

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter:** Cardona

**Co-Drafters:** Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

**Meeting Date:** January 22 – 23, 2016

### I. CURRENT CALIFORNIA RULE 1-120

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

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

### II. DRAFTING TEAM'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 8.4 (CLEAN)

#### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

#### Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] Although a lawyer is personally answerable to the entire criminal law, a lawyer is

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to the lawyer's ability or fitness to practice law. Examples of such offenses include those involving violence, dishonesty, or breach of trust. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.

[4] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act. But see Rule 1.2(d) [3-210]. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[7] Paragraph (d) does not apply to a lawyer who refuses to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d) [3-210], which also applies to challenges of legal regulation of the practice of law.

[8] Paragraph (d) may apply to a lawyer's abuse of public office that demonstrates an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of a position of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

### IV. PROPOSED RULE 8.4 (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

#### Rule ~~8.41-120~~ Misconduct~~Assisting, Soliciting, or Inducing Violations~~

It is professional misconduct for a lawyer to:

- (a) violate ~~A member shall not knowingly assist in, solicit, or induce any violation of~~ these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

#### Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] Although a lawyer is personally answerable to the entire criminal law, a lawyer is professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to the lawyer's ability or fitness to practice law. Examples of such offenses include those involving violence, dishonesty, or breach of trust. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.

[4] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises,

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act. But see Rule 1.2(d) [3-210]. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[7] Paragraph (d) does not apply to a lawyer who refuses to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d) [3-210], which also applies to challenges of legal regulation of the practice of law.

[8] Paragraph (d) may apply to a lawyer's abuse of public office that demonstrates an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of a position of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### V. PROPOSED RULE (REDLINE TO MODEL RULE 8.4)

#### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate ~~or attempt to violate the Rules of Professional Conduct~~ these Rules or the State Bar Act, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the ~~lawyer's~~ lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the these~~ Rules of Professional Conduct, the State Bar Act, or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

judicial conduct or other law.

### Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

~~[2][1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~

~~[3][2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer ~~should be is~~ professionally answerable under paragraph (b) only for offenses that indicate lack of those characteristics relevant to law practice the lawyer's ability and fitness to practice law. Examples of such Offenses ~~offenses include those~~ involving violence, dishonesty, breach of trust, ~~or serious interference with the administration of justice are in that category.~~ A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~

~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[4] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. See In re Kelley (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]. A lawyer may be disciplined under Business and Professions Code § 6106 for acts of moral turpitude that constitute gross negligence.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act. But see Rule 1.2(d) [3-210]. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

Lead Drafter: Cardona

Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

Meeting Date: January 22 – 23, 2016

supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[47] Paragraph (d) does not apply to a lawyer ~~may refuse who refuses~~ to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. ~~The provisions of Testing the validity of any law, rule, or ruling of a tribunal is governed by~~ Rule 1.2(d) ~~concerning a good faith challenge to the validity, scope, meaning or application of the law apply~~[3-210], which also applies to challenges of legal regulation of the practice of law.

~~[58] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's~~ Paragraph (d) may apply to a lawyer's abuse of public office ~~can suggest that demonstrates~~ an inability to fulfill the professional role of lawyers. The same is true of a lawyer's abuse of ~~positions a position~~ of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### VI. PUBLIC COMMENTS SUMMARY

None.

### VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 4/20/2015:**  
OCTC does not recommend any revisions to Rule 1-120.<sup>1</sup>
- **RUSSELL WEINER, OCTC, 6/15/2010:**
  1. OCTC supports this rule. However, OCTC believes that the Model Rules version of subparagraph (a) is clearer and better. The Model Rules also prohibit an attorney from violating or attempting to violate the Rules of Professional Conduct. There is no sound reason to exclude this language.
  2. OCTC believes that subparagraph (f) should include solicit or induce a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no reason for the differences

<sup>1</sup> However, as the Commission's work progresses, OCTC will offer comment on related issues such as whether it would be appropriate to promulgate a new rule addressing attempts to violate rules and a requirement that members report the misconduct of others.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

between (a) and (f).

3. Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. OCTC supports Comments 2A, 2B and 6.
4. OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would appear to apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) OCTC recommends that this Comment be stricken or clarified.
5. OCTC is very concerned about the last sentence of Comment 6, which states “This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.” This is beyond the scope of the Rules and Comments. This Comment invades the prosecutory discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. In fact, the Supreme Court rejected the notion that it objected to duplicative charging. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 fn. 2 [“We do not wish to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence.”]) Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges, but other times it does not, although it gives them no additional weight. (See *In the Matter of Wolf* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.

• **MIKE NISPEROS, OCTC, 9/27/2001:**

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

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

and replace with:

A member shall not:

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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

through the acts of another;

(b) commit a criminal act;

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

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

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

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

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

### OCTC COMMENTS:

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

Section (a) is similar to current rule 1-120, but makes clear that an attorney shall not himself or herself violate the Rules of Professional Conduct or the State Bar Act, induce another to do so, or use another to either violate the rules or induce another to violate the rules.

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

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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

existing law, but only codifying it.

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

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

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

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

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

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

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

- **West Virginia Rule 8.4** is identical to Model Rule 8.4:

#### **West Virginia Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

induce another to do so, or do so through the acts of another;

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

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

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

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

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

- **Model Rule 8.4.** The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120 as well as other provisions referenced in OCTC's recommendation. The chart is posted at:
  - [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf)
  - Thirteen states have adopted Model Rule 8.4 verbatim.<sup>2</sup> Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 8.4.<sup>3</sup> Seven states have adopted a version of the rule that is substantially different to Model Rule 8.4.<sup>4</sup>
- **Model Rule 8.4, Comment [3] & Proposed Rule 8.4.1.** Comment [3] to Model Rule 8.4 prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Similar language was also included in Comment [3] of the first Commission's proposed rule 8.4. The subject matter of Comment [3] is addressed in proposed Rule 8.4.1.

<sup>2</sup> The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Idaho, Montana, Mississippi, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Utah and West Virginia.

<sup>3</sup> The thirty-one jurisdictions are: Alabama, Alaska, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The seven jurisdictions are: California, Florida, Georgia, Illinois, Maine, New York, Texas, Washington.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

Twelve jurisdictions have adopted Model Rule 8.4, Comment [3] verbatim.<sup>5</sup> Seven jurisdictions have adopted a slightly modified version of Model Rule 8.3, Comment [3].<sup>6</sup> Fourteen jurisdictions have adopted a version of Comment [3] that is substantially different from Model Rule 8.3.<sup>7</sup> Eighteen jurisdictions have not adopted a version of Comment [3].<sup>8</sup>

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised June 15, 2015, is available at:

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

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

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

**General Concepts.** The drafting team recommends that the Commission agree to the following general concepts reflected in proposed Rule 8.4, which used as its starting point current rule 1-120, which prohibits a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules or the State Bar Act, and ABA Model Rule 8.4, which contains a similar prohibition as well as additional misconduct provisions.

1. In accordance with the approach of Model Rule 8.4, expand the scope of current rule 1-120 and collect in a single rule various misconduct provisions that are currently found in other rules of professional conduct or in the Business & Professions Code.
  - Pros: There would be a single rule that lawyers, judges and the public can consult to identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply. Placing these standards in a single rule should facilitate compliance with and enforcement of the Rules by clearly stating these basic principles and also

<sup>5</sup> The twelve jurisdictions are: Delaware, Idaho, Illinois, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

<sup>6</sup> The seven jurisdictions are: Arizona, Colorado, Connecticut, Iowa, Maine, North Dakota, and Tennessee.

<sup>7</sup> The fourteen jurisdictions are: Alaska, Arkansas, District of Columbia, Florida, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Texas, and Washington.

<sup>8</sup> The eighteen jurisdictions are: Alabama, California, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Virginia, and Wyoming.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

- promote confidence in the legal profession and the administration of justice by prominently placing the principles in a single rule.<sup>9</sup>
- Cons: The principles already exist in the current rules or the State Bar Act. Collecting them in a single rule will create another source for a disciplinary charge, risking duplication of charging in the disciplinary process.
2. Address the concept of discrimination by a lawyer either in the practice of law or in the operation and management of a law practice in a separate rule, proposed Rule 8.4.1, rather than addressing it as either a blackletter provision<sup>10</sup> or comment<sup>11</sup> to this Rule.
- Pros: See discussion in Report & Recommendation re proposed Rule 8.4.1.
  - Cons: See discussion in Report & Recommendation re proposed Rule 8.4.1.
3. Address the concept of an “attempt” to violate a rule or a provision of the State Bar Act in individual rules rather than generally make an “attempt” a potential violation of any rule.
- Pros: Similar to RRC1, the drafting team believes<sup>12</sup> that the Commission should

<sup>9</sup> The ABA similarly collected dispersed principles into Model Rule 8.4 by bringing together concepts from ABA Model Code of Professional Responsibility, DR [Disciplinary Rule] 1-102(A), DR 9-101(C), EC [Ethical Consideration] 7-34, and EC 9-1.

<sup>10</sup> Although there is no blackletter provision in the Model Rules that expressly addresses discrimination by a lawyer, the ABA Standing Committee on Ethics and Professional Responsibility has recently proposed adoption of new paragraph 8.4(g), which would provide it is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The proposed amendment also includes a substantial reworking of MR 8.4, cmt. [3]. Both proposed paragraph 8.4(g) and the original and reworked comment [3] are discussed in detail in the Report & Recommendation relating to proposed Rule 8.4.1.

<sup>11</sup> Currently, Model Rule 8.4, cmt. [3] provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

<sup>12</sup> It should also be noted that during the initial consideration of a rule based on current rule 1-120 in May 2015, the Chair inquired and determined that it was the view of a significant majority of the Commission that attempts should be addressed on a rule-by-rule basis. Similarly, RRC-1 appears to have voted unanimously to reject inclusion of a general attempt provision.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. This approach should result in any prohibition on an attempt being tailored to a specific rule's violation and potential harm, and avoid creating a blunt instrument for discipline that would serve little purpose when applied to most rules. For example, in proposed Rule 1.5 [4-200], this Commission has recommended a rule that provides a lawyer "shall not make an agreement for, charge, or collect an unconscionable or illegal fee." The terms "make" and "charge" in effect prohibit an attempt to "collect" an unconscionable fee. Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay such a fee should be prohibited. On the other hand, the Commission also recommends adoption of proposed Rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. The harm is in the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with the lawyer-client relationship. Prohibiting an attempt to engage in such a communication poses the risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person. An additional example where problems would be created by a general provision authorizing discipline for an attempted violation is Rule 1.4, which requires a lawyer to "promptly" provide information to clients. With a general attempt provision, any delay not long enough to constitute an actual violation of Rule 1.4 might be characterized as indicating an attempt subject to discipline.

- Cons: ABA Model Rule provides it is misconduct to "attempt to violate" any rule, so the proposed rule reflects a divergence from the national model.

**Blackletter Provisions.** Each of the proposed blackletter provisions is discussed in the following paragraphs:

4. Recommend adoption of paragraph (a) of Model Rule 8.4, without the concept of "attempt" and without the term "solicit," which is in current rule 1-120.
  - Pros: Paragraph (a) largely carries forward current rule 1-120, except that the term "solicit" has been deleted because that concept is covered by the Model Rule term "induce," which is already present in rule 1-120. Concerning the concept of "attempt," see paragraph 3, above.
  - Cons: Proposed paragraph (a) does not go far enough in modifying MR 8.4(a). RRC1 deleted from the Model Rule not only the concept of attempt, but also the concept that it is misconduct to "violate the Rules of Professional Conduct." As RRC1 explained: "[A]ny conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation." Ultimately, however, the proposed rule circulated by the Board of

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

Governors included the concept that it was professional misconduct to violate the Rules or the State Bar Act.<sup>13</sup>

5. Recommend adoption of paragraph (b) of Model Rule 8.4 but add a reference to “moral turpitude” to the paragraph.
  - Pros: As explained more fully in proposed Comment [3] (based on MR 8.4, cmt. [2]), this provision focuses only on crimes committed by a lawyer that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer, central principles in lawyer conduct. The reference to moral turpitude is included to maintain conformity with the broader public protection afforded by the Business & Professions Code, specifically § 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. Some jurisdictions have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the drafting team recommends adding “moral turpitude” to the proposed rule. In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code §§ 6101 and 6102. That the crime is one of moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.
  - Cons: “Moral turpitude” and “fitness as a lawyer in other respects” means essentially the same thing. If the purpose of the rule is to alert lawyers to the case law in California concerning moral turpitude, it should be done by means of a comment.
6. Recommend adoption of paragraph (c) of Model Rule 8.4, with the words “reckless or intentional” added to modify “misrepresentation.”
  - Pros: The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of “reckless or intentional” is intended to clarify that negligent misrepresentation is not regarded as dishonesty that would trigger this Rule. This clarification is consistent with the intended scope of the ABA’s rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., *State ex rel. Oklahoma Bar Ass’n v. Besly* (Okla., 2006) 136 P.3d 590 [2006 OK 18] and *In re Clark* (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827]. Including these modifiers avoids the aspirational nature of the Model Rule provision. Compare proposed Rule 1.1, under which discipline is imposed only if a lawyer has “intentionally, recklessly, repeatedly, or with gross negligence” failed to act competently.

<sup>13</sup> Attached for reference is proposed Rule 8.4 and its accompanying comments from the version of the rules resulting from the work of RRC1 that was approved by the Board of Governors in July and September 2010. (See page 29 of this agenda item.)



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

State Bar Act, or doing so through the acts of another, does not preclude a lawyer from advising a client concerning actions the client is legally entitled to make. Cons: This sentence, taken out of context from the rest of MR 8.4, cmt. [1] seems simply to state the obvious. It should be deleted, or the substance of the first part of the model rule comment should be restored to provide the necessary context.

12. Recommend adoption of Comment [3], derived from the last three sentences of Model Rule 8.4, cmt. [2], which have been revised for clarity.

- Pros: This comment provides interpretative guidance in the sense of providing the underlying rationale for the focus of paragraph (b) on crimes involving dishonesty or other characteristics indicative of a lawyer's ability or fitness to practice law. (See discussion at paragraph 5, above.)
- Cons: Question whether the last sentence, which RRC1 deleted, should be included. The proposition stated is unclear in the absence of a definition of what is considered an offense of "minor significance." This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code § 6068(a), and conviction referrals under Business and Professions Code § 6101. For example, a lawyer's conviction for a single misdemeanor charge could be construed as a conviction for an offense of "minor significance" offense under the Model Rule language. Under existing California standards, however, a pattern of such offenses might not be necessary for discipline, which would be contradicted by an interpretation of the comment language as requiring such a pattern before discipline is appropriate.

13. Recommend adoption of Comment [4], which is derived from RRC1's proposed Comment [2A].

- Pros: Comment [4] provides important guidance as to what is intended by the concept in California case law, "other misconduct warranting discipline." The cited case, *In re Kelley*, is the seminal Supreme Court case on this concept.
- Cons: The comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.

14. Recommend adoption of Comment [5], which is derived from RRC1's proposed Comment [2C].

- Pros: RRC1 drafted this comment in response to a public comment from the Department of Justice. Given RRC1's decision not to recommend a version of Model Rule 4.1 [Truthfulness in Statements To Others], the language addressing covert activity that RRC1 previously had considered for inclusion as Rule 4.1(b), was added as a comment to Rule 8.4. The comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules.
- Cons: None identified as to substance. However, should this Commission

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

decide to recommend a version of Model Rule 4.1, then this comment might more appropriately be placed in that rule.

15. Recommend adoption of Comment [6], which is derived from RRC1's proposed Comment [2D].

- Pros: This comment provides important interpretive guidance. It stresses that constitutional rights in a disciplinary context must be protected so that activities protected by the First Amendment do not become the subject of disciplinary proceedings or their exercise is not chilled. See, e.g, *Ramirez v. State Bar* (1980) 28 Cal. 3d 402, 411 [169 Cal. Rptr. 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *Matter of Anderson* (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).
- Cons: None identified.

16. Recommend adoption of Comment [7], which is derived from Model Rule 8.4, cmt. [4], revised to make it more concise.

- Pros: This comment provides important guidance on the scope of paragraph (d)'s prohibition of conduct prejudicial to the administration of justice by clarifying that it does not apply to a lawyer's refusal to comply with an obligation imposed by law or court order when there is a good faith belief no valid obligation exists.
- Cons: In addition to the cross-reference to Rule 1.2(d) [3-120], a cross-reference should also be added to Rule 3.1 [3-100], which similarly does not impose an obligation when there exists "a good faith argument for an extension, modification or reversal of such existing law."

17. Recommend adoption of Comment [8], which is derived from Model Rule 8.4, cmt. [5], revised to shorten it and remove the Model Rule's vague language.

- Pros: This comment clarifies that conduct as a nonlawyer government official can be subject to discipline under this Rule. The substituted clause – "can involve conduct prohibited by this Rule" – does not suffer the same vagueness of the Model Rule clause ("can suggest an inability to fulfill the professional role of lawyers.")
- Cons: None identified.

### **B. Concepts Rejected (Pros and Cons):**

1. Include in the Rule the concept of "attempt" to violate a rule.
  - Pros: See Section A.3, above.
  - Cons: See Section A.3, above.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter:** Cardona

**Co-Drafters:** Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

**Meeting Date:** January 22 – 23, 2016

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

1. The drafting team believes that none of the proposed revisions of current rule 1-120 constitutes a change in duties for California lawyers, all of the provisions in the proposed Rule having counterparts in the current Rules, the State Bar Act, or case law. (See also Section A.1, above).

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

1. 1. The drafting team believes that all of the proposed revisions of current rule 1-120 are non-substantive changes.

### **E. Alternatives Considered:**

1. No alternatives to the proposed rule were considered.

## **X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

- (1) The drafting team has neither had an opportunity to study nor made a substantive recommendation in this Report regarding Model Rule 8.3 (Reporting Professional Misconduct). The drafting team is unanimous that Model Rule 8.3 should be the subject of separate consideration and discussion by the Commission.

ABA Model Rule 8.3 reads as follows:

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

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

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

Seven jurisdictions have adopted Model Rule 8.3 verbatim. Twenty-nine jurisdictions have adopted a slightly modified version of Model Rule 8.3. Fifteen jurisdictions have

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]

**Lead Drafter:** Cardona

**Co-Drafters:** Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser

**Meeting Date:** January 22 – 23, 2016

adopted a version of the rule that is substantially different from Model Rule 8.3.”

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

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

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

#### Cardona

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

#### Langford

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

#### Zipser

- [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 1-120 [8.4] 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 1-120 [8.4] in the form attached to this Report and Recommendation.

### XIII. DISSENTING POSITION(S)

None.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-120 [8.4]**

**Lead Drafter: Cardona**

**Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser**

**Meeting Date: January 22 – 23, 2016**

**XIV. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

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

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

Rule 1-120 Assisting, Soliciting, or Inducing Violations

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

(There is no Discussion section to this rule.)

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

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

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

Following discussion of the public comments, the Commission recommended that the rule be adopted in the form in which it was circulated for public comment. The Board Committee considered the recommendation of the Commission at its May 6, 1988 meeting and recommended that the Board adopt the rule as proposed by the Commission. At its June 18, 1988 meeting, the Board adopted the rule in the form recommended by the Commission and directed that the rule be forwarded to the California Supreme Court with a request that the Court approve the rule. (Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, September 1988, at pp. 16 – 19.)

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

A. In a 2001 Letter to the First Commission, OCTC Provided the Following Comment on Rule 1-120:

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

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

and replace with:

A member shall not:

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

(b) commit a criminal act;

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

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

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

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

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

OCTC COMMENTS:

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

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

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

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

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

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

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

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

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

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

**B. New Comments from OCTC:**

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

**IV. *Potential Deficiencies in the Current Rule:***

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

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

**V. *California Context:***

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

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

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

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

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

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

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

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

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

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

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

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-120 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

**VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple references in this assignment document to a particular issue do not necessarily warrant the drafting team taking action on an issue and recommending a rule change.)

(1) Whether the concept of prohibited "attempts" to violate the rules should be considered in connection with rule 1-120.

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

**IX. Research Resources:**

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

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

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

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

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

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

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

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

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

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

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

## **Proposed Rules of Professional Conduct (v.24, 7-21-14) (resulting from First Commission)**

### **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

### **Comment**

#### *Paragraph (a)*

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

#### *Paragraph (b)*

[2] A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business and Professions Code sections 6101 et seq.), or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Rev. Dept. 1995 ) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients’ interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805] [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

#### *Paragraph (c)*

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. But see Rule 1.2(d). “Covert activity,” as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

#### *Paragraph (d)*

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal. 3d 402, 411 [169 Cal. Rptr. 206] (a

statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (d).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

[6] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Business and Professions Code sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.