

**RRC2 – Rule 1-100(B) [1.0.1]**  
**Post-Agenda E-mails, etc. – Revised (January 19, 2016)**  
**Drafting Team: Chou (Lead), Bleich, Langford, Zipser**

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**January 12, 2016 OCTC Memo to RRC2:**

\* \* \*

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

OCTC addressed many aspects of rule 1-100 in its April 2015 comment and refers the Commission to that document as well as the below.

If the Commission includes a definition of “tribunal” in this rule, the definition should include legislative bodies acting in an adjudicative capacity.

If the Commission incorporates levels of intent into revised rules by use of language such as “knowingly” and “knows,” it should define that language to include circumstances where the member deliberately closes her eyes to facts she had a duty to see or makes a reckless misstatement as fact. This will maintain consistency with the Business and Professions Code. (Unqualified and unequivocal statements under circumstances that should have caused one uncertainty are deceptive and support a finding of culpability under Business and Professions Code, sections 6068(d) and 6106. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) )

**April 20, 2015 OCTC Memo to RRC2:**

\* \* \*

**A. Rule 1-100 of the Rules of Professional Conduct**

\* \* \*

2. The definitional section of rule 1-100, subsection (B), should be clarified or expanded to expressly state that the rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the *California Rules of Court*.)

\* \* \*

**E. Rule 2-400 and ABA Model Rule 8.4 re discriminatory conduct**

\* \* \*

Additionally, OCTC supports those sections of ABA Model Rule 8.4 not directly related to rule 2-400.

**January 12, 2016 Chou Email to Drafting Team, cc Difuntorum, McCurdy & Lee:**

I reproduce below OCTC’s comments on Rule 1-100. As I explain below, I do not believe that the comments require any revisions to our draft rule:

**OCTC Comment:**

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OCTC addressed many aspects of rule 1-100 in its April 2015 comment and refers the Commission to that document as well as the below.

If the Commission includes a definition of “tribunal” in this rule, the definition should include legislative bodies acting in an adjudicative capacity.

If the Commission incorporates levels of intent into revised rules by use of language such as “knowingly” and “knows,” it should define that language to include circumstances where the member deliberately closes her eyes to facts she had a duty to see or makes a reckless misstatement as fact. This will maintain consistency with the Business and Professions Code. (Unqualified and unequivocal statements under circumstances that should have caused one uncertainty are deceptive and support a finding of culpability under Business and Professions Code, sections 6068(d) and 6106. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) )

**Response to OCTC Comment:**

I do not believe that we need to make any changes in response to OCTC’s comments.

1. The revised draft defines “tribunal” to include legislative bodies acting in an adjudicative capacity as suggested by OCTC.
2. I do not believe that we should expand the definition of the terms “knowingly,” “known,” or “knows” to address the concepts of willful blindness or reckless misstatements. It is not clear to me that the cited decision supports the proposition cited by OCTC. In *Chesnut*, the attorney “unequivocally” and “unqualified[ly]” stated that he served “John” even though the person he served was surprised when he received the dissolution papers and the attorney made no efforts to verify the identity of the person he served. Under these facts, the Court arguably concluded that the attorney actually knew that his statement that he was certain that he had served John was false. In any event, I think it would be better to let the courts clarify the meaning and scope of these terms on a case-by-case basis.

**January 13, 2016 Langford Email to Drafting Team, cc Difuntorum, McCurdy & Lee:**

OCTC is trying to make sure we are not appearing to exclude reckless behavior by our definition. The Bar does punish reckless behavior and the Disciplinary Standards recognize levels of misconduct like gross negligence vs. intentional conduct.

**January 13, 2016 Chou Email to Drafting Team, cc Difuntorum, McCurdy & Lee:**

I think it will be sufficient if we indicate in the ultimate transmittal to the Supreme Court that the definitions relating to mental state do not change the law. This is what RRC1 did. I’m reluctant to go further with respect to the definitions of “knowingly,” “known,” or “knows” without clear, binding precedent addressing the meanings of those terms under facts where the court found that the defendant lacked actual knowledge but engaged in willful blindness or engaged in reckless behavior.

**January 16, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Here are my thoughts on this proposal ---

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- 1) Regarding "where appropriate" in paragraph (e), I hope the drafting team will explain where they think it would and where it would not be appropriate for a lawyer to identify "the reasonably available alternatives to the proposed conduct."
- 2) Regarding proposed paragraph (m):
  - a. This begins with references to courts and arbitrators, but it omits two equivalents. These are administrative law judges and special masters.
  - b. I disagree with the inclusion of legislative and administrative bodies. The import of the definition only can be understood by examining where the definition will be used in other Rules. The key use of this term is in the Rule 3.3 (Candor Toward The Tribunal). Extending Rule 3.3 to legislative and administrative bodies would intrude on the First Amendment right to petition and influence the government. In addition, there are concepts that are problematic outside of the court context. These include, e.g.: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii) the application of the ex parte requirements of Rule 3.3(d). An expansive definition of "tribunal" might be appropriate if used only as a reminder of best practices but would not function properly as a disciplinary standard. Moreover, there is no reason to overreach in the definition and the application of Rule 3.3 b/c the statutory duty of honesty under B&P C § 6106 will supplement Rule 3.3. This point was explained by the first Commission with its Comment [11]: "This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9." Even when legislative or administrative bodies adjudicate a matter, such as with a decision to approve construction of a subdivision, the hearing can be expected to be essentially political in nature, involving the sort of political advocacy, use of political pressure, and trading of favors that is not part of the judicial process. As one example of the political nature of many of these non-judicial proceedings, it is common for an applicant's lawyer, such as in seeking approval for a subdivision, to petition members of a city council ex parte in advocating on behalf of a client, but the first Commission's version of Rule 3.3(d) stated: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Requiring this would be contrary to the nature of political advocacy and would deprive many applicants of the use of their lawyers as their representatives in this process. Another example of the problem created by the expansive definition of "tribunal" is in proposed Rule 3.1, which is agenda item III.H. on the January 2016 agenda. Its paragraph (a) begins: "In a proceeding before a tribunal, a lawyer shall not:(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; ...." This would apply the concept of probable cause to legislative and administrative decision making, which is nonsensical. Also note that the Supreme Court's letter dated April 15, 2014, directed that Rule 3.1 apply only to tribunals, but that presumably was in the context of the first Commission's definition of "tribunal" that did not include legislative or administrative decision making.
  - c. I urge adoption of the first Commission's version: "'Tribunal' means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court."

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- d. If the Commission were to retain the legislative and administrative references, the sentence, the sentence does not scan: "A legislative body, administrative agency or other body acts ...." The word "acts" should be "acting".
- 3) In Comment [2], I question the need for everything after the first sentence b/c it is practice information and not an explanation of the Rule's meaning, and it includes a case citation that I think we have decided to exclude wherever possible. The information that I would omit is correct but is along the lines of Restatement explanation.
- 4) I would include the bracketed Comment [3] but not the bracketed Comment [4].
- 5) Regarding Comment [5]:
- a. I don't understand the reason for cross-referencing other Rules that use the defined terms. This is not otherwise done in Rule 1.0.1 and seems to me to unnecessarily complicate the drafting.
- b. If the cross-references are retained, I don't understand why they are segregated rather than being a single series.
- c. Also if they are retained, why is Rule 1.13 included? It does not use the defined term.
- 6) In the first line of Comment [6], "rule" should be capitalized.
- 7) In Comment [6]:
- a. In the interests of brevity, the first three sentences could be removed and the fourth sentence could be edited as follows: "The communication necessary to obtain such informed consent or informed written consent will vary according to the rule Rule involved and the circumstances giving rise to the need to obtain consent."
- 8) Everything after the first sentence of Comment [8] amounts to practice advice (good advice) but not an explanation of the Rule. I don't think it meets the directions under which we are acting and should be removed.
- 9) I think the reference to California in n. 3 should be removed. We have not yet adopted any version of MR 1.0.
- 10) ¶7 on p. 21 of 30 does not seem to me to capture the most important point, particularly in light of our directions to not fix what isn't broken. This is that the definition of "informed consent" carries forward the current definition found in rule 3-310(A), which is the definition used or relied on in numerous appellate decisions and advisory ethics opinion. I suggest editing the first sentence of that paragraph along the following lines: "In paragraph (e), recommend adoption of RRC1's definition of "informed consent," as this carries forward the definition now found in rule 3-310(A) without substantive change. However, we have modified the RRC1 definition 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."

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11) I recommend making a corresponding change to ¶8 by editing its first sentence along these lines: "...which is based on current rule 3-310(A)(2) and carries forward the substance of the current rule."

12) The first two sentences on p. 22 of 30 are not precise b/c the requirement of informed written consent appears in our current rules only in certain situations. I suggest: "Unlike the Model Rules or jurisdictions that have largely adopted the Model Rules' approach to consent, California has a heightened standard that requires in certain situations, particularly those involving significant conflicts, that a client's the consent from a client, former client or other person, 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."

13) I suggest adding to ¶18 on p. 24 of 30, as a new second sentence: "We recommend using the Evidence Code definition rather than the substantially similar Model Rule definition so as to not have two definitions in California law that might be argued to have different meanings."

14) In ¶4, which begins at the foot of p. 26 of 30, I can add another reason for not having a global definition of "independent lawyer". The term is not always used the same way. Compare Rule 1.8.1 and 4.2.

**January 16, 2016 Langford Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

What I don't like about leaving them out (legislative bodies) is that case law is not definitive on what you are saying with regard to candor, and in fact case law disallows lawyers lying to third parties or helping a client do so when the lie hurts people. Randy's staff did research on this for me as I was concerned about it.

**January 17, 2016 Chou Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

Thanks for the thoughtful comments. My responses are in red below.

- 1) Regarding "where appropriate" in paragraph (e), I hope the drafting team will explain where they think it would and where it would not be appropriate for a lawyer to identify "the reasonably available alternatives to the proposed conduct."

This is why the drafting team decided to leave it up to the committee as a whole. I could not think of a specific instance where a lawyer should not communicate a reasonable available alternative but agreed to refer this issue to the whole committee since RRC1 – which included the "where appropriate" language – apparently thought there may be such an instance. I wanted to hear from other committee members before deciding that the phrase should be omitted.

- 2) Regarding proposed paragraph (m):
  - a. This begins with references to courts and arbitrators, but it omits two equivalents. These are administrative law judges and special masters.

I believe an "administrative agency or other body acting in an adjudicative capacity" encompasses ALJs and special masters.

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- b. I disagree with the inclusion of legislative and administrative bodies. The import of the definition only can be understood by examining where the definition will be used in other Rules. The key use of this term is in the Rule 3.3 (Candor Toward The Tribunal). Extending Rule 3.3 to legislative and administrative bodies would intrude on the First Amendment right to petition and influence the government. In addition, there are concepts that are problematic outside of the court context. These include, e.g.: (i) the meaning of “legal authority in the controlling jurisdiction” in Rule 3.3(a)(2); and (ii) the application of the *ex parte* requirements of Rule 3.3(d). An expansive definition of “tribunal” might be appropriate if used only as a reminder of best practices but would not function properly as a disciplinary standard. Moreover, there is no reason to overreach in the definition and the application of Rule 3.3 b/c the statutory duty of honesty under B&P C § 6106 will supplement Rule 3.3. This point was explained by the first Commission with its Comment [11]: “This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.” Even when legislative or administrative bodies adjudicate a matter, such as with a decision to approve construction of a subdivision, the hearing can be expected to be essentially political in nature, involving the sort of political advocacy, use of political pressure, and trading of favors that is not part of the judicial process. As one example of the political nature of many of these non-judicial proceedings, it is common for an applicant’s lawyer, such as in seeking approval for a subdivision, to petition members of a city council *ex parte* in advocating on behalf of a client, but the first Commission’s version of Rule 3.3(d) stated: “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Requiring this would be contrary to the nature of political advocacy and would deprive many applicants of the use of their lawyers as their representatives in this process. Another example of the problem created by the expansive definition of “tribunal” is in proposed Rule 3.1, which is agenda item III.H. on the January 2016 agenda. Its paragraph (a) begins: “In a proceeding before a tribunal, a lawyer shall not:(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; ....” This would apply the concept of probable cause to legislative and administrative decision making, which is nonsensical. Also note that the Supreme Court’s letter dated April 15, 2014, directed that Rule 3.1 apply only to tribunals, but that presumably was in the context of the first Commission’s definition of “tribunal” that did not include legislative or administrative decision making.

I do not believe that the right to petition is different in scope for courts and legislative and administrative bodies “*acting in an adjudicative capacity.*” For example, under the sham exception to the Noerr-Pennington doctrine, the scope of the right to petition is construed identically in court proceedings and in adjudicatory proceedings before an administrative agency. Although RRC1 cited the right to petition as a concern, it did not cite any authority for the proposition that the right to petition is different in scope for courts and administrative or legislative agencies acting in an adjudicative capacity. Finally, we are unaware of any issues with the many states that have adopted the model rule definition of “tribunal.” As to the policy question of whether the inclusion of legislative and administrative agencies is problematic, I believe that the definition of when such agencies act in an adjudicative capacity sufficiently limits the scope of any lawyer’s duty in such adjudications. Ultimately, whether a legislative or

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administrative agency is acting in an adjudicative capacity will depend on whether it is acting more like a court than a political entity and can be determined on a case-by-case basis.

- c. I urge adoption of the first Commission's version: "'Tribunal' means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court."

See above. I continue to believe we should keep the more expansive definition of "Tribunal."

- d. If the Commission were to retain the legislative and administrative references, the sentence, the sentence does not scan: "A legislative body, administrative agency or other body acts ...." The word "acts" should be "acting".

Grammatically, I think the word "acts" is correct. Otherwise, there is no verb in the second sentence of subdivision (m).

- 3) In Comment [2], I question the need for everything after the first sentence b/c it is practice information and not an explanation of the Rule's meaning, and it includes a case citation that I think we have decided to exclude wherever possible. The information that I would omit is correct but is along the lines of Restatement explanation.

I thought the information after the first sentence was helpful to provide a concrete example of why the "specific facts" matter by noting that a person who is "of counsel" may be deemed a member of a law firm in one context but not another. But I am open to deleting them.

- 4) I would include the bracketed Comment [3] but not the bracketed Comment [4].

We have referred the issue of whether to include these comments to the committee as a whole.

- 5) Regarding Comment [5]:

- a. I don't understand the reason for cross-referencing other Rules that use the defined terms. This is not otherwise done in Rule 1.0.1 and seems to me to unnecessarily complicate the drafting.
- b. If the cross-references are retained, I don't understand why they are segregated rather than being a single series.
- c. Also if they are retained, why is Rule 1.13 included? It does not use the defined term.

We thought it was useful to have the references to these rules so the reader can better understand why the terms "fraud" or "fraudulent," as defined for purposes of these Rules, do not require the two elements of common law fraud: reliance and damages. They are segregated because we are referencing two separate categories of rules where it is relevant. I am fine with deleting Rule 1.13 from the comment since it does not include the terms, and its inclusion may create some confusion.

- 6) In the first line of Comment [6], "rule" should be capitalized.

I am fine with that.

7) In Comment [6]:

- a. In the interests of brevity, the first three sentences could be removed and the fourth sentence could be edited as follows: “The communication necessary to obtain ~~such~~ informed consent or informed written consent will vary according to the rule Rule involved and the circumstances giving rise to the need to obtain consent.”

I am fine with deleting the first three sentences – which, aside from cross-referencing rules, appears to merely state the obvious: that we define both “informed consent” and “informed written consent” because some rules require informed consent while other rules require informed written consent.

8) Everything after the first sentence of Comment [8] amounts to practice advice (good advice) but not an explanation of the Rule. I don’t think it meets the directions under which we are acting and should be removed.

I thought the information following the first sentence was helpful to advise readers of how the definition would be applied but I am open to deleting them.

9) I think the reference to California in n. 3 should be removed. We have not yet adopted any version of MR 1.0.

I assumed that the footnote refers to the terms that had been defined in Rule 1-100(B) – which are significantly different from MR 1.0.

10) ¶7 on p. 21 of 30 does not seem to me to capture the most important point, particularly in light of our directions to not fix what isn’t broken. This is that the definition of “informed consent” carries forward the current definition found in rule 3-310(A), which is the definition used or relied on in numerous appellate decisions and advisory ethics opinion. I suggest editing the first sentence of that paragraph along the following lines: “In paragraph (e), recommend adoption of RRC1’s definition of “informed consent;” as this carries forward the definition now found in rule 3-310(A) without substantive change. However, we have modified the RRC1 definition 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.”

I am fine with the proposed edit.

11) I recommend making a corresponding change to ¶8 by editing its first sentence along these lines: “...which is based on current rule 3-310(A)(2) and carries forward the substance of the current rule.”

I am fine with the proposed edit.

12) The first two sentences on p. 22 of 30 are not precise b/c the requirement of informed *written* consent appears in our current rules only in certain situations. I suggest: “Unlike the Model Rules or jurisdictions that have largely adopted the Model Rules’ approach to consent, California has a heightened standard that requires in certain situations, particularly those involving significant conflicts, that a client’s the consent from a client, former client or

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other person, 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.

I agree with Bob that those sentences should be more precise and am fine with his proposed edits.

13) I suggest adding to ¶18 on p. 24 of 30, as a new second sentence: “We recommend using the Evidence Code definition rather than the substantially similar Model Rule definition so as to not have two definitions in California law that might be argued to have different meanings.”

I am fine with the proposed addition.

14) In ¶4, which begins at the foot of p. 26 of 30, I can add another reason for not having a global definition of “independent lawyer”. The term is not always used the same way. Compare Rule 1.8.1 and 4.2.

I am fine with the proposed addition.

**January 16, 2016 Langford Email to Chou, cc Drafting Team, Kehr, Difuntorum, Mohr, McCurdy & Lee:**

I am with you Danny on all your comments.