in~~means a law partnership;; a professional law corporation;; a sole proprietorship ~~or other~~; an association ~~authorized to engaged in the practice of law;~~ or lawyers employed in a legal services organization or in the legal department, division or office of a corporation ~~or other~~, of a government organization, or of another organization.

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- (d) “Fraud” or “fraudulent” ~~denotes~~ means conduct that is fraudulent under the ~~substantive or procedural~~ law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” ~~denotes the~~ means a person’s agreement ~~by a person~~ to a proposed course of conduct after the lawyer has communicated ~~adequate information and explanation about the~~ and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable adverse consequences and material risks of ~~and the proposed conduct and~~ [, where appropriate,] the reasonably available alternatives to the proposed ~~course of~~ conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.
- (f) “Knowingly,” “known,” or “knows” ~~denotes~~ means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” ~~denotes~~ means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer ~~denotes~~ means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer ~~denotes~~ means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer ~~denotes~~ means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- [(k) “Screened” ~~denotes~~ means the isolation of a lawyer from any participation in a matter ~~through, including~~ the timely imposition of procedures within a law firm that are ~~reasonably~~ adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.]
- [(l) “Substantial” when used in reference to degree or extent ~~denotes~~ means a material matter of clear and weighty importance.]
- (m) “Tribunal” ~~denotes~~ means: a court, an arbitrator in a binding arbitration proceeding or a

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legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a ~~party's~~party's interests in a particular matter.

- (n) “Writing” or “written” ~~denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications~~ has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Confirmed in Writing

~~[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.~~

Firm or Law Firm

~~[21] Whether two or more lawyers constitute a law firm ~~within paragraph (c)~~ can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they ~~should~~ may be regarded as a law firm for purposes of ~~the~~ these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. ~~Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~~~

~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

[2] Whether a lawyer who is denominated as “of counsel” or by a similar term should be

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deemed a member of a law firm will also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the law firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification but not for purposes of fee division. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.]

[4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.]

Fraud

[5] When ~~used in these Rules~~, the terms “fraud” or “fraudulent” ~~refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of~~ are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud or avoid a lawyer assisting in the perpetration of a fraud, see Rules 1.2, 1.13, 1.16, 3.3, or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent conduct. See Rules 1.5 and 8.4.

Informed Consent and Informed Written Consent

[6] Many of the ~~Rules of Professional Conduct rules~~ require ~~the a~~ lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. ~~See, e.g. Other rules require a lawyer to obtain informed written consent. Compare, for example, Rules [1.2(c), and 1.6(a)] and 1.7(b)(informed consent) with Rules [1.7, 1.8.1 and 1.9] (informed written consent).~~ The communication necessary to obtain such consent will vary according to the ~~Rule~~ rule involved and the circumstances giving rise to the need to obtain ~~informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it~~

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~~may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.~~ consent. In determining whether the information and explanation provided to the client are reasonably adequate to ensure the client's consent is informed, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. ~~Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.~~

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent ~~However, except where the standard is one of informed~~ written consent, consent may be inferred, ~~however,~~ from the conduct of a client or other person who has reasonably adequate information about the matter. ~~A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a~~ See paragraph (n) for the definition of "writing" and "confirmed in writing," ~~see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).~~ written."

Screened

~~[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.~~

[98] The purpose of screening is to assure the affected ~~parties~~ client, former client, or prospective client that confidential information known by the personally ~~disqualified lawyer~~ remains protected ~~prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed.~~ The personally ~~disqualified~~ prohibited lawyer ~~should~~ shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter ~~should~~ promptly shall be informed that the screening is in place and that they may not communicate with the personally ~~disqualified~~ prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected ~~lawyers~~ law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the ~~screened~~ personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other ~~information, including information in electronic form,~~ materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the ~~screened~~ personally prohibited lawyer relating to the matter, denial of access by ~~the screened~~

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that lawyer to law firm files or other ~~information, including information in electronic form,~~ materials relating to the matter, and periodic reminders of the screen to the ~~screened~~ personally prohibited lawyer and all other law firm personnel.

[409] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

* * * * *

VI. PUBLIC COMMENTS SUMMARY

None.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

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

- **RUSSELL WEINER, OCTC, 6/5/2010:**

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature’s authority to impose some regulation on the legal profession. (See *O'Brien v. Jones* (2000) 23 Cal.4th 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.
3. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

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

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

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...

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

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

...

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

OCTC also further clarifies the definition of the word “associate” in the discussion section of Rule 1-100 (B.) The proposed additional language to the discussion section is as follows:

Discussion

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

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

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

OCTC COMMENTS:

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

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

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- **State Bar Court:** No comments received from State Bar Court.

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

- **Delaware Rule 1.0** is identical to Model Rule 1.0:

Delaware Rule 1.0 Terminology

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of

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reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The ABA State Adoption Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.0: Terminology,” revised July 29, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_0.pdf [last accessed 12/23/15]
- Four states have adopted Model Rule 1.0 verbatim.¹ Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 1.0.² Sixteen states have adopted a version of the rule that is substantially different from Model Rule 1.0.³

¹ The four states are: Arkansas, Delaware, Idaho, and Louisiana.

² The thirty-one jurisdictions are: Arizona, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

³ The fourteen states are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Michigan, Mississippi, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and Wisconsin.

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

Concepts Accepted (Pros and Cons):

General Concepts Recommended for Adoption.

- A.
- Recommend adoption of a global terminology section with definitions of terms that are used throughout the Rules of Professional Conduct.
 - Pros: Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed Rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed Rule 1.0.1 would obviate a lawyer's need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the Rules.
 - Cons: None identified.
 - Similar to the California Code of Judicial Ethics, recommend placing an asterisk next to every instance where a global term appears in the Rules (or alternatively, bold or italicize the term).
 - Pros: Similar highlighting of defined terms has been incorporated to good effect in the Code of Judicial Ethics. The highlighting will provide notice that the term so marked is defined in the terminology section so that a lawyer reading the rule in question would know to consult the definition in determining how the rule should be applied.
 - Cons: None identified.
 - As to the substantive content of the definitions, recommend adoption of the Model Rule 1.0 definitions to the extent those definitions conform to California law and, where the Model Rule definitions and California law or settled public policy are not aligned, revise those definitions to reflect California law or policy.
 - Pros: Where the Model Rule and California meanings of a term are aligned, adopting the Model Rule definition will remove unnecessary differences between the California rule and the corresponding rule in other jurisdictions, an important consideration in regulating lawyers from other jurisdictions who practice in California under one of the multijurisdictional practice rules of court. (See, e.g., Rules of Court 9.45 – 9.48 and proposed Rule 8.5 [Choice of Law].) Changing a Model Rule definition to reflect California law or settled policy will ensure continuation of important public policies, including client protection, that are reflected in the California approach. (See, e.g., proposed definition of "informed consent" and "informed written consent," and rejection of the Model Rule concept, "confirmed in writing," below.)
 - Cons: None identified.

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Specific Blackletter Definitions. Each of the proposed definitions is discussed in the following paragraphs:

4. In paragraph (a), recommend adoption of the RRC1’s definition of “belief,” which is nearly identical to the Model Rule definition. See also “reasonable” and “reasonable belief,” below.
 - Pros: The definition is used throughout the Rules (e.g., Rules 1.1 [3-110], 1.6 [3-100], 1.16 [3-700]), justifying a global definition. The RRC1 definition made only non-substantive changes to the Model Rule definition, i.e., substituting “means” for “denotes,”⁴ and the present tense “supposes” for “supposed” to correspond to the tense of “believes.”
 - Cons: None identified.
5. In paragraph (c), recommend adoption of RRC1’s definition of “firm” with minor revisions (semi-colon and deletion of “or” after “sole proprietorship”).
 - Pros: The definition is used throughout the Rules (e.g., Rules 1.5.1 [2-200], 5.1 to 5.3, 5.4), justifying a global definition. In addition, “firm” is defined by reference to its organizational attributes rather than its constituent members, which obviates the need to specifically define the terms “shareholder” and “associate” in the rule, as is done in current rule 1-100(B).
Further, RRC1 included a reference to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers. See *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.
Finally, the substitution of “engaged in” for “authorized to” (as in the Model Rule) is made to assure that the requirements of the Rules apply to everyone acting as a law firm even if not authorized to do so [Maryland, Michigan, and South Carolina similarly have removed the phrase “authorized to”].
 - Cons: None identified.
6. In paragraph (d), recommend adoption of RRC1’s definition of “fraud,” which is identical to the Model Rule definition, and to modify Comment [5]. (See discussion below re Comment [5].)
 - Pros: It is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction. (See proposed Rule 8.5 concerning choice of law.) Further, as clarified in Comment [5], neither damages nor reliance need to be proven because, as the term “fraud” is typically used in

⁴ The drafting team, similar to RRC1, recommends substituting “means” for “denotes” throughout the blackletter. “Means” is more specific and definite than “denotes.”

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these Rules, it is as a “trigger” for imposing a lawyer’s duty to prevent fraud or avoid assisting a client in perpetrating a fraud. See Rules 1.2(d)⁵ [lawyer “shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, ...”]; 1.13, cmt. [13] [“If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1). 1.16, 3.3.”]; 1.16(b)(2) [Lawyer may withdraw if “the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer’s services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud”]; 3.3(b) [“A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).”]

Fraud is also mentioned in Rules 1.5 [fees] and 8.4 [Misconduct]. Under proposed Rule 1.5 (approved by this Commission), a factor in considering whether a fee was unconscionable is “whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee,” and RRC1 Rule 8.4 provided that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation.” In each of the foregoing, the prohibition is on a lawyer “engaging” in fraudulent conduct, not that the lawyer has committed fraud in the sense that all elements of the tort must have been proven. In the legal profession, great emphasis is placed on a lawyer’s honesty and requiring only “conduct involving fraud” reflects that emphasis.

As to how the definition of fraud should be qualified, i.e., in the blackletter of the rule or in a comment, the drafting team believes it should be in a comment. As noted, in applying a rule, e.g., Rule 3.3, to a specific set of facts, it is not necessary that reliance or damage be shown because that would frustrate the rule’s intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder. Guidance in how a rule should be applied is one of the approved purposes of a comment, so that qualifying provision should remain in a

⁵ To the extent the Commission has not yet addressed the following listed rules, citations and quotes are to the RRC1’s proposed Rules.

It should also be noted that RRC1 rejected the expansive exceptions to confidentiality in MR 1.6 that permit a lawyer to disclose confidential information to prevent fraud and a similar provision in MR 1.13. This Commission has already rejected including those MR 1.6 provisions in its proposed Rule 1.6. Nevertheless, there is a reasonable probability that, if this Commission recommends adoption of the referenced rules 1.2, 1.13, 1.16 and 3.3, it will be in substantially the same form as the RRC1 rules, so the issue regarding the meaning of fraud will apply to those rules as well.

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comment, where the rationale for not requiring damages or reliance, which likely contradicts the required elements of fraud under the common law in every jurisdiction, can be more fully explained. Put another way, placing the qualification in a comment permits an explanation for why the definition is qualified and avoids the confusion that would be generated by contradicting the definition of fraud (law of the “applicable jurisdiction”), which presumably requires both reliance and damage at common law. Further, an expanded explanation does not belong in a blackletter provision; it belongs in a comment. Please see discussion of proposed comment [5], below.

In addition, RRC1 deleted the phrase “substantive or procedural” from the Model Rule definition. RRC1 explained the phrase was removed “because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes.”

- **Cons:** None identified.

7. In paragraph (e), recommend adoption of RRC1’s definition of “informed consent,” modified to add the phrase “adverse consequences,” (see current rule 3-310(A)(1)’s definition of “disclosure”), and also modified to place brackets around the phrase “where appropriate,” to indicate the drafting team’s consensus that whether this phrase should be included should be an open issue for the Commission as a whole.

In addition, RRC1 made other changes to the Model Rule definition: adding the term “relevant circumstances” and the phrase “actual and reasonably foreseeable” to the required disclosure points for obtaining informed consent.

- **Pros:** The definition is used throughout the current California Rules (e.g., Rules 3-100, 3-310, 5-210 [lawyer as witness], warranting a global definition rather than different, rule-specific definitions. (Cf. current rule 3-310(A)(1) and (2).)

Regarding the inclusion of “relevant circumstance” and “actual and reasonably foreseeable,” these terms conform the definition to California case law. See, e.g., *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429-31.

Regarding the phrase, “where appropriate,” RRC1 had included that phrase to clarify that there may be situations where there are no alternatives to the proposed conduct. On the other hand, the definition of “informed consent” already requires only the explanation of alternatives that are “reasonably available.”

As to the contra argument that the concept of informed consent belongs in specific conflicts rules, the concept is not unique to conflicts. (See, e.g., current rule 3-100; proposed Rule 1.6; proposed Rule 1.4 [3-500].)

- **Cons:** The definition of “informed consent” belongs in specific conflicts rules, not in a global terminology rule.

8. In paragraph (e-1), recommend adoption of RRC1’s definition of “informed written consent,” which is based on current rule 3-310(A)(2).

- **Pros:** The definition is used throughout the current Rules (e.g., Rules 3-310(C), (E), (F), 5-210) and was incorporated into other rules by RRC1, many if not most of which this Commission is likely to recommend, (e.g., 1.8.6, 1.8.7, 1.9, 1.10,

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- 1.11, 1.12). Unlike the Model Rules or jurisdictions that have largely adopted the Model Rules approach to consent, California has a heightened standard that requires a client's consent not only be informed, but also in writing. This means that not only must the client's consent be in writing but also that the disclosure be in writing. California's current, more client-protective approach to consent should be carried forward.
- Cons: None identified.
9. In paragraph (f), recommend adoption of RRC1's definition of "knowingly," etc., which is nearly identical to the Model Rule definition. See also "reasonably should know," below.
- Pros: This scienter requirement is used throughout the Rules, justifying a global definition.
 - Cons: None identified.
10. In paragraph (g), recommend adoption of RRC1's definition of "partner," which is identical to the Model Rule definition.
- Pros: It is important to globally define this term, which is used throughout the Rules, because it clarifies that "partner" is not limited to its traditional meaning, i.e., it does not only apply to a member of a partnership but also includes shareholders in law corporations, etc.
 - Cons: None identified.
11. In paragraph (g-1), recommend adoption of RRC1's definition of "person" even though it has no counterpart in the Model Rules.
- Pros: This definition is used throughout the Rules, justifying a global definition. (See, e.g., definitions in this Rule; see also proposed Rules 1.6, 1.8.3, 1.8.5, 4.2, 4.3). The proposed definition will eliminate potential confusion over whether the term "person" includes an organization. Six other jurisdictions have adopted definitions of "person;" the proposed definition is based on the definition adopted in Michigan.
 - Cons: That a "person" means both a natural person and an organization is well-settled and need not be defined.
12. In paragraph (h), recommend adoption of RRC1's definition of "reasonable," etc., which is identical to the Model Rule definition.
- Pros: This term is used throughout the Rules and conforms to California law.
 - Cons: None identified.
13. In paragraph (i), recommend adoption of RRC1's definition of "reasonable belief," etc., which is identical to the Model Rule definition.
- Pros: This term is used throughout the Rules and conforms to California law.
 - Cons: None identified.
14. In paragraph (j), recommend adoption of RRC1's definition of "reasonably should know," which is identical to the Model Rule definition.
- Pros: This term is used throughout the Rules and conforms to California law.
 - Cons: None identified.
15. In paragraph (k), retain for the time being but place in brackets RRC1's definition of "screened," which modifies the Model Rule definition primarily by the addition of clause (ii), until there is a decision by the Commission to address the concept of ethical

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screening in the Rules.

- Pros: Placing the term in brackets will permit the drafting team assigned to the conflicts of interest rules to determine the efficacy of addressing ethical screening within the context of those rules and, if that decision is affirmative, whether the proposed definition is sufficient.

- Cons: None identified.

16. In paragraph (l), place in brackets RRC1's definition of "substantial" and identify it as an open issue for the Commission. The pros and cons of including the term "substantial" are:

- Pros: The term "substantial" as defined in the Model Rules and RRC1's proposed Rules is accurate and provides important guidance in applying the many rules where the term "substantial" acts as a trigger for imposing a duty on a lawyer. As defined, the term "substantial" as used in the Rules refers to the quality of an event, i.e., "a material matter of clear and weighty importance." Its usage is similar to "significant." The primary dictionary definition of "substantial," on the other hand, refers to the amount of something rather than its quality, i.e., "large in amount, size, or number."⁶
- Cons: Although the term "substantial" is used throughout the Rules, (e.g., Rules 1.2, 1.6 [3-100], 1.7 [3-310], 1.8.3 [4-400], 1.13 [3-600], 1.14, 1.17 [2-300], 3.6 [5-120], etc.), the drafting team was unable to reach consensus on whether such a definition is needed. It would appear that a common dictionary definition of the term should be sufficient.

17. In paragraph (m), recommend adoption of the Model Rule's definition of "tribunal" and rejection of RRC1's proposed definition of "tribunal."

- Pros: The Model Rule definition includes within its scope administrative and other courts to which lawyers should owe the same duties of candor as to courts of general jurisdiction. The definition as proposed would not inhibit a client's right of petition because the duty is limited to legislative bodies or administrative agencies that are acting in an adjudicative capacity. There appears to be nothing to suggest that the right to petition is different in scope when a court, arbitrator, or ALJ is acting in an adjudicative capacity versus when a legislative or administrative body is acting in an adjudicative capacity. Finally, we are not aware of any issues relating to the right to petition in the numerous states that have adopted the ABA Model Rule definition of "tribunal."
- Cons: Given practical considerations, imposing the same duties of candor as are owed a court of general jurisdiction on a lawyer appearing before a legislative body or administrative agencies will risk violating the right of petition of the client's lawyer.

⁶ See, e.g., Merriam-Webster's online dictionary, at <http://www.merriam-webster.com/dictionary/substantial>

Similarly, Dictionary.com's primary definition for "substantial" is "of ample or considerable amount, quantity, size, etc." See: <http://dictionary.reference.com/browse/substantial>

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18. In paragraph (n), recommend adoption of RRC1’s definition of “writing,” etc., which is based on the Evidence Code, (see current rule 3-310(A)(3)), and also include RRC1’s second sentence concerning electronic writings.

- Pros: This term is used throughout the Rules and conforms to California law. Moreover, including the second sentence clarifies that an electronic signature (or other modern forms of signature) are sufficient to establish that the writing is “signed.” This sentence, based on the second sentence in MR 1.0(n) and also accepted by RRC1, should avoid potential confusion over whether electronic or other modern forms of signature will suffice.
- Cons: None identified.

Introduction to Comments to Proposed Rule 1.0.1. The drafting team has recommended nine comments based on RRC1’s proposed comments, which in turn were largely derived from the Model Rule comments. Several of the RRC1 comments are recommended for deletion. (Comments [8], [11] and [12].)

Because this Rule provides definitions for terms that are employed throughout the Rules of Professional Conduct, the drafting team believes that including the following comments, which provide important interpretive guidance regarding the defined terms, is warranted.

19. Recommend adoption of Comment [1] concerning the definition of “law firm”.

- Pros: Comment provides helpful interpretive guidance for determining whether a grouping of lawyers might constitute a law firm, e.g., for purposes of conflicts or fee splitting.
- Cons: None identified.

20. Recommend adoption of Comment [2] concerning the concept of a lawyer who is “of counsel” to a law firm. The comment is a substantially shortened version of RRC1 Comment [2], which has no counterpart in the Model Rule.

- Pros: The comment provides helpful guidance on determining whether certain lawyers associated with a law firm should be considered as part of the firm for purposes of a rule that uses the term “law firm” or “firm.” The term “of counsel” (and similar terms) can have a variety of meanings and have been the subject of significant litigation. Providing guidance on resolving what the term means in a particular situation will permit lawyers to better determine whether a rule applies and thus enhances compliance with the Rules.
- Cons: There is no reason to include this guidance in the rule. Sufficient guidance is available in the case law, e.g., the two opinions cited in the comment.

21. Comment [3] has been bracketed as an open issue for consideration by the full Commission. The drafting team was inclined to delete the comment. The arguments for and against its retention include:

- Pros: This comment provides important guidance regarding organizations that provide legal services to those unable to afford them by cautioning that the legal services organization must be studied to avoid conflicts that might impair the

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- delivery of such legal services.
- Cons: The comment does not provide guidance but simply states the obvious: that whether such an organization, which is included in the definition of law firm, constitutes a “law firm” for purposes of the rule, will depend on the specific facts and circumstances, guidance already provided in Comment [1].
22. Comment [4] has been bracketed as an open issue for consideration by the full Commission. The drafting team was split on whether to retain the comment. The arguments for and against its inclusion include:
- Pros: [Per RRC1, which authored the comment] “The Commission recommends its addition in order to prevent the definition of “law firm” from being misread as an authorization to practice law. The consequence is that anyone acting as a law firm has all the duties of law firms even if not authorized to practice law.”
 - Cons: In light of the various law prohibiting the unauthorized practice of law by a person not licensed in California, and the existence of numerous Rules of Court that provide an avenue for such lawyers to practice in California, it is not likely that the definition of “law firm” could reasonably be interpreted to authorize the practice of law by a person not licensed in California.
23. Recommend adoption of Comment [5] concerning the definition of fraud.
- Pros: As noted, (see paragraph 6, above), this comment provides important qualifications on what constitutes fraud for purposes of the Rules and also provides an explanation for the qualifications. Also as noted, the qualification on the definition belongs in a comment, not in the blackletter.
 - Cons: None identified.
24. Recommend adoption of Comment [6] to clarify the term, “informed consent.” This comment is a substantially shortened version of RRC1 comment [6], which in turn was a shortened version of the Model Rule, Comment [6], modified to more closely track California case law. Rule number cross-references are bracketed pending the Commission’s consideration of the identified rules.
- Pros: The comment provides concise interpretive guidance on providing sufficient disclosure to assure a client’s consent is informed. There were two sentences in the RRC1 version that were deleted because they are unnecessary in light of the language in the definition. The last sentence of the RRC1 definition has been retained to explain that the disclosure required may vary depending on the experience of the client in using legal services and in making informed decisions of the kind involved, an important consideration for a lawyer in determining the extent of disclosure required for the consent to be informed.
 - Cons: The blackletter of paragraph (e) does not require any further elaboration. It already identifies the components of a disclosure sufficient to render the client’s consent informed: disclosure of “the reasonably foreseeable adverse consequences and material risks of the proposed conduct” and “reasonably available alternatives.”
25. Recommend adoption of Comment [7] regarding “informed consent.”

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- Pros: The comment serves as a useful reminder that a lawyer should not rely on a client's silence or apparent acquiescence to conclude that the client has provided consent. This is an important caveat given the important rights a client might waive by consent as provided in numerous provisions in the Rules of Professional Conduct.
 - Cons: None identified.
26. Recommend adoption of Comments [8] and [9] regarding the term "screened," provided the Commission decides to recommend including the concept of ethical screening in the Rules of Professional Conduct. (See discussion at paragraph 15, above.)
- Pros: Provides important, concise guidance on the implementation of an effective ethical screen.
 - Cons: Similar guidance can be found in California case law. (See, e.g., *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010); *Hendriksen v. Great Am. Sav. & Loan*, 11 Cal.App.4th 109 (1992).

Concepts Rejected (Pros and Cons):

- B.
1. Retain the definitions in current rule 1-100(B)(4) and (5) for "associate" and "shareholder," respectively.
 - Pros: In current rule 1-100(B).
 - Cons: It is recommended that these terms be removed because they were not retained in RRC1's proposed rules and it is unlikely that they will reappear in RRC2's proposed Rules. Compare, for example, current rule 2-200 (refers to "associate") to proposed Rule 1.5.1 (refers only to "law firm") concerning fee splitting. See also the definition of "partner," below, which includes a shareholder in a law corporation.
 2. Retain the definition of "member" in current rule 1-100(B)(2).
 - Pros: None identified.
 - Cons: "Member" as defined in rule 1-100(B)(2) has been, and is likely to be, retained in only one Rule, proposed Rule 5.3.1 [1-311]. That is not a sufficient reason to retain that term in a global terminology rule and, in any event, is defined in Rule 5.3.1. Moreover, member is used often in the Rules to mean something entirely different, e.g., a "member" of a firm or a member of a legal services organization, etc.
 3. Retain the definition of "lawyer" in current rule 1-100(B)(3).
 - Pros: None identified.
 - Cons: RRC2 has decided to recommend that the word "lawyer" be substituted throughout the rules for "member," except in proposed Rule 5.3.1 [3-111], which defines the word "member". That global substitution obviates the need to define "lawyer" and proposed Rule 8.5 adequately explains which lawyers are covered by the rules.
 4. Add the following concepts to the terminology rule: advance for fees; client (Evidence Code § 951); independent lawyer; law clerk; matter; of counsel; personally and substantially; public official (defined in proposed rule 4.2 [2-100]); retainer [defined in

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proposed rule 1.5 [4-200]); substantially related; practice of law (already rejected by Commission).

- **Pros:** All of the foregoing terms are used either in the Model Rules or RRC1's proposed Rules, or both.
- **Cons:** The foregoing terms are not used with sufficient frequency to warrant their inclusion in a global terminology rule, have a common meaning that is not subject to misunderstanding, or have various meanings that are better left to explanation in the specific rule in which it is used.

Changes in Duties/Substantive Changes to the Current Rule:

1. The drafting team believes that none of the proposed revisions of current rule 1-100(B) constitutes a change in duties for California lawyers.
2. The only change that is arguably a substantive change is the definition of "firm" or "law firm." The proposed term is defined by reference to its organizational attributes rather than its constituent members. See Section A.5, above.

Non-Substantive Changes to the Current Rule:

1. The drafting team believes that the proposed definitions in proposed Rule 1.0.1 are non-substantive changes for the following reasons:
 - a. Although the current California Rules of Professional Conduct do not include a global terminology rule other than rule 1-100(B), for the most part proposed rule 1.0.1 incorporates terms that are already recognized in California case law.
 - b. Some terms already have counterparts in the current rules, e.g., "law firm" is defined in current rule 1-100(B)(1), "informed consent" and "informed written consent" are defined in current rule 3-310(A)(2), and "writing" is defined in current rule 3-310(A)(3). None of these proposed terms and definitions change the duties of California lawyers.
 - c. None of the proposed terminology paragraphs derived primarily from language in Model Rule 1.0 alter current duties of California lawyers. These definitions include terms that might be referred to as "scienter" terms or standards that are already found in the current rules. This category would include proposed rules 1.0.1(a) ("belief"); 1.0.1(f) ("knows"); 1.0.1(h) ("reasonable"); 1.0.1(i) ("reasonable belief"); 1.0.1(j) ("reasonably should know"). Similarly, proposed rule 1.0.1(l) ("substantial") is a term found in the current rules. All of these definitions would provide guidance on what is intended when the word or phrase is used in the proposed Rules. It is noteworthy that OCTC did not object to the adoption of any of the foregoing terms.
 - d. Nor did OCTC object to proposed rule 1.0.1(d) ("fraud"), which simply clarifies that when the term "fraud" and "fraudulent" appears in the rules, the meaning is to be determined by the law of the applicable jurisdiction, which would be determined by reference to proposed rule 8.5 (Disciplinary Authority; Choice of Law).
 - e. When the State Bar submitted its brief on RRC1's proposed Rule 1.0.1, it identified only three definitions that might arguably be substantive changes: (i) proposed Rule 1.0.1(e-2) ("information protected by Business and Professions Code section 6068(e)"); (ii) proposed Rules 1.0.1(k) ("screened"); and proposed Rule 1.0.1(m) ("tribunal"). The

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drafting team has declined to recommend either RRC1's paragraph (e-2)⁷ or RRC1's definition of tribunal. (See Section A.17, above.) As to the term "screened," the drafting team does not believe that either the blackletter definition or the comments related to the definition are contrary to California law, but has deferred consideration of the definition to the drafting team that will study the conflicts rules.

2. Substitute the term "lawyer" for "member."
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
3. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). This Rule is numbered 1.0.1 rather than 1.0 as in the Model Rules or in nearly every jurisdiction that has adopted a version of the Model Rules. That is because the Commission has assigned the number "1.0" to the Rule that sets forth the purpose and scope of the Rules, which in Model Rules jurisdiction^s is typically set out in unnumbered Preamble and Scope sections.
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

⁷ The drafting team did not include a definition of "information protected by Business and Professions Code § 6068(e)(1)" for three reasons. First, in an April 15, 2014 letter, the Supreme Court directed the State Bar to remove paragraph (e-2), which defined the term by reference to comments in another rule. Second, even assuming that the Court's concern was with a definition that appeared in a comment to another Rule, the 3-100 drafting team declined to recommend adoption of any definition of the term, even in proposed Rule 3-100's black letter. Third, it is uncertain whether a rule of professional conduct can define what is in effect a statutory term.

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Alternatives Considered:

1. No alternatives to the proposed global terminology rule were considered.

E. X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) Whether to include in paragraph (e) [“informed consent”] the phrase “where appropriate” to modify the duty to inform the client of “reasonably available alternatives.” See Section IX.A.7.

- Pros: Clarifies that there may be situations where there are no alternatives to the proposed conduct. The lawyer should be required to include an alternative course of action in a disclosure only if such an alternative exists.
- Cons: The phrase “reasonably available” – which modifies “alternatives” – arguably makes this clear already.

(2) Whether to include paragraph (l) [“substantial”], as included in MR 1.0(l) and as recommended by RRC1.

- Pros: See Section IX.A.16, “Pros.”
- Cons: See Section IX.A.16, “Cons.”

(3) Whether to include Comment [3] concerning legal services organizations.

- Pros: See Section IX.A.21, “Pros.”
- Cons: See Section IX.A.21, “Cons.”

(4) Whether to include Comment [4] refuting that the definition of “law firm” is intended to authorize any person or entity to engage in the practice of law.

- Pros: See Section IX.A.22, “Pros.”
- Cons: See Section IX.A.22, “Cons.”

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Chou

- [Date]: Email Comment
- [Date]: Email Comment

Bleich

- [Date]: Email Comment
- [Date]: Email Comment

Zipser

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- [Date]: Email Comment
- [Date]: Email Comment

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-100(B) [1.0.1] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 1-100(B) [1.0.1] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 1-100(B)
“Rules of Professional Conduct, in General (Terminology)”

I. Text of Current Rule:

Rule 1-100 Rules of Professional Conduct, in General

(B) Definitions.

(1) “Law Firm” means:

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

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

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

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

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

* * * * *

Discussion:

* * * * *

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

II. Background/Purpose:

The California Rules of Professional Conduct have never included a comprehensive global terminology section. The American Bar Association has included, since 1969, a “Definitions” or “Terminology” section in its Model Code of Professional Responsibility and the Code’s successor, the Model Rules of Professional Conduct, respectively. As part of the State Bar’s

comprehensive revision and renumbering of the rules that became operative in 1989, rule 1-100 was revised to include a new paragraph (B), which contains definitions for five terms (“Law Firm,” “Member,” “Lawyer,” “Associate,” and “Shareholder”) that are referenced throughout the rules. (See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” Bar Misc. No. 5626, December 1987.)¹ The purpose of adding this paragraph was to assist attorneys in interpreting and applying the rules. Including a definition of the term “client” was considered but rejected because such a definition was thought to be both over and under-inclusive, depending on the circumstances. A Discussion paragraph was added to explain that “law firm” does not include associations or people who are unauthorized to practice law. Other definitions, which were viewed as rule-specific, were included as part of the rule to which they are relevant.²

(B) Definitions.

(1) “Law Firm” means:

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

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

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

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

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

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

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

¹ In the December 1987 memorandum, the addition of definitions was summarized as follows:

“Paragraph (B) is new and defines words and phrases used throughout the rules to assist attorneys in interpreting and applying the rules. Including a definition of the term ‘client’ was considered but rejected because such a definition was thought to be both over and under-inclusive, depending on the circumstances.” (December 1987 memorandum at page 14.)

² For example, the current rules, adopted and approved in 1989 and 1992, contain definitions for “communication” and “solicitation” in rule 1-400(A) and (B), respectively; a definition for “candidate for judicial office” in rule 1-700; definitions for “law practice,” “knowingly permit,” and “unlawfully” in rule 2-400(A); a definition for “competence” in rule 3-110(B); a definition for “sexual relations” in rule 3-120(A); a definition for “disclosure,” “informed written consent,” and “written” in rule 3-310(A); and a definition for “administrative charges” and “civil dispute” in rule 5-100(B) and (C), respectively.

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

Discussion:

* * * * *

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

Rule 1-100(B) was last amended in 1992. (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, No. S024408, pages 8 - 9.) There were two changes. First, in subparagraph (B)(1)(b), the reference to a law corporation within the definition of the term "Law Firm" substituted the word "lawyer" for "member" to conform to California professional corporation law and the State Bar's law corporation rules permitting a non-California attorney to be an employee or shareholder in a law corporation. Second, in subparagraph (B)(3), the definition of "Lawyer" was revised to include foreign attorneys. In part, both of these changes arose from ambiguity in the use of the terms "member" and "lawyer" throughout the 1989 rules.

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

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

A.

2015 Comment

In a [REDACTED], 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-200:

B. (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.)

2001 Comment

In a 2001 letter to the prior Commission, OCTC provided the following comment on rule 1-100(B):

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

...

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

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

. . .

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

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

Discussion

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

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

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

OCTC COMMENTS:

The recommendations proposed with regard to the term “associate” removes any doubt that the term applies only to those working in the same law firm and not to lawyers from different firms who may be sharing profits, expenses, and liabilities with regard to a given case. In 2001, the California courts of appeal rendered conflicting opinions as to what the term “associate” means. In *Sims v. Charness* (2001) 86 Cal.App.4th 884, the court of appeals applied the term to two attorneys working in different law firms but on the same case. However, in *Chambers v. Kay* (2001) 88 Cal.App.4th 903, the court rejected that interpretation. It should be noted that the California Supreme Court recently granted certiorari and will hear the Chambers case.³ OCTC believes that the Chambers interpretation is correct, but for the sake of complete clarity recommends that the current rule be changed to eliminate any doubt.

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

June 2010 Comment

In a June 15, 2010 letter to the prior Commission, OCTC provided the following comment regarding proposed rule 1.0.1:

³ *Chambers v. Kay* (2002) 29 Cal.4th 142.

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature’s authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4th 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies acting in an adjudicative capacity should be included in the definition of tribunal.
3. Comments [1], [3], [4], [5], [11] and [12] are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

D. August 2010 Comment

In an August 27, 2010 letter to the prior Commission, OCTC provided the following comment regarding proposed rule 1.0.1:

1. OCTC is concerned with the revisions to proposed rule 1.0.1(e). The new proposal states: “informed consent’ means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and foreseeable material risks of the proposed conduct and where appropriate the reasonable available alternatives to the proposed conduct.” Most of the changes to the previous proposal are stylistic and OCTC has no problems with those. However, OCTC is concerned with the addition of the term “where appropriate” to the language requiring an attorney to communicate and explain the reasonable available alternatives to the proposed conduct.

The term “where appropriate” is vague, confusing, and too subjective. It gives the attorneys, rather than the clients, the right to determine if it is appropriate to provide this information. Yet, the purpose of this rule is to encourage attorneys to provide clients with the risks of the proposed conduct and the reasonable available alternatives so that the client is making an informed decision. This addition to the rule is unnecessary, confusing, and problematic. Further, the sentence already eliminates absurd or unreasonable alternatives by using the term “reasonable available alternatives.” The term “where appropriate” is unnecessary, duplicative, and confusing.

Consequently, using the term “where appropriate” makes any rule that requires “informed consent” unnecessarily ambiguous, vague, too subjective, and more difficult for the attorneys to understand and comply with. It will result in attorneys leaving things out and cause more disputes about whether the “alternative” was appropriate. Likewise, it makes these rules more difficult to enforce. The term “where appropriate” is not in the ABA rules and should not be in our rule. OCTC would suggest deleting the term “where appropriate” to the definition for informed consent.

2. OCTC remains concerned with the definition in proposed rule 1.0.1(e)(2). Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature’s authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4th 40.)

Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition. The Commission has stated that it is not defining the statute, only providing attorneys with guidance. However, that is not what the rule states. Rule 1.0.1(e)(2) states: “Information protected by Business & Professions Code section 6068(e) is *defined* in Rule 1.6, Comments [3] – [6].” [Emphasis added.]”

In addition, the rules lack authority to provide “guidance” about the definition of a term in a statute.

3. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule’s definition of tribunal. The Commission’s proposed rule excludes from the definition of tribunal legislative bodies *acting in an adjudicative capacity*. However, there is no valid reason to exclude legislative bodies when they are acting in an adjudicative capacity. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.

The Commission’s definition, especially when used in proposed rule 3.3, is confusing in that the State Bar Act already prohibits attorneys from engaging in dishonesty to a court and others and does not separate dishonesty in front of legislative bodies acting in an adjudicative capacity from misrepresentations to courts or others. For instance, it is the duty of an attorney “[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” (Business & Professions Code section 6068(d).) Likewise, “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.” (Business & Professions Code section 6106.) These statutes do not carve out

an exception for misrepresentations to legislative bodies acting in an adjudicative capacity and neither should the new rules. Any attempt to distinguish misrepresentations when made in front of legislative bodies acting in an adjudicative capacity from misrepresentations to courts or others is, thus, misleading, confusing, and could present problems for enforcement of the State Bar Act and the Rules of Professional Conduct. OCTC supports the ABA's version of this definition.

4. OCTC supports the definition for a signed writing in rule 1.0.1(n), but believes it should be a separate definition and not in the same paragraph as the definition for writing or written.
5. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

IV. Potential Deficiencies in the Current Rule:

See above input from OCTC.

- A. Current rule 1-100(B) has only limited defined terms and there are other terms used throughout the rules that might warrant consideration for global definitions. For further discussion, see section IX of this memorandum, below.
- B.
- C. The California Code of Judicial Ethics, as well as the ABA Model Rules, use a separate dedicated provision for global definitions but California's current rule includes definitions as a subpart of the "Purpose and Function" Rule 1-100. In addition, the Code of Judicial Ethics uses an "*" system for identifying defined terms throughout the Code and the Commission may want to consider using a similar system.
- D. RRC1 reviewed several terms that they decided not to include in a global definition section. The Commission may want to consider whether any of these definitions should be included in a global terminology rule: "advance for fees;" "client;" "independent lawyer;" "law clerk;" "lawyer;" "matter;" "personally and substantially;" "public official;" "retainer;" and "substantially related." Alternatively, the Commission may consider whether some of these terms should be defined in relation to specific proposed rules.
- E.

- F. Whether the definition of "of counsel" should remain in an advertising rule standard (see Rule 1-400 Standard (8)) considering the California Supreme Court has apparently approved of that definition for conflicts purposes. See *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153.

See OCTC's letter from 2001, above, suggesting that the definition for the term "associate" be amended by adding the phrase "of the same firm" to remove any doubt "that the term applies only to those working in the same law firm and not to lawyers from different firms who may be sharing profits, expenses, and liabilities with regard to a given case." See also, *Chambers v. Kay* (2002) 29 Cal.4th 142, 152 had to analyze current rules 1-100(B)(4) and 2-200 to determine that an attorney hired as

co-counsel on a particular case is not an “associate” for purposes of the California Rules of Professional Conduct.

See OCTC’s letter from 2001, above, recommending that a definition for the term “informed consent” be amended to add the concept that disclosure should expressly refer to the “material risks and reasonable alternatives of any course of action.” OCTC believes the definition for “informed consent” should be clarified to assist members in understanding the duty being imposed.

G.

The term “practice of law” currently is not defined. However, recall that this Commission agreed with the 1-300 drafting team’s rejection of such a definition or guidance comment.

H.

V. California Context:

The California Code of Judicial Ethics uses an “*” system for identifying defined terms as a function of the global terminology provision in that Code. The following is stated under the “Terminology” heading of the Code of Judicial Ethics:

A.

“Terms explained below are noted with an asterisk (*) in the canons where they appear. In addition, the canons in which these terms appear are cited after the explanation of each term below.”

The following is an example:

“Candidate for judicial office” is a person seeking election to or retention of a judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. See Preamble and Canons 3E(2)(b)(i), 3E(3)(a), 5, 5A, 5A (Commentary), 5B(1), 5B(2), 5B(3), 5B (Commentary), 5C, 5D, and 6E.

B.

The Rules of Procedure of the State Bar of California contain a global definition in [Rule 5.4](#), Title 5, Division 1. General Rules. Rule 5.4 states, “These definitions apply to all rules, unless otherwise stated. Defined terms are not capitalized unless they are proper names.” This is followed by fifty-six defined terms listed numerically.

C.

The Rules of Procedure of the State Bar of California contain a global definition in [Rule 1.2](#), Title 4, Standards for Attorney Sanctions for Professional Misconduct. This rule contains eleven defined terms listed alphabetically.

D.

E.

Evidence Code section 950 defines “lawyer” as a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

Evidence Code section 951 defines “client” as a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and

includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

- Evidence Code section 250 defines “writing” as a handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.
- F.

VI. Approach In Other Jurisdictions (National Backdrop):

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.0: Terminology,” revised July 29, 2015, is available at:

- A. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_0.pdf
- Four states have adopted Model Rule 1.0 verbatim.⁴ Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 1.0.⁵ Fourteen states have adopted a version of the rule that is substantially different to Model Rule 1.0.⁶ Two states did not adopt Model Rule 1.0 or a separate terminology rule.⁷

VII. Public Comment Received by the First Commission:

The final clean text of a proposed new rule 1.0.1 drafted by the first Commission and adopted by the Board to replace rule 1-100(B) is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. This draft appears in the attachments as “Draft B.” Although the proposed rule differs from current rule 1-100(B), the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule. Also the initial (previous) draft of proposed rule 1.0.1 (as drafted by the first Commission and circulated for public comment with a deadline of August 2010) is included in the attachments and appears as “Draft A.”

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-100(B) 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

⁴ The four states are: Arkansas, Delaware, Idaho, and Louisiana.

⁵ The thirty-one jurisdictions are: Arizona, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

⁶ The fourteen states are: Alabama, Alaska, California, Georgia, Hawaii, Michigan, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and Wisconsin.

⁷ The two states are: Florida and Mississippi.

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 mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

Consulting the RRC1 terminology rule may be helpful in terms of identifying significant terms that should be contained in a global terminology rule. However, because this Commission has not yet considered all of the rules they are tasked with reviewing, it might be premature to recommend certain defined terms. Therefore, the drafting team may want to consider the approach of conditional [bracketed] defined terms for rules that RRC2 might eventually adopt, but has not yet considered (for example, the term "screened" is not used in the current rules but is used in the RRC1 rules and the ABA Model Rules). The drafting team may choose to have placeholder definitions for such terms that would need to be revisited once the underlying rule is adopted. If a rule is not adopted, then it would be understood that that term would not be included in the final terminology rule.

(1) Whether the proposed rules should contain a global terminology rule and provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed rules.

(2) Whether the proposed rule should expand the number of terms defined?

(3) Whether to adopt the ABA Model Rule 1.0(b) concept of "confirmed in writing" when used in reference to the informed consent of a client; or to maintain California's more rigorous "informed written consent" standard for memorializing a client's informed consent to a particular course of conduct.

(4) If the Commission decides to define the term "tribunal," should the Commission recommend the ABA Model Rule 1.0(m) definition of "tribunal" which includes legislative and administrative bodies; or, should the Commission limit its definition of "tribunal" to a court of law or its equivalent?

(5) The rule recommended by the first Commission and adopted by the Board, proposed Rule 1.0.1, was submitted to the California Supreme Court in 2013 (the rule filing is provided separately as additional background materials) and in a letter dated April 15, 2014, the Supreme Court referred proposed Rule 1.0.1 back to the State Bar for

redrafting (the Supreme Court's letter also is separately provided). The Court referred to the definition of "Information protected by Business and Professions Code section 6068(e)" and stated two requests for State Bar redrafting. First, the Court stated that the "language of the redrafted submission should be consistent with the terms of Business and Professions Code section 6068, subdivision (e), as well as the compliance and disciplinary purpose and function of the California Rules of Professional Conduct." Second, the Court seemed to express a concern that a definition should be a part of the black letter and not placed in a comment. As adopted by the first Commission and the Board, proposed Rule 1.0.1(e-2) did not include a definition. Instead, it cross referenced certain Comments to the proposed confidentiality rule, Rule 1.6. If the drafting team considers utilizing the first Commission's proposed Rule 1.0.1, then the Court's views should be considered.

IX. Research Resources:

- *People ex rel. Department of Corporation v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153 (regarding definition of "of counsel")
- *Chambers v. Kay* (2002) 29 Cal.4th 142, 152 (regarding definition of "associate")
- [California State Bar Formal Opinion 1993-129](#) (regarding definition of "of counsel")
- [ABA Formal Opinion 90-357](#) (regarding definition of "of counsel")