PROPOSED RULE OF PROFESSIONAL CONDUCT 1.0
(Current Rule 1-100)
Purpose and Function of the Rules of Professional Conduct

EXECUTIVE SUMMARY

The Commission has evaluated current rule 1-100 (Rules of Professional Conduct, In General) in accordance with the Commission Charter. While there is no direct rule counterpart in the American Bar Association ("ABA") Model Rules, many jurisdictions have adopted the ABA Preamble and Scope section of the Model Rules and the Commission considered the Preamble and Scope in studying proposed amendments to rule 1-100. The result of the Commission's evaluation is proposed rule 1.0 (Purpose and Function of the Rules of Professional Conduct).

Rule As Issued For 90-day Public Comment

Two main issues were considered in drafting proposed Rule 1.0.[1] The first issue was whether to update existing references in the rule 1-100 Discussion concerning the application of the rules in non-disciplinary settings (i.e., to address whether a violation of a rule may be considered as evidence of a breach of a civil standard of care). The second was whether a comment to the rule should be added to address voluntary pro bono as a professional responsibility.

Regarding the application of the rules in non-disciplinary settings, the Commission determined that the existing information in the first paragraph of the rule 1-100 Discussion required updating as the propositions included therein, and the cases cited, did not reflect current California law. The Commission is recommending updated information clarifying that although a rule violation is not itself a basis for civil liability, a lawyer's violation of a rule may be evidence of a lawyer's fiduciary breach or other substantive legal duty in a non-disciplinary context. This proposition has been added to the rule as new paragraph (b)(3) with additional explanatory information provided in a new Comment [1]. The information provided is consistent with well-settled California case law and selected cases are included in Comment [1]. For example, Comment [1] includes a citation to the California Supreme Court's decision in *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] in which the Supreme Court found that a lawyer violated the rule governing fee sharing agreements between lawyers who are not in the same law firm and concluded that such violation rendered the enforcement of the fee sharing agreement unenforceable as a matter of public policy.

The second issue concerning voluntary pro bono service arose from the Commission's consideration of Model Rule 6.1 (Voluntary Pro Bono Publico Service). At the Commission's January 22, 2016 meeting, the Commission determined that a proposed California version of Model Rule 6.1 should not be recommended for adoption because that rule would be an aspirational standard rather than a disciplinary rule.[2] The Commission's Charter provides that

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[1] Rule 1-100 includes the purpose and function of the rules generally (1-100(A)) and also sections on definitions of terms used throughout the rules (1-100(B)) and the geographic scope of the rules (1-100(D)). The Commission is recommending that definitions be moved to a standalone rule, proposed rule 1.0.1 (Terminology). Similarly, the Commission is recommending that the geographic scope of the rules be moved to a standalone rule, proposed rule 8.5 (Disciplinary Authority; Choice of Law). This proposed reorganization is adapted from the national standard of the Model Rule's numbering system. Proposed rules 1.0.1 and 8.5 are presented in their respective executive summaries.

the Commission must ensure that any proposed rules state clear and enforceable disciplinary standards as opposed to "purely aspirational objectives." While adoption of a California version of Model Rule 6.1 is not recommended, the Commission is proposing that voluntary pro bono be addressed in a comment to proposed rule 1.0.[3] The emphasis of the proposed comment is that disciplinary standards promulgated in the rules are not intended to address all aspects of a lawyer's professional responsibilities and that the rules do not state the entirety of a lawyer's obligations as an officer of the legal system with special duties for assuring access to justice. At the Commission's June 2 – 3, 2016 meeting, a representative of the Access to Justice Commission was in attendance and provided public comment on this issue.[4] The representative stressed that the Commission's recommendation to include the topic of pro bono in the comments to rule 1.0 was supported by the Access to Justice Commission as necessary to underscore the importance of pro bono and essential for the functioning of the justice system. The Commission agrees with this position; however, one member of the Commission submitted a written dissent asserting, in part, that including a pro bono comment is inconsistent with the Commission's Charter and that the State Bar should instead consider adoption of a rule imposing mandatory reporting of pro bono hours. The full text of the dissent is attached to this summary.

In addition to these two main issues, other proposed amendments include the following.

- In paragraph (a), adding to the purpose of the rules the protection of the integrity of the legal system and promotion of the administration of justice.
- In paragraph (c), explaining the intended function of the rule comments as guidance for interpreting the rules and promoting compliance, but not as a separate basis for imposing discipline.
- In Comment [2], clarifying that a violation of the rules can occur when a lawyer is not practicing law in a professional capacity.
- In Comment [3], providing a case citation and State Bar Act citation to explain that the concept of "willful" misconduct does not require that a lawyer intend to commit a violation of a rule.
- In Comment [4], retaining the language in current rule 1-100(A) which provides that while not binding, ethics opinions should be consulted by lawyers for guidance on professional conduct.

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[2] In part, Model Rule 6.1 states that: "A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year." See Attachment 3 for the summary of the Commission's action concerning Model Rules that were considered but are not recommended for adoption.

[3] The Commission's drafting team assigned to this matter also considered but did not recommend the adoption of a Preamble as an appropriate place within the rules for addressing pro bono. A Preamble was not recommended, in part, because proposed rule 1.0 serves the same function of the Preamble to the Model Rules. California has never had a Preamble to its rules and, unlike the existing Discussion sections that would be renamed as Comments, adding a Preamble could be confusing as to the binding nature of information stated in that Preamble.

[4] The attorney who attended was Amos E. Hartston, currently with the California Department of Justice but formerly with Inner City Law Center, Los Angeles.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment, the Commission replaced the phrase “sources of guidance” with the word “authorities” in Comment [4] as “authorities” provides a better description of the statutes identified in paragraph (b)(2). In Comment [5], the Commission removed the parenthetical at the end of the Comment and added a full sentence stating lawyers may fulfill their pro bono responsibility by providing financial support to organizations that provide free legal services.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.0 [1-100]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: Danny Chou, Howard Kornberg, Hon. Dean Stout

I. CALIFORNIA RULE

Rule 1-100 Rules of Professional Conduct, in General

(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) "Law Firm" means:

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

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

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

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

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

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

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

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

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."

Discussion:

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.0 [1-100]
Vote: 13 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.0 [1-100]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct

(a) Purpose.

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code §§ 6076 and 6077 to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These Rules together with any standards

adopted by the Board of Trustees pursuant to these Rules shall be binding upon all lawyers.

(b) Function.

(1) A willful violation of any of these rules is a basis for discipline.

(2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.

(3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

(d) These Rules may be cited and referred to as the "California Rules of Professional Conduct."

Comment

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Ibid*.; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of a rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Also, lawyers may fulfill this pro bono responsibility by providing financial support to organizations providing free legal services. See Business and Professions Code § 6073.

IV. COMMISSION'S PROPOSED RULE 1.0 [1-100] (REDLINE TO CURRENT CALIFORNIA RULE 1-100)

Rule 1.0 [1-100] Purpose And Function Of The Rules Of Professional Conduct~~, In General~~

(a) ~~(A)~~ Purpose~~ and Function~~.

The following rules are intended to regulate professional conduct of ~~members of the State Bar~~lawyers through discipline. They have been adopted by the Board of ~~Governors~~Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code ~~sections~~§§ 6076 and 6077 to protect the public~~ and to~~, the courts, and the legal profession; protect the integrity of the legal system; and promote ~~respect~~the administration of justice and confidence in the legal profession. These ~~rules~~Rules together with any standards adopted by the Board of ~~Governors~~Trustees pursuant to these ~~rules~~Rules shall be binding upon all ~~members of the State Bar~~lawyers.

(b) Function.

(1) ~~For a~~A willful ~~breach~~violation of any of these rules~~, the Board of Governors has the power to~~ is a basis for discipline~~ members as provided by law~~.

(2) The prohibition of certain conduct in these rules is not exclusive. ~~Members~~Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California

courts. ~~Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

(3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~

~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

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

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

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

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

~~(2) "Member" means a member of the State Bar of California.~~

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

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

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

(c) ~~(C)~~ Purpose of ~~Discussions~~Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~

~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

(d) ~~(E)~~ These ~~rules~~Rules may be cited and referred to as the "California Rules of Professional Conduct ~~of the State Bar of California~~."

~~Discussion:~~Comment

[1] The Rules of Professional Conduct are intended to establish the standards for ~~members~~lawyers for purposes of discipline. ~~(~~See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489].~~)~~ ~~The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186~~ Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Ibid.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.~~3d 1324~~4th 41, 44 [~~231~~5 Cal.Rptr. ~~355].)~~ ~~These rules are not intended to supercede existing law relating to members in~~2d 571]. A violation of a rule may have other non-disciplinary ~~contexts~~consequences. ~~(~~See~~,~~ e.g., ~~*Klemm*~~*Fletcher* *v.* ~~*Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v.*~~

~~*Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)~~*Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

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

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Also, lawyers may fulfill this pro bono responsibility by providing financial support to organizations providing free legal services. See Business and Professions Code § 6073.

V. RULE HISTORY

A. 1928 Rules

The original expression of the purpose and function of the rules was in former rule 1, part of this Court's original promulgation of the rules in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) In relevant part, former rule 1 of the 1928 rules provided that:

> . . . [T]hese rules shall be binding upon all members of the State Bar, and the willful breach of any of these rules shall be punishable by suspension from the practice of law . . . . The specification in these rules of certain conduct as unprofessional is not to be interpreted as approval of conduct not specifically mentioned. In that connection, the Canons of Ethics of the American Bar Association are commended to the members of the State Bar. Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California.

Rule 1 embraced the following concepts: (1) the rules are binding; (2) disciplinary consequences of a rule violation; (3) the rules are not the sole basis for determining unprofessional conduct; (4) recognition of other authorities (in 1928, the ABA Canons of Ethics; in 1970, the ABA Code of Professional Responsibility); (5) the rules do not limit or supersede other law that imposes duties on lawyers; and (6) the proper title for citing the rules. Each concept has been carried forward in proposed Rule 1.0.

B. 1975 Rule Amendments

Rule 1 was not materially revised and adopted until 1975 as part of the first comprehensive rules revision since 1928. Rule 1 was renumbered 1-100 and the reference to ABA Code of Professional Responsibility deleted. The special committee charged with revising the rules in 1970 summarized rule 1-100 in its 1972 Final Report:

> Comment: This provision retains the substance of present Rule 1, Rules of Professional Conduct. This provision, like present Rule 1, is intended to serve as an introductory provision to the Rules of Professional Conduct enacted pursuant to Business and Professions Code Section 6077. The reference in present Rule 1 to members noting the ABA Code of Professional Responsibility has been deleted.

(Final Report of the State Bar of California Special Committee to Study the ABA Code of Professional Responsibility, dated November 8, 1972, at page 1, copy on file with the State Bar.) While no direct explanation was given for deleting the reference to the ABA Code, it appears from the entirety of the 1972 Report that the Special Committee believed its proposed revisions to the 1928 rules struck an appropriate balance between conforming to the ABA Code and conforming to applicable California statutes and case law, rendering a reference to the ABA Code unnecessary and potentially misleading .[1]

[1] The Special Committee stated: "It was obvious to your Committee from the outset that the proper job could not be done here simply by 'rubber stamping' the ABA Code and recommending the repeal of our statutes and rules which might be in conflict therewith. . . .¶Thus the detailed recommendations which follow [in this report] . . . basically conform to the ABA numbering system, even though in particular instances, as will be noted, a California Rule is recommended over the ABA rule on the same subject." (1972 Final Report, at p. iii.)

C. 1989 Rule Amendments

The 1975 rule 1-100 was next amended with the comprehensive rules revision made operative in 1989. Rule 1-100 was expanded to include: definitions of terms used throughout the rules; an explanation of the Discussion component to the rules; and provisions on the geographic scope of the rules, i.e., the rules' application to State Bar member conduct outside California and conduct by lawyers from other jurisdictions practicing law in California.

Proposed Rule 1.0 does not include provisions on the geographic scope of the rules or definitions as those topics are relocated to proposed Rules 8.5 and 1.0.1, respectively, to conform to the organization of the Model Rules. As "Comments" in the proposed Rules substitute for the "Discussion," proposed Rule 1.0(c) describes the role of Comments.

The 1989 version of rule 1-100 also included amendments to the description of the purpose and function of the rules. A reference to Business and Professions Code sections 6076 and 6077 (the statutory provisions providing for Board adoption of rule amendments and the range of disciplinary remedies for a violation) was added. Also added was a statement that the rules serve to "protect the public and to promote respect and confidence in the legal profession." Proposed Rule 1.0 carries forward both the statutory references (Comment [1]) and the concept of public protection and confidence in the legal profession (proposed Rule 1.0(a)(1) and (a)(4)).

The 1989 version of rule 1-100 also added new language on the non-exclusivity of the rules, including an explicit commendation of other authorities for guidance, i.e., opinions of ethics committees and rules promulgated by other jurisdictions and bar associations, which presumably encompass the ABA Model Rules. Proposed Rule 1.0 carries forward these concepts (Comment [3]).

The 1989 revisions also deleted the following language on the non-disciplinary impact of the rules: "Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof." This sentence was replaced with two new sentences stating:

> These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

The new language, and a related new Discussion paragraph, was developed in part from discussions with Robert Fellmeth, State Bar Disciplinary Monitor, in 1988, who had expressed interest in this aspect of rule 1-100. (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. 13 – 15 ("1988 Supplemental Memorandum").) The new language was explained as follows:

> The amendments are intended to clarify that the Rules of Professional Conduct do not create new civil causes of action, but rather are for purposes of assessing the duties of an attorney in the context of attorney discipline. The amendments also make clear that the new rules are not intended to disrupt the already existing body of law relating to the duties of attorneys in non-disciplinary contexts.

(1988 Supplemental Memorandum at p. 15.)

Proposed Rule 1.0 includes this concept but uses new language (proposed Rule 1.0(b)(3) and Comment [2]) to account for new case law in this area of attorney professional responsibility.

D. 1992 Rule Amendments

The most recent rule 1-100 amendments became operative in 1992. The only revisions were to the definition of "lawyer" and a non-substantive clarification of the geographic scope of the rules, neither of which is carried forward in proposed Rule 1.0, having been moved to other rules.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule.

   Commission Response: No response required.

2. OCTC supports Comments [2], [3], and [4].

   Commission Response: No response required.

3. Comment [1] is duplicative of subsections (a) and (b) and, thus, unnecessary and inconsistent with the Supreme Court's directive that Comments should be used sparingly and only to elucidate and not to expand upon the rules themselves.

   Commission Response: The Commission disagrees with the commenter's assessment. It believes that Comment [1] provides guidance on how the rule is applied by clarifying that although the rules are disciplinary in nature, they can be evidence of the standard of conduct in a civil action, and providing leading authority on that concept.

4. Comment [5] is aspirational only, encouraging attorneys to do pro bono activities. The Comment, therefore, is contrary to the Supreme Court's directive that the Commission should avoid incorporating purely aspiration or ethical considerations that are present in the Model Rules and Comments.

   Commission Response: The Commission believes that the Comment is an important reminder of a lawyer's professional responsibilities as an officer of the

legal system. The Comment is intended to encourage lawyers to provide voluntary pro bono services to help address the recognized problem of access to justice in California, but at the same time clarify that the Comment is not a disciplinary standard. Given those parameters, the Commission believes that a comment in proposed Rule 1.0, which is the closest provision in the proposed Rules to the ABA Model Rules' Preamble, is appropriate.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, ten public comments were received. Two comments agreed with the proposed Rule, two comments disagreed, one comment agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. Public comment synopsis tables, with the Commission's responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Introduction

Proposed Rule 1.0 addresses the purpose and scope of the rules. The closest analog to Rule 1.0 nationally is found in two introductory sections, modeled on the introductory sections of the ABA Model Rules designated as the "Preamble and Scope," some version of which have been adopted by nearly every other jurisdiction.

Only two states have adopted a numbered rule that is somewhat similar to the content of rule 1-100, Michigan and Nevada. For example, Nevada Rule 1.0A provides:

> **Rule 1.0A. Guidelines for Interpreting the Nevada Rules of Professional Conduct**. The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments. The following guidelines for interpreting and applying the Nevada Rules of Professional Conduct are hereby adopted:

(a) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.

(b) For purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as the duty of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

(c) Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

(d) Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.

See also Michigan Rule 1.0, which provides:

> **Rule 1.0 Scope and Applicability of Rules and Commentary[2]**
>
> (a) These are the Michigan Rules of Professional Conduct. The form of citation for this rule is MRPC 1.0.
>
> (b) Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.
>
> (c) The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule.

B. ABA Model Rule Adoptions

The ABA has two charts that report separately on the implementation of the "Preamble" and the "Scope." Each chart reports on implementation in fifty-one United States jurisdictions (including California and the District of Columbia). One chart is captioned: "ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities" and was last updated October 21, 2010.

- http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.pdf (Last accessed on 2/7/17.)

The second chart is captioned: "ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Scope" and was last updated September 15, 2016.

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope.authcheckdam.pdf. (Last accessed on 2/7/17.)

Regarding the "Preamble" provisions, twenty-seven jurisdictions have adopted text that is either the same[3] or substantially similar[4] to the Model Rule "Preamble." Seven

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[2] Michigan includes sections titled "Preamble" and "Scope" as part of the Comment to Rule 1.0.

[3] These jurisdictions are: Delaware; Iowa; Maryland; Minnesota; Missouri; Nebraska; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Vermont; and Wisconsin.

[4] These jurisdictions are: Alaska; Arizona; Arkansas; Colorado; Connecticut; Idaho; Indiana; Kansas; Kentucky; Mississippi; New Mexico; North Dakota; Tennessee; Washington; and Wyoming.

jurisdictions do not have any preamble text.[5] Seventeen jurisdictions take a different approach by implementing unique language or a significantly revised version of the Model Rule "Preamble."[6]

Regarding the "Scope" provisions, twenty-six jurisdictions have adopted text that is either the same[7] or substantially similar[8] to the Model Rule "Scope." Six jurisdictions do not have any scope text.[9] Nineteen jurisdictions take a different approach by implementing unique language or a significantly revised version of the Model Rule "Preamble."[10]

Based on these two charts, a majority of states implement "Preamble and Scope" provisions that are either identical or substantially similar to the Model Rules.

In addition, similar to proposed Rule 1.0, proposed Comment [1], one jurisdiction, Maryland, refers to specific case law authority on the use of the rules in a non-disciplinary proceeding. Paragraph [20] of the Maryland "Scope" section cites to *Post v. Bregman* (1998) 349 Md. 142 (holding that enforcement of the Rule of Professional Conduct dealing with splitting of fees among lawyers who are not part of the same firm is not limited to disciplinary proceedings). Comment [1] to proposed Rule 1.0 cites to this Court's decision in *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] that likewise involves application of a rule of professional conduct to decide a question of the civil enforceability of a fee division agreement between lawyers who are not in the same law firm.

Proposed Rule 1.0 also includes an updated discussion of the use of the rules in non-disciplinary proceedings. That issue is also addressed in paragraph [7] of the Minnesota Rule, above (the corresponding paragraph is [20] of the Model Rule "Preamble and Scope.") The last sentence in paragraph [7] provides, in part, that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Based on the ABA chart concerning implementation of paragraph [20] of the Model Rule "Scope," thirty

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[5] These jurisdictions are: District of Columbia; Louisiana; Nevada; New Hampshire; New Jersey; North Dakota; and Tennessee.

[6] These jurisdictions are: Alabama; California; Florida; Georgia; Hawaii; Illinois; Maine; Massachusetts; Michigan; Montana; New York; North Carolina; Ohio; Texas; Utah; Virginia; and West Virginia.

[7] These jurisdictions are: Colorado; Idaho; Iowa; Rhode Island; and Utah.

[8] These jurisdictions are: Alaska; Arizona; Arkansas; Delaware; Illinois; Indiana; Kansas; Kentucky; Maine; Maryland; Minnesota; Missouri; Nebraska; New Mexico; New York; North Carolina; Ohio; South Carolina; Vermont; Wisconsin; and Wyoming.

[9] These jurisdictions are: Louisiana; Nevada; New Hampshire; New Jersey; Oregon; and South Dakota.

[10] These jurisdictions are: Alabama; California; Connecticut; District of Columbia; Florida; Georgia; Hawaii; Massachusetts; Michigan; Mississippi; Montana; North Dakota; Oklahoma; Pennsylvania; Tennessee; Texas; Virginia; Washington; and West Virginia.

states[11] have adopted language that is either the same or substantially similar to the last sentence of paragraph [7] of the Minnesota Rule "Scope." Twenty-one states[12] either do not have any scope text or, if they do, they have deleted or significantly changed the last sentence in paragraph [7]. Thus, addressing the use of the rules in non-disciplinary proceedings is the approach taken in a majority of jurisdictions and proposed Rule 1.0 promotes this national standard.

A final aspect of national uniformity is the approach taken in every jurisdiction, all of which either have a separate terminology section or a separate rule containing the definitions of common terms used throughout their respective rules, and also have a separate rule, patterned after Model Rule 8.5, which addresses geographic scope and choice of law. The recommendation to relocate the provisions currently in paragraphs (B) and (D) of current rule 1-100, (See Sections IX.A.9 & 12, below), would conform the California Rules to that national approach. Current rule 1-100(B) provides definitions of terms used throughout the current rules and rule 1-100(D) addresses geographic scope principles. The Commission has proposed Rule 1.0.1 as the terminology rule and proposed Rule 8.5 as the rule delimiting the disciplinary authority for enforcing the rules and the geographic scope of the Rules.

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

A. Concepts Accepted (Pros and Cons):

1. Changing the title of the current rule.

   - Pros: The change in title more accurately describes the content of the rule as amended, i.e., the amended rule only sets out the purpose and function of the rule and no longer contains other general concepts, i.e., global definitions and the geographic scope of the rule. It should facilitate the ability of a lawyer who is trying to find a rule topic by scanning the table of contents.

   - Cons: None identified because current paragraphs (B) [definitions] and (D) [geographic scope of the rules] have been relocated to Rules 1.0.1 and 8.5, respectively.

2. Proposed paragraph (A) of current rule 1-100 (Purpose and Function [of the rules]) is divided into (i) paragraph (a) [Purpose], which retains the concept of

[11] These jurisdictions are: Alaska; Arizona; Arkansas; Colorado; Connecticut; District of Columbia; Florida; Idaho; Illinois; Indiana; Iowa; Kentucky; Maine; Maryland; Minnesota; Mississippi; Nebraska; Hew Hampshire; New Mexico; New York; North Carolina; North Dakota; Ohio; Rhode Island; South Carolina; Tennessee; Utah; Virginia; Wisconsin and Wyoming.

[12] These jurisdictions are: Alabama; California; Delaware; Georgia; Hawaii; Kansas; Louisiana; Massachusetts; Michigan; Missouri; Montana; Nevada; New Jersey; Oklahoma; Oregon; Pennsylvania; South Dakota; Texas; Vermont; Washington; and West Virginia.

current (A), subparagraph 1, and (ii) paragraph (b) [Function], which retains the concepts of current (A), subparagraphs (2)-(4).

- Pros: Clarifies which aspects of current paragraph (A) are intended to describe the purposes of the rules and which aspects clarify the function of the Rules, each of which is relevant in interpreting them.

- Cons: The concepts described in one paragraph might also be susceptible to being viewed as a concept in the other and thus the division of the concepts might cause confusion. For example, it could be argued that the purpose of the rules "to regulate conduct of members through discipline" might also be viewed as a "function" of the rules. On balance, however, the Commission concluded the division of current paragraph (A) into two paragraphs provided better guidance for lawyers in interpreting their duties under the Rules.

3. In proposed paragraph (a), substitute the concepts in Principle 1 of the Commission's Charter ("The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.") for the language in current paragraph (A), subparagraph 1 ("to protect the public and to promote respect and confidence in the legal profession.")

   - Pros: Retains the same concepts found in the current rule and adds the concept of promoting the administration of justice, which highlights a lawyer's role as an officer of the court.

   - Cons: There is no evidence that the current language is lacking. But see "Concepts Rejected," Section IX.B.4, below, concerning OCTC's request that rule 1-100 include a purpose of the rules "to promote and enforce the highest professional standards among attorneys."

4. In proposed paragraph (b)(1), amend current rule 1-100(A), subparagraph 2, to provide: "A willful violation of any of these rules is a basis for discipline." In particular, note the substitution of the term "violation" for "breach."

   - Pros: The revised language is a more succinct and accurate statement of the consequences of violating a rule than is the current statement ("For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.") *First*, use of the amended language avoids the problem of distinguishing exactly what the Board of Trustees has authority to do, i.e., the Board can impose reprovals but only the Supreme Court can impose suspensions and disbarments. The change reduces the language that would otherwise be required to more accurately describe the relative allocation of authority, i.e., only the Supreme Court has authority to suspend or disbar. *Second*, regarding the substitution of "violation" for "breach," "breach" is suggestive of a breach of duty, a concept in malpractice. Use of "violation" more accurately describes the basis for discipline, a rule violation.

- Cons: The Commission is unaware of evidence suggesting that the current language has caused problems. Further, the word "breach" is used in the State Bar Act, e.g., Bus. & Prof. Code § 6077.

5. In proposed paragraph (b)(2), retain the first two sentences of current rule 1-100(A), subparagraph 3, which provide: "The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts."

   - Pros: The first two sentences provide important information about how lawyers are regulated in California, i.e., lawyers are subject not only to the Rules of Professional Conduct, as is true in other jurisdictions, but also subject to the provisions of the State Bar Act.

   - Cons: None identified.

6. In proposed paragraph (b)(2), delete the last two sentences, of current rule 1-100(A), subparagraph 3, which provide: "Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered." Further, place the sentences in a comment to the rule.

   - Pros: The use of the word "should" with respect to California ethics opinions (aspirational) and "may" with respect to opinions from other jurisdictions (permissive) indicates that the sentences should be relegated to a comment. The sentences are not a disciplinary standard but guidance. Such aspirational guidance should be included in a comment if it is to appear in the rules at all. A lawyer's failure to consult such ethics opinions should not by itself be a basis for discipline. (Compare Commission Charter, Principle 2, which states that the Commission should "ensure that the proposed Rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.") See also discussion re Comment [4], below, in paragraph 19.

   - Cons: Ethics opinions provide such important guidance on proper conduct that the clause should remain in the black letter because lawyers often limit their reading to the black letter and would miss the guidance in a comment. New lawyers or lawyers from other jurisdictions are more likely to pay attention to this guidance if it is in the rule. Further, the sentences have been in the current rule for over 25 years without any problems having been identified; there would appear to be no reason to make a change.

7. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substitute the following language for the first sentence: "A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule."

    - Pros: The replacement statement is derived from *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097, which is well-settled California law. The current statement is misleading because courts since the rule was promulgated in 1989 have held that a violation of a rule can be used as evidence of a breach of duty in a malpractice cause of action. The rule should more accurately reflect the case law.

    - Cons: The Rules are *intended* as disciplinary rules, and should not be a basis for creating a new cause of action.

8. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4, substitute the following language for the second sentence: "Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others."

    - Pros: The proposed amended sentence is a clearer and more succinct statement about the intended effect of the rules on the law related to lawyer liability.

    - Cons: The phrase "law regarding the liability of lawyers" might be an underinclusive concept. It suggests malpractice liability or other similar damages actions brought against a lawyer. In contrast, the issue of civil disqualification is not ordinarily referred to as a liability issue yet one goal of the proposed new sentence is to clarify that the rules, such as the rules governing conflicts of interest, are not intended to govern a disqualification proceeding.

9. Delete current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules (e.g., member, lawyer, law firm) and instead include as part of the Rules a global terminology rule, proposed Rule 1.0.1.

    - Pros: This is the approach that is taken in the California Code of Judicial Ethics, the Model Rules, and the rules in every other jurisdiction. A global terminology rule would provide convenient and ready access in one place to common definitions for State Bar members and other lawyers practicing in California as permitted by the various rules of court that regulate multijurisdictional practice. See, e.g., California Rules of Court, rule 9.40 (Counsel pro hac vice); 9.41 (Appearances by military counsel); 9.43 (Out-of-state attorney arbitration counsel); 9.44 (Registered foreign legal consultant); 9.45 (Registered legal services attorneys); 9.46 (Registered in-house counsel); 9.47 (Attorneys practicing law temporarily in California as part of litigation); and 9.48 (Nonlitigating attorneys temporarily in California to provide legal services).

- Cons: None identified.

10. Change the name of the "Discussion" section to "Comment".

    - Pros: The Code of Judicial Ethics refers to its explanatory sections as "*Commentary* of the Advisory Committee." (Emphasis added). The ABA Model Rules and every other jurisdiction that has adopted the Model Rule approach of including comments to their rules, refers to the explanatory comment sections of each rule as "Comment."

    - Cons: None identified.

11. In proposed paragraph (c), delete the first clause in current rule 1-100, paragraph (C), which provides: "Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules …"

    - Pros: The clause is surplus exposition and does not belong in the black letter of rules that are intended to "set forth a clear and enforceable articulation of disciplinary standards."

    - Cons: This language has not proven to be problematic.

12. Delete current rule 1-100, paragraph (D) [Geographic scope of the rules] and instead include in the Rules a standalone rule, similar to Model Rule 8.5, which addresses the geographic scope of the Rules and choice of law. See materials in support of adoption of proposed Rule 8.5.

    - Pros: Including the topic in a separate rule would be similar to the approach taken in the Model Rules and every other jurisdiction. Placing the geographic scope in a separate rule would help lawyers from other jurisdictions who are authorized to practice in California to determine the extent to which the California rules would apply to them.

    - Cons: That the rules apply to non-California lawyers could reasonably be perceived as a purpose or function of the rules and retaining the topic of the geographic scope of the rules in rule 1-100 would be consistent with that concept. Simply changing "member" to "lawyer" in this rule might not be enough to convey the true scope of the rules.

13. In proposed paragraph (d) [current rule 1-100(E)], change the preferred citation of the rules to the "California Rules of Professional Conduct."

    - Pros: The proposed language is more succinct than the current term in 1-100(E), "Rules of Professional Conduct of the State Bar of California."

    - Cons: The current statement more accurately describes the rules as those "of the State Bar of California."

14. Number the Comment sections.

    - Pros: This is done in two current rules, rule 1-650 and rule 3-100, both of which were promulgated after 2003. Numbering the Comments facilitates references in opinions and briefs, as well as cross-references within the rules.

    - Cons: None identified.

15. In Comment [1], replace the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (b)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts.

    - Pros: See discussion of proposed paragraph (b)(3) in paragraphs 7 and 8, above.

    - Cons: See discussion of proposed paragraph (b)(3) in paragraphs 7 and 8, above.

16. In Comment [1], include pin cites in the case citations in the Comment.

    - Pros: Pin cites will provide a precise reference point for a lawyer who wants to review a more in-depth analysis of the proposition for which the case is cited.

    - Cons: None identified.

17. Add Comment [2], which clarifies that the Rules apply to a lawyer's conduct even when the lawyer is not practicing law or acting in a professional capacity.

    - Pros: This comment clarifies the scope of conduct regulated under the Rules and thus provides important guidance to lawyers in complying with the rules.

    - Cons: None identified.

18. Add Comment [3], which explains that a willful violation of a rule does not require that a lawyer intend to violate the rule. Comment [3] is derived from the first Commission's proposed Rule 1.0, Cmt. [2].

    - Pros: This comment provides important clarification regarding the requisite intent contemplated in paragraph (b)(1), which provides that a willful violation of any rule is a basis for discipline.

    - Cons: This comment might be confusing in those instances where a lawyer is interpreting a rule that, by its terms, includes a specific intent element. (See, for example, current rule 5-320(D) which requires an intent to harass or embarrass a juror.)

19. Add Comment [4], which is a verbatim restatement of current rule 1-100(A), subparagraph 3.

    - Pros: See discussion re proposed paragraph (b)(2) in paragraph 6, above.

    - Cons: See discussion re proposed paragraph (b)(2) in paragraph 6, above.

20. Add Comment [5], which recognizes voluntary pro bono provision of legal services as an important professional obligation of lawyers.

    - Pros: Having concluded that an aspirational rule patterned after Model Rule 6.1 and the Board of Trustees Resolution on Pro Bono Publico Legal Services was inappropriate in a set of disciplinary rules, the Commission nevertheless determined that a comment regarding pro bono was appropriate in proposed Rule 1.0. Rule 1.0 delimits the purpose and function of the rules, including "to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession." By including this Comment, it is emphasized that the disciplinary standards promulgated in the rules are not intended to address all aspects of a lawyer's professional responsibilities and that the rules do not state the entirety of a lawyer's obligations as an officer of the legal system with special duties for assuring access to justice. Including this comment in the Rules should also enhance the ability of legal services organizations to recruit lawyers to provide pro bono service.

    - Cons: The proposed comment is purely aspirational and offends paragraph 2 of the Commission's Charter, which provides:

      "2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed Rules set forth a clear and enforceable articulation of disciplinary standards, *as opposed to purely aspirational objectives*." (Emphasis added).

      Further, the proposed comment deviates from paragraph 5 of the Commission's Charter. Unlike the other proposed comments to proposed Rule 1.0, proposed Comment 5 provides no "guidance for interpreting and practicing in compliance with the Rules," which is the purpose of the Comments as set forth in paragraph (c) of Rule 1.0.

B. Concepts Rejected (Pros and Cons):

1. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It would facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their

jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It would also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system. Further, for this rule, which numbering system is used is irrelevant, because the analogous "rule" in most jurisdictions is not a rule but instead two unnumbered sections called the "Preamble" and "Scope."

2. Substituting the term "lawyer" for the term "member".

   - Pros: The Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

3. In proposed paragraph (a), delete the adjective "professional" as a modifier of "conduct".

   - Pros: Deleting "professional" more accurately describes the scope of conduct for which lawyers can be disciplined. The rules are not limited to regulating a lawyer's conduct in his or her professional capacity. See, e.g., rules 3-100 (Confidential Information of a Client); 3-120 (Sexual relations with clients); 3-320 (Relationship with other party's lawyer); 4-300 (Purchasing property at a foreclosure of a sale subject to judicial review); and 4-400 (Gifts from client). See also *In re Scott* (1991) 52 Cal.3d 968 [inherent power of the Supreme Court to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession].

   - Cons: The principal purpose of the Rules is to address a lawyer's conduct when he or she is acting in a professional capacity, although certain rules do reach a lawyer's conduct when not acting in a professional capacity. Regardless of the context, the lawyer's conduct is subject to the rules. See proposed Comment [2] and related discussion in paragraph IX.A.17, above.

Therefore, the qualifying word "professional" accurately describes the central aspects of the rules.

4. Include in proposed paragraph (a) [current rule 1-100(A), subparagraph 1] that a purpose of the rules is "to promote and enforce the highest professional standards among attorneys." (See 4/20/2015 OCTC [Kim] Memo to Chair & Commission), Rule 1-100, ¶.1.)

    - Pros: The California Supreme Court has stated that the primary purposes of imposing discipline include maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514.)

    - Cons: Including such a goal or purpose would take away from the more grounded goals identified in proposed paragraph (a), i.e., "to promote confidence in the legal profession and the administration of justice, and ensure adequate protection for the public." Employing the term "highest standards" would also appear inappropriate in light of the Commission's charge to "ensure that the proposed Rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." See Charter, Principle 3. The concept of maintaining the highest professional standards would appear to be purely aspirational in a set of disciplinary standards that are intended to set out the base level of conduct that will be tolerated before discipline is imposed.

5. In proposed paragraph (b)(2), delete the phrase "and opinions of California courts."

    - Pros: The notion that lawyers can be disciplined for not acting in consonance with a California appellate court opinion (which may be wrong) is worrisome. Lawyers can debate all day long what a court of appeal opinion means. Further, this rule language is not a black letter standard but a vague incorporation-by-reference of a universe of appellate opinions which may or may not be grounded on the Rules of Professional Conduct. In addition, the legal effect of an opinion is established under principles *stare decisis*, law of the case, *res judicata*, etc. The concept is used to define the precedential effect of an opinion on other courts. But opinions in the abstract do not "bind". Finally, the phrase might even be construed to apply to trial court opinions, which themselves do not even have precedential effect.

    - Cons: *First*, the language has been in the current rule for over 25 years. There is no evidence that the language has caused overreaching by the State Bar in discipline cases. There is no compelling reason to delete it. *Second*, current 1-100's language also encompasses discipline common law from the Supreme Court. If the language is deleted, the rule's "legislative history" must clarify that the State Bar does not recommend any change to a lawyer's duty to comply with attorney conduct standards that have evolved as discipline

common law in Supreme Court and State Bar Court decisions (see, e.g., *In the Matter of Respondent C,* 1 Cal. State Bar Ct. Rptr. 439, 450-451, 1991 WL 63249 (Rev. Dept. 1991), which describes the common law duty to communicate that predates both rule 3-500 and B&P sec. 6068(m)).[13] This tradition of common law discipline is a part of the minimum standards of discipline that the rules should continue to recognize. *Third*, the phrase would also apply to opinions of the Review Department of the State Bar, which provide important insight into the application of the rules in a disciplinary context and other court opinions provide important guidance concerning the application of the rules in non-disciplinary contexts. (See also discussion of proposed Comment [1] in paragraphs IX.A.15 & 16, above.)

6. In proposed paragraph (b)(3), add the clause "for enforcement of a rule or" so that the first sentence would read "A violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule."

    - Pros: Adding the clause would make paragraph (b)(3) more accurate. For example, in a fee splitting dispute, the cause of action brought by the lawyer who did not receive any of the fee typically is a claim for breach of the fee agreement between the fee splitting lawyers. The lawyer who refuses to share the fee in accordance with the agreement, typically asserts a rule 2-200 violation as a defense, i.e., asks the court to enforce the rule. Similarly in disqualifying a lawyer, California courts typically cite to a violation of a specific rule, e.g., rule 3-310(E) or rule 2-100, as the basis for granting the motion.

    - Cons: The additional language is unnecessary. Fee splitting disputes often assert causes of action for violation of Rule 2-200. Conflict rules are often enforced by a separate cause of action (e.g., for injunctive relief) to disqualify lawyers (as opposed to by a motion).

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[13] The Court observed:

> Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)" (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor v. State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in *Aronin v. State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068(m), as falling within the parameters of an attorney's oath and **451 duties, under the general provisions of sections 6068(a) (duty to support the laws). (See e.g., *Taylor v. State Bar, supra*; *Aronin v. State Bar, supra*.)

7. In paragraph (c), delete the clause that states the discussion sections in the rule are intended to provide guidance for "practicing in compliance with the rules."

    - Pros: Deleting the clause would strictly comply with the Commission Charter directs that the Comments "should be used sparingly to elucidate, and not to expand upon, the rules themselves," see Charter, Principle 5.

    - Cons: The comments can and should also provide guidance for complying with the rules so long as the Comment does not expand the scope of the rule itself. See also Commission Charter, Principle 4 ("The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.")

8. OCTC's request that the Commission make certain changes or additions to the definitions in current rule 1-100, paragraph (B), as identified by OCTC. (See Section VI.B, above.) The Commission recommends that paragraph (B) be deleted and its definitions be part of a global terminology rule or section.

    - Pros: See discussion re deletion of paragraph (B) in paragraph IX.A.9, above.

    - Cons: See discussion re deletion of paragraph (B) in paragraph IX.A.9, above.

9. OCTC's request that the Commission consider the concepts captured in Model Rule 8.5. (See 4/20/2015 OCTC Memo, ¶.2.) The Commission recommends that paragraph (D) be deleted and that a separate standalone rule similar to Model Rule 8.5 be included in the Rules.

    - Pros: See discussion re deletion of paragraph (D) in paragraph IX.A.12, above.

    - Cons: See discussion re deletion of paragraph (D) in paragraph IX.A.12, above.

10. Including the term "willful" in the terminology rule/section.

    - Pros: Such a definition would provide lawyers with a better understanding of what is required for a willful violation of a rule.

    - Cons: The word "willful" is not a term that is used throughout the rules. It is used only in rule 1-100. The Commission, however, recommends including Comment [3] because it clarifies the requisite intent contemplated in paragraph (b)(1), which provides that a willful violation of any rule is a basis for discipline. Paragraph (b)(1) carries forward the same concept that is currently found in rule 1-100(A), subparagraph 2.

11. In Comment [4], add as a qualifier to the statement that a lawyer may consider ethics opinions and rules and standards in other jurisdictions the clause, "to the extent they are consistent with these rules and the State Bar Act."

    - Pros: Such a qualifying clause would place an important limitation on the relevance of opinions and rule approaches in other jurisdictions.

    - Cons: There is no evidence that the language in current rule 1-100(A), paragraph 3 regarding consideration of ethics opinions from outside of California has caused any problems. Absent such evidence, the language should not be qualified or otherwise modified.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. In proposed paragraph (a), substituting the concepts in Principle 1 of the Commission's Charter ("The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.") for the language in current paragraph (A), subparagraph 1 ("to protect the public and to promote respect and confidence in the legal profession") is not intended as a substantive change except to the extent that the phrase "administration of justice" arguably reflects a lawyer's role as an officer of the legal system, a concept that has not been expressed in rule 1-100 previously.

2. In proposed paragraph (b)(1), amending current rule 1-100(A), subparagraph 2, to provide: "A willful violation of any of these rules is a basis for discipline" is not intended as a substantive change. However, the substitution of the term "violation" for "breach" might be viewed as such. (See paragraph IX.A.4, above.)

3. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substituting the new language for the first sentence ("A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule") is a substantive change because it updates the law concerning the effect of the rules in civil cases. (See paragraph IX.A.7, above.)

4. In Comment [1], replacing the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (b)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts, is a substantive change for the reasons set forth in paragraphs IX.A.7, 15 and 16, above.

D. Non-Substantive Changes to the Current Rule:

1. Changing the rule title is not a substantive change. It is intended simply to provide a better description of the rule's content, especially in light of the recommended deletion of current rule 1-100, paragraphs (B) and (D).

2. Dividing current rule 1-100(A) [Purpose and Scope] into paragraph (a) [Purpose], and paragraph (b) [Function] and numbering the subparagraphs of proposed paragraph (B) is not a substantive change. It is a formatting change to intended to make the rule more user-friendly.

3. In proposed paragraph (a), substituting "lawyer" for "member" is intended as a non-substantive change that more accurately reflects the current scope of the Rules, i.e., their application is not limited to members of the State Bar. See discussion at paragraph IX.A.1, above.

4. In proposed paragraph (b)(1), amending current rule 1-100(A), subparagraph 2, to provide: "A willful violation of any of these rules is a basis for discipline" is not intended as a substantive change. Although the substitution of the term "violation" for "breach" might be viewed as a substantive change, it is merely a clarifying change for the reasons set out in paragraph IX.A.4, above.

5. In proposed paragraph (b)(2), the deletion of the last two sentences from the current rule paragraph arguably is a substantive change because it moves black letter in the current rule into a comment. However, as discussed in paragraph IX.A.6, above, the change is non-substantive because the relocated black letter was either aspirational ("should") or permissive ("may").

6. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substituting language for the second sentence ("Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others") is non-substantive change intended as a clearer and more succinct statement of the current rule's sentence. See paragraph IX.AA.8, above.

7. Deleting current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules, and instead including the definitions in a global terminology rule, proposed Rule 1.0.1, is a non-substantive change.

8. Changing the name of the "Discussion" section to "Comment" is a non-substantive change, simply brining the rules in line with other jurisdictions and the California Code of Judicial Ethics.

9. In proposed paragraph (c), deleting the first clause in current rule 1-100, paragraph (C), which provides: "Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, …" is a non-substantive change for the reasons stated in paragraph IX.A.11, above.

10. Deleting current rule 1-100, paragraph (D) [Geographic scope of the rules] and instead include in the Rules a standalone rule, proposed Rule 8.5 (based on Model Rule 8.5), is a non-substantive change.

11. In proposed paragraph (d) [current rule 1-100(E)], changing the preferred citation of the rules to the "California Rules of Professional Conduct" is a non-substantive change for the reasons stated in paragraph IX.A.13, above.

12. Numbering the Comment sections is non-substantive for the reasons stated in paragraph IX.A.14, above.

13. Adding pin cites to the case citations in proposed Comment [1] is a non-substantive change, intended to provide lawyers with ready access to an in-depth discussion of the point for which the relevant case is being cited.

14. Adding Comment [3], which explains that a willful violation of a rule does not require that a lawyer intend to violate the rule, is a nonsubstantive change because it clarifies proposed paragraph (b)(1).

15. Adding Comment [4], which is a nearly verbatim restatement of current rule 1-100(A), subparagraph 3, is a non-substantive change for the same reasons deletion of those sentences from the black letter is non-substantive. See discussion in paragraph 5, above.

16. Adding Comment [5], which identifies the provision of pro bono publico services as an important aspect of a lawyer's responsibilities as an officer of the legal system, is a non-substantive change. Comments do not impose duties.

E. Alternatives Considered:

None.

VIII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Eaton submitted a written dissent asserting, in part, that including a pro bono comment is inconsistent with the Commission's Charter and that the State Bar should instead consider adoption of a rule imposing mandatory reporting of pro bono hours. See attached for the full text of the dissent and the Commission's response to the dissent.

IX. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.0 [1-100] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.0 [1-100] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Daniel Eaton, on the Recommended Adoption of Proposed Rule 1.0

Paragraph 2 of the Commission Charter reads: "The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, *as opposed to purely aspirational objectives*." (emphasis added.) Paragraph 5 of the Commission Charter reads in pertinent part: "Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly *to elucidate*, and not to expand upon, *the rules themselves*." (emphasis added.)

Notwithstanding this mandate, the Commission adopted the following Comment 5 to Rule 1.0:

> "The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are *encouraged* to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should *aspire* to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services)." (Emphasis added.)

On its face, the Comment states an aspirational objective. That offends Paragraph 2 of the Commission's Charter.

The Comment also deviates from Paragraph 5 of the Commission's Charter. Unlike the other proposed comments to Proposed Rule 1.0, proposed Comment 5 offers no "guidance for interpreting and practicing in compliance with the Rules." Under Proposed Rule 1.0(c), that is the only proper purpose of a Comment. The stated benefits of this Comment that the drafting team identifies, such as enhancing the ability of legal services organizations to recruit, make this point especially clear.

By adding this Comment, the Commission also deviated from an additional aspect of Paragraph 5 of the Charter which directs us to use Comments "sparingly" to "elucidate"

the rule to which it is appended. This comment does not do that. Instead, it introduces a distinct concept altogether untethered to its Rule.

The proponents of this Comment admirably acknowledged that this Comment deviates from paragraphs 2 and 5 of the Charter. For me, that was enough to warrant its exclusion. The argument for including the Comment anyway that carried the day was that pro bono service ought to be mentioned somewhere in the disciplinary rules in order to concentrate the profession's collective mind on addressing the unmet need of a substantial underserved population. I am not convinced the approach the Commission took was sound.

There is a different, better way to achieve the objectives of this Comment in an enforceable way. The Commission should have considered adopting a Rule like the one in effect in Florida that requires the mandatory reporting of pro bono hours. Florida Rule of Professional Conduct 4.6.1, subdivision (d) says in full:

> (d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual membership fees statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor:
>
> (1) I have personally provided _____ hours of pro bono legal services;
>
> (2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided);
>
> (3) I have contributed $_____ to: (indicate organization to which funds were provided);
>
> (4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or
>
> (5) I have been unable to provide pro bono legal services to the poor this year; or
>
> (6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired, or inactive).

The failure to report this information shall constitute a disciplinary offense under these rules.

This is a specific, enforceable way to induce more lawyers to provide substantial pro bono service to the economically less advantaged.[1] As one commentator put it after reviewing the demonstrated increase in pro bono service that resulted from Florida's mandatory reporting system, "a mandatory reporting system is the most efficient and effective policy to begin the process of narrowing the gap between demand for free legal aid and its availability." L. Boyle, "Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements," 20 Geo. J. Legal Ethics 415 (2007). And such a Rule also would accord with each aspect of this Commission's Charter in a way that Comment 5 does not.

Moreover, there are other concepts, such as civility, which lawyers also should be encouraged to embrace. The Rules of Professional Conduct is not the place to offer that encouragement. Why mention pro bono aspirationally and no other "aspects of a lawyer's professional obligations" the violation of which are not subject to discipline? The simple answer to that question is that the Commission would get consumed by debates on ideals or practices to which a lawyer should aspire and those to which a lawyer should not.

If mandatory reporting of pro bono hours is considered objectionable for some reason, the existing State Bar Pro Bono Resolution, similar local bar resolutions, and awards given out by a range of bar and other organizations remain proper vehicles to advance worthy goals such as this that do not fit in the Rules. A sense of functional humility should restrain this Commission from stuffing the Rules with concepts that exceed our mandate.

Comment 5 is neither necessary nor sufficient to address what is universally recognized as the severe shortfall in providing legal services to those with limited means. I dissent.

Commission's Response to Dissent Submitted by Daniel Eaton on the Recommended Adoption of Proposed Rule 1.0

The Commission disagrees and believes Rule 1.0 is the functional equivalent of a preamble to the Rules and therefore is consistent with the Commission's Charter. The Commission acknowledges that raising the profile of a lawyer's pro bono responsibility in this new Comment does not create a duty enforceable by lawyer discipline. At the same time, the Comment also is mindful of the fact that Comment [5] will not promote the unfair discipline of lawyers using vague or unenforceable standards. As such, the Comment is appropriate for inclusion in Rule 1.0 which defines in a general sense the scope of the Rules and a lawyer's professional obligations. The Comment simply signals that the provision of pro bono services, while not mandated, is an important

[1] Other provisions of Florida Rule 4.6.1, such as the suggested number of annual pro bono hours a lawyer should provide, are aspirational and therefore do not belong in our Rules.

aspect of a lawyer's responsibilities as an officer of the court and the legal system. Its inclusion in Rule 1.0 does not depart from the Commission's overall mission to propose disciplinary standards, as opposed to purely aspirational objectives. Moreover, the Comment [5] is consistent the State Bar's pro bono resolution which has been in place for nearly 20 years. The Commission also disagrees that the proper approach would be to require the mandatory reporting of pro bono hours (as required in Florida). Promulgation of a mandatory pro bono reporting requirement would entail the commitment of additional State Bar resources in terms of monitoring and audits to insure compliance, as is currently required under the MCLE program. This would require resource and budgetary commitments to finance such a program that are beyond the purview of the Commission.

Proposed Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct
Synopsis of Public Comments

TOTAL = 1 *A = 0* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21a	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC supports this rule. 2. OCTC supports Comments [2], [3], and [4]. 3. Comment [1] is duplicative of subsections (a) and (b) and, thus, unnecessary and inconsistent with the directive that Comments should be used sparingly and only to elucidate and not to expand upon the rules themselves. 4. Comment [5] is aspirational only, encouraging attorneys to do pro bono activities. Therefore, this Comment is contrary to the Commission Charter.	No response required. No response required. 3. The Commission disagrees with the commenter's assessment. It believes that Comment [1] provides guidance on how the rule is applied by clarifying that although the rules are disciplinary in nature, they can be evidence of the standard of conduct in a civil action, and providing leading authority on that concept. 4. The Commission continues to believe that the comment is an important reminder of a lawyer's professional responsibilities as an officer of the legal system. The comment is intended to encourage lawyers to provide voluntary pro bono services to help address the recognized problem of access to justice in California, but at the same time clarify that the comment is not a disciplinary standard. Given those parameters, the

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct
Synopsis of Public Comments

TOTAL = 1 *A = 0* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						Commission believes that a comment in proposed Rule 1.0, which is the closest provision in the proposed Rules to the ABA Model Rules' Preamble, is appropriate.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.0.1
(Current Rule 1-100(B))
Terminology

EXECUTIVE SUMMARY

In connection with consideration of current rule 1-100 (Rules of Professional Conduct, In General), the Commission evaluated current rule 1-100(B) (Definitions) in accordance with the Commission Charter, including the national standard of the ABA counterpart, Model Rule 1.0 (Terminology), as well as the Terminology section of the California Code of Judicial Ethics. The result of this evaluation is proposed rule 1.0.1 (Terminology) which expands upon the five definitions currently contained in rule 1-100(B).

Rule As Issued For 90-day Public Comment

The proposed rule provides a global terminology section with definitions of terms that are used throughout the proposed Rules of Professional Conduct. Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed rule 1.0.1 would obviate a lawyer's need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the rules.

The content of the definitions is derived from ABA Model Rule 1.0 where the Model Rule and California meanings of a term are aligned. The Commission believes adopting the Model Rule definition will remove unnecessary differences between the California rule and the corresponding rule in other jurisdictions, an important consideration in regulating lawyers from other jurisdictions who practice in California under one of the multijurisdictional practice rules of court.[1] However, where the Model Rule definition and California law or settled public policy are not aligned, the Commission revised those definitions to reflect California law or policy to ensure continuation of important public policies, including client protection, that are reflected in the California approach.[2]

Paragraph (a) of proposed rule 1.0.1 defines "belief" of "believes" and is nearly identical to ABA Model Rule 1.0(a). The only changes are non-substantive and they include substituting "means" for "denotes,"[3] and the present tense "supposes" for "supposed" to correspond to the tense of "believes."

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[1] See, e.g., California Rules of Court 9.45 – 9.48.

[2] An example of this is California's approach to "informed written consent" which is a heightened standard requiring that both the client's consent, as well as the attorney's disclosure to the client of the relevant circumstances and the material risks, including reasonably foreseeable adverse consequences, be in writing. The Model Rules approach is for the client to confirm in writing that the lawyer orally communicated adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.

[3] The Commission has substituted "means" for "denotes" throughout the rule because the Commission believes "means" is more specific and definite than "denotes."

Paragraph (c) defines "firm" or "law firm" and is derived from ABA Model Rule 1.0(c). The proposed rule includes a reference to a government organization. This addition emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers.[4] The proposed rule substitutes "engaged in" for "authorized to," as stated in the Model Rule, to assure that the requirements of the rules apply to everyone acting as a law firm even if not authorized to do so.[5]

Paragraph (d) defines "fraud" or "fraudulent" and is nearly identical to ABA Model Rule 1.0(d). The Commission believes it is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction.[6] In addition, Comment [3], discussed below, clarifies that neither damages nor reliance need to be proven because that would frustrate the rule's intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder.

Paragraph (e) provides a definition for "informed consent" and differs from ABA Model Rule 1.0(e) by, among other things, adding the term "relevant circumstances" and the phrase "actual and reasonably foreseeable" to the required disclosure points for obtaining informed consent. These terms are consistent with California policy and case law. (See, e.g., current rule 3-310(A)(1) and *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429-31.)

Paragraph (e-1) defines "informed written consent" which has no counterpart in the Model Rule. The definition is based on current rule 3-310(A)(2). Unlike the Model Rules, or the jurisdictions that have largely adopted the Model Rules approach to consent, California has a heightened standard that requires a client's consent not only be informed, but also in writing. This means that not only must the client's consent be in writing but also that the disclosure be in writing. California's current approach to this standard is more client protective.

Paragraph (f) defines "knowingly," "known," or "knows" and is nearly identical to ABA Model Rule 1.0(f).

Paragraph (g) defines "partner" and is nearly identical to ABA Model Rule 1.0(g).

Paragraph (g-1) defines "person" which has no counterpart in the Model Rule. The proposed definition will eliminate potential confusion over whether the term "person" when used throughout the rules includes an organization. Six other jurisdictions have adopted a definition for the term "person."

Paragraph (h) defines "reasonable" or "reasonably" and is identical to ABA Model Rule 1.0(h).
Paragraph (i) defines "reasonable belief" or "reasonably believes" and is identical to ABA Model Rule 1.0(i).

Paragraph (j) defines "reasonably should know" and is identical to ABA Model Rule 1.0(j).

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[4] See, *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.

[5] Maryland, Michigan, and South Carolina have similarly removed the phrase "authorized to."

[6] See, proposed rule 8.5(b), concerning choice of law.

Paragraph (k) defines “screened” and modifies ABA Model Rule 1.0(k) primarily by adding the clause “(ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.”

Paragraph (l) defines “substantial” and is identical to ABA Model Rule 1.0(l).

Paragraph (m) defines “tribunal” and differs from ABA Model Rule 1.0(m). There was debate as to whether the definition should reference “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved” for fear that imposing the same duties of candor on lawyers appearing before such a body as they owe courts of general jurisdiction may violate the lawyer’s client’s right of petition. Ultimately, the Commission determined that the proposed definition would not inhibit a client’s right of petition because the definition is limited to administrative bodies acting in an adjudicative capacity. The Commission could not find anything to suggest that the right to petition is different is scope when a court, arbitrator, or administrative law judge is acting in an adjudicative capacity versus when an administrative body is acting in an adjudicative capacity. The Commission is not aware of any issues relating to the right to petition in the numerous jurisdictions that have adopted the ABA Model Rule definition of “tribunal.”

Paragraph (n) defines “writing” or “written” which is based on Evidence Code section 250 and includes a second sentence clarifying that an elective signature (or other modern forms of signature) are sufficient to establish that a writing is “signed.”

There are six comments to the rule. Comment [1] provides interpretative guidance for determining whether a grouping of lawyers might constitute a law firm. Comment [2] provides interpretative guidance concerning use of the term “of counsel.” Comment [3] provides important qualifications on what constitutes fraud for purposes of the rules and also provides an explanation for the qualifications. Neither damages nor reliance need to be proven because as the term “fraud” is typically used in these rules, it is as a “trigger” for imposing a lawyer’s duty to prevent fraud or avoid assisting a client in perpetrating a fraud. Comment [4] clarifies the term “informed consent” and “informed written consent.” Comments [5] and [6] provide guidance on the implementation of an effective ethical screen for purposes of these rules.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

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

Commission Drafting Team Information

Lead Drafter: Danny Chou
Co-Drafters: Jeffrey Bleich, Carol Langford, Dean Zipser

I. CURRENT CALIFORNIA RULE

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

* * * * *

(B) Definitions.

(1) "Law Firm" means:

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

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

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

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

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

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

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

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

* * * * *

Discussion:

* * * * *

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.0.1 [1-100(B)]
Vote: 15 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.0.1 [1-100(B)]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.0.1 [1-100(B)] Terminology

(a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) [Reserved]

(c) "Firm" or "law firm" means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.

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

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

(g-1) "Person" means a natural person or an organization.

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

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

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

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

(m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body 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.

(n) "Writing" or "written" has the meaning stated in Evidence Code § 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

COMMENT

Firm or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or

conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term "of counsel" implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as "of counsel" or by a similar term should be deemed a member of a law firm* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

*Fraud**

[3] When the terms "fraud"* or "fraudulent"* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term "fraud"* or "fraudulent"* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*Screened**

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

instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm* personnel.

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

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

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

* * * * *

(a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

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

(b) ~~a law corporation which employs more than one lawyer; or~~[Reserved]

(c) ~~a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~"Firm" or "law firm" means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) ~~a publicly funded entity which employs more than one lawyer to perform legal services~~"Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.

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

(2g) "~~Member~~Partner" means a member of ~~the State Bar of California~~a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

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

(g-1) "Person" means a natural person or an organization.

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

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

(4j) "~~Associate" means an employee or fellow employee who is employed as~~Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

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

(m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body 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.

(n) "Writing" or "written" has the meaning stated in Evidence Code § 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

* * * * *

~~Discussion:~~Comment

Firm or Law Firm**

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

[2] The term "of counsel" implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as "of counsel" or by a similar term should be deemed a member of a law firm* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

*Fraud**

[3] When the terms "fraud"* or "fraudulent"* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term "fraud"* or "fraudulent"* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*Screened**

[5] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known* by the personally prohibited

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

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

* * * * *

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

V. RULE HISTORY

The California Rules of Professional Conduct have never included a comprehensive global terminology section. The American Bar Association has included, since 1969, a "Definitions" or "Terminology" section in its Model Code of Professional Responsibility and the Code's successor, the Model Rules of Professional Conduct, respectively. As part of the State Bar's comprehensive revision and renumbering of the rules that became operative in 1989, rule 1-100 was revised to include a new paragraph (B), which contains definitions for five terms ("Law Firm," "Member," "Lawyer," "Associate," and "Shareholder") that are referenced throughout the rules. (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987.)[1] The purpose of adding this

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

"Paragraph (B) is new and defines words and phrases used throughout the rules to assist attorneys in interpreting and applying the rules. Including a definition of the term 'client' was considered but rejected because such a definition was thought to be both

paragraph was to assist attorneys in interpreting and applying the rules. Including a definition of the term "client" was considered but rejected because such a definition was thought to be both over and under-inclusive, depending on the circumstances. A Discussion paragraph was added to explain that "law firm" does not include associations or people who are unauthorized to practice law. Other definitions, which were viewed as rule-specific, were included as part of the rule to which they are relevant.[2]

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

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation)**

    1. OCTC supports most of this proposed rule, but is concerned with the definition of "knowingly," "known," or "knows" in subsection (f) as meaning actual knowledge of the fact in question. As discussed in the General Section of this letter, the use of actual knowledge in several of the proposed rules is contrary to the State Bar Act and well-established disciplinary law in California; will lower the minimum professional standards required of attorneys in this State; mislead attorneys as to their professional obligations; and create confusion in disciplinary law. Moreover, this definition is too narrow and will allow attorneys to use willful blindness or a lack of diligence in searching for facts or law when they have a duty to do so. Allowing knowledge to be proven by circumstantial evidence does not solve this problem. First, in State Bar proceedings, intent and facts are always provable by circumstantial evidence. (*Geffen v. State Bar* (1975) 14 Cal.3d 843, 853; *In the*

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over and under-inclusive, depending on the circumstances." (December 1987 memorandum at page 14.)

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

Matter of Petilla (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.) Second, there is a difference between circumstantial evidence of intent and willful blindness or gross negligence. OCTC recommends that this definition include the following: "knowing" or "knowingly" means the attorney has actual knowledge of a fact *or deliberately closed his or her eyes to facts he or she had a duty to see or recklessly stated as facts things of which he or she was ignorant*.[3]

Commission Response: The Commission has not made any changes to the proposed definition of "knows."

First, to the extent that the global definition might be too narrow for a particular rule, the mental state requirement for a violation can expanded for that rule. For example, proposed Rule 8.2 does just that by prohibiting a lawyer from making "a statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity . . . ." The Commission therefore continues to believe there is no need to change the global definition of "knows." Indeed, the Commission purposely limited the mental state requirement of many of the rules cited by OCTC to actual knowledge for legal and/or policy reasons.

Second, OCTC's concerns about willful blindness appears overblown. In fact, the Review Department of the State Bar has recently held that "willful blindness . . . is tantamount to having actual knowledge . . . ." (*In Matter of Carver* (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, *4.) In reaching this conclusion, the Review Department cited a 1901 California Supreme Court decision which recognized that "willing ignorance" may be "regarded as equivalent to actual knowledge." (*Levy v. Levine* (1901) 134 Cal. 664, 671-672.) The Commission believes that the definition covers willful blindness by providing "knowledge can be inferred from circumstances."

2. OCTC supports the Comments to this rule.

   Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, ten public comments were received. One comment agreed with the proposed Rule, five comments disagreed, two comment agreed only if modified, and two comments did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

[3] See *People v. Rader* (Col. 1992) 822 P.2d 950, 953 [citations omitted].

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

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

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

The following is an example:

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

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

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

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

Evidence Code § 951 defines "client" as a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

Evidence Code § 250 defines "writing" as a handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication

or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

B. ABA Model Rule Adoption

The ABA State Adoption Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.0: Terminology," revised December 9, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_0.authcheckdam.pdf [last accessed 2/6/17]

- Four jurisdictions have adopted Model Rule 1.0 verbatim.[4] Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 1.0.[5] Sixteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.0."[6]

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

A. Concepts Accepted (Pros and Cons):

General Concepts Recommended for Adoption.

1. Recommend adoption of a global terminology section with definitions of terms that are used throughout the Rules of Professional Conduct.

    - Pros: Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed Rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed Rule 1.0.1 would obviate a lawyer's need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the Rules.

    - Cons: None identified.

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[4] The four jurisdictions are: Arkansas, Delaware, Idaho, and Louisiana.

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

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

2. Similar to the California Code of Judicial Ethics, recommend placing an asterisk next to every instance where a global term appears in the Rules (or alternatively, bold or italicize the term).

    - Pros: Similar highlighting of defined terms has been incorporated to good effect in the Code of Judicial Ethics. The highlighting will provide notice that the term so marked is defined in the terminology section so that a lawyer reading the rule in question would know to consult the definition in this Rule in determining how the Rule should be applied.

    - Cons: None identified.

3. As to the substantive content of the definitions, recommend adoption of the Model Rule 1.0 definitions to the extent those definitions conform to California law and, where the Model Rule definitions and California law or settled public policy are not aligned, revise those definitions to reflect California law or policy.

    - Pros: Where the Model Rule and California meanings of a term are aligned, adopting the Model Rule definition will remove unnecessary differences between the California rule and the corresponding rule in other jurisdictions, an important consideration in regulating lawyers from other jurisdictions who practice in California under one of the multijurisdictional practice rules of court. (See, e.g., Rules of Court 9.45 – 9.48 and proposed Rule 8.5 [Choice of Law].) Changing a Model Rule definition to reflect California law or settled policy will ensure continuation of important public policies, including client protection, that are reflected in the California approach. (See, e.g., proposed definition of "informed consent" and "informed written consent," and rejection of the Model Rule concept, "confirmed in writing," below.)

    - Cons: None identified.

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

4. In paragraph (a), recommend adoption of the definition of "belief," which is nearly identical to the Model Rule definition. See also "reasonable" and "reasonable belief," below.

    - Pros: The definition is used throughout the Rules (e.g., Rules 1.1, 1.6, 1.16), justifying a global definition. The definition makes only non-substantive changes to the Model Rule definition, i.e., substituting "means" for "denotes,"[7] and the present tense "supposes" for "supposed" to correspond to the tense of "believes."

[7] The Commission recommends substituting "means" for "denotes" throughout the blackletter. "Means" is more specific and definite than "denotes."

- Cons: None identified.

5. In paragraph (c), recommend adoption of the definition of "firm," derived from Model Rule 1.0(c).

   - Pros: The definition is used throughout the Rules (e.g., Rules 1.5.1, 5.1 to 5.3, 5.4), justifying a global definition. In addition, "firm" is defined by reference to its organizational attributes rather than its constituent members, which obviates the need to specifically define the terms "shareholder" and "associate" in the rule, as is done in current rule 1-100(B).

     Further, the definition includes a reference to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers. See *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.

     In addition to using semi-colons and deleting the "or" after "sole proprietorship," the phrase "authorized to" is used instead of "engaged in" to conform the definition to the Model Rule definition and to clarify that the Rules only cover associations authorized to practice law. The phrase "a lawyer acting as a" is added in front of "sole proprietorship" to clarify that the lawyer is subject to the Rules.

   - Cons: None identified.

6. In paragraph (d), recommend adoption of the definition of "fraud," which is identical to the Model Rule definition, and to modify Comment [5]. (See discussion below re Comment [5].)

   - Pros: It is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction. (See proposed Rule 8.5 concerning choice of law.) Further, as clarified in Comment [5], neither damages nor reliance need to be proven because, as the term "fraud" is typically used in these Rules, it is as a "trigger" for imposing a lawyer's duty to prevent fraud or avoid assisting a client in perpetrating a fraud. See Rules 1.2.1(a) [lawyer "shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, …."]; 1.16(b)(2) [Lawyer may withdraw if "the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud"]; 3.3(b) ["A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6."] Comment [3] also clarifies that "fraud," as used in these Rules,

does not include negligent conduct, including negligent misrepresentations or omissions.

Fraud is also mentioned in Rules 1.5 [fees] and 8.4 [Misconduct]. Under proposed Rule 1.5(b)(1), a factor in considering whether a fee is unconscionable is "whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee," and proposed Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." In each of the foregoing, the prohibition is on a lawyer "engaging" in fraudulent conduct, not that the lawyer has committed fraud in the sense that all elements of the common law tort of fraud must have been proven. In the legal profession, great emphasis is placed on a lawyer's honesty and requiring only "conduct involving fraud" reflects that emphasis.

As to how the definition of fraud should be qualified, i.e., in the blackletter of the rule or in a Comment, the Commission believes it should be in a Comment. As noted, in applying a rule, e.g., Rule 3.3, to a specific set of facts, it is not necessary that reliance or damage be shown because that would frustrate the rule's intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder. Guidance on how a rule should be applied is one of the approved purposes of a Comment, so that qualifying provision should remain in a Comment, where the rationale for not requiring damages or reliance, which are typically required elements of fraud under the common law in every jurisdiction, can be more fully explained. Put another way, placing the qualification in a Comment permits an explanation for why the definition is qualified and avoids the confusion that would be generated by contradicting the definition of fraud (law of the "applicable jurisdiction"), which presumably requires both reliance and damage. Further, an expanded explanation does not belong in a blackletter provision; it belongs in a Comment. Please see discussion of proposed Comment [3], below.

- Cons: None identified.

7. In paragraph (e), recommend adoption of a definition of "informed consent," modified to identify two disclosures required for consent to be "informed": (i) the "relevant circumstances" and (ii) the "material risks" of the representation, the latter retained from the Model Rule. The Commission has also added the clause "actual and reasonably foreseeable "adverse consequences of the proposed course of conduct," (see current rule 3-310(A)(1)'s definition of "disclosure"), to clarify what is intended by the phrase "material risks."

    - Pros: The inclusion of the term "material risks" clarifies that the definition is a global definition that is not limited to the conflicts context and conforms the definition more closely to the Model Rule definition. The inclusion of "relevant circumstances" and "actual and reasonably foreseeable adverse consequences" conform the definition to California case law. See, e.g., *Sharp*

v. Next Entertainment, Inc. (2008) 163 Cal.App.4th 410, 429-31.

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

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

8. In paragraph (e-1), recommend adoption of the definition of "informed written consent," which is based on current rule 3-310(A)(2).

   - Pros: The definition is used throughout the current Rules (e.g., Rules 3-310(C), (E), (F), 5-210) and has been incorporated into other rules by this Commission (e.g., 1.8.6, 1.8.7, 1.9, 1.10, 1.11, 1.12). Unlike the Model Rules or jurisdictions that have largely adopted the Model Rules approach to consent, California has a heightened standard that requires a client's consent not only be informed, but also in writing. This means that not only must the client's consent be in writing but also that the disclosure be in writing. California's current, more client-protective approach to consent should be carried forward.

   - Cons: None identified.

9. In paragraph (f), recommend adoption of the definition of "knowingly," etc., which is nearly identical to the Model Rule definition. See also "reasonably should know," below.

   - Pros: This scienter requirement is used throughout the Rules, justifying a global definition. Limiting this definition to "actual knowledge" which may be "inferred from the circumstances" – rather than expressly including willful blindness or gross negligence – is consistent with the scienter requirement determined by the Commission to be appropriate for the rules that use these terms. In any event, "actual knowledge," under existing case law, appears to cover willful blindness. See, e.g., *Levy v. Levine* (1901) 134 Cal.; 664, 671-672; *In re Matter of Carver* (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, *4. And to the extent the scienter requirement in a rule should be broader than actual knowledge, the rule itself can expand its particular scienter requirement. See, e.g., Rule 8.2 (prohibiting a lawyer from making "a statement that the lawyer knows to be false or *with reckless disregard as to its truth or falsity*").

   - Cons: Limiting the definition to actual knowledge is contrary to the State Bar Act and California law governing lawyer discipline, lowers the professional standards required of California lawyers, misleads attorneys as to their professional obligations, and creates confusion in California law governing lawyer discipline.

10. In paragraph (g), recommend adoption of the definition of "partner," which is identical to the Model Rule definition.

    - Pros: It is important to globally define this term, which is used throughout the Rules, because it clarifies that "partner" is not limited to its traditional meaning, i.e., it does not only apply to a member of a partnership but also includes shareholders in law corporations, etc.

    - Cons: None identified.

11. In paragraph (g-1), recommend adoption of the definition of "person" even though it has no counterpart in the Model Rules.

    - Pros: This definition is used throughout the Rules, justifying a global definition. (See, e.g., definitions in this Rule; see also proposed Rules 1.4.1, 1.6, 1.7, 1.8.1, 1.8.3, 1.8.5, 1.8.10, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 3.1, 3.3, 3.4, 3.5, 3.6, 3.8, 4.1, 4.2, 4.3, 5.1, 5.2, 5.3, 5.3.1, 5.4, 5.5, 7.1, 7.2, 7.3, 8.1 and 8.4.1). The proposed definition will eliminate potential confusion over whether the term "person" includes an organization. Six other jurisdictions have adopted definitions of "person;" the proposed definition is based on the definition adopted in Michigan.

    - Cons: That a "person" means both a natural person and an organization is well-settled and need not be the subject of a definition.

12. In paragraph (h), recommend adoption of the definition of "reasonable," etc., which is identical to the Model Rule definition.

    - Pros: This term is used throughout the Rules and conforms to California law.

    - Cons: None identified.

13. In paragraph (i), recommend adoption of the definition of "reasonable belief," etc., which is identical to the Model Rule definition.

    - Pros: This term is used throughout the Rules and conforms to California law.

    - Cons: None identified.

14. In paragraph (j), recommend adoption of the definition of "reasonably should know," which is identical to the Model Rule definition.

    - Pros: This term is used throughout the Rules and conforms to California law.

    - Cons: None identified.

15. In paragraph (k), recommend adoption of the definition of "screened," which modifies the Model Rule definition primarily by the addition of clause (ii).

    - Pros: The addition of clause (ii) imposes bilateral duties of non-communication on the law firm, i.e., it prohibits not only the screened lawyer from communicating with other firm lawyers about the matter but also places a similar prohibition on all other lawyers in the firm.

    - Cons: None identified.

16. In paragraph (l), recommend adoption of the definition of "substantial." The pros and cons of including the term "substantial" are:

    - Pros: The term "substantial" as defined in the Model Rules is accurate and provides important guidance in applying the many rules where the term "substantial" acts as a trigger for imposing a duty on a lawyer. As defined, the term "substantial" as used in the Rules refers to the qualitative nature of an event, i.e., "a material matter of clear and weighty importance." Its usage is similar to "significant." The primary dictionary definition of "substantial," on the other hand, refers to the quantitative nature of something rather than its qualitative nature, i.e., "large in amount, size, or number."[8] Because the common usage departs from how the term is employed in the Rules, a definition is warranted.

    - Cons: None identified.

17. In paragraph (m), recommend adoption of the definition of "tribunal," derived from Model Rule 1.0(m), modified to add the term "administrative body" to clause (i).

    - Pros: The first Commission's definition included within its scope courts and their equivalents acting in an adjudicative capacity to which lawyers should owe the same duties of candor as to courts of general jurisdiction. The term "administrative body" has been added to the list of entities acting in an adjudicative capacity to which lawyers should owe those duties because governmental entities, particularly local governmental entities, have administrative bodies, such as personnel boards and civil service commissions, that adjudicate disputes and render decisions that can be binding on the parties. Because an administrative body acting in an adjudicative capacity is acting in a capacity similar to an ALJ or arbitrator, there is an expectation from the body, the parties, and the public that a lawyer representing a client before that body is providing legal opinions and therefore adhering to his or her ethical duties as a lawyer. California courts also have

[8] See, e.g., Merriam-Webster's online dictionary, at: http://www.merriam-webster.com/dictionary/substantial.

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

ample experience distinguishing between administrative bodies acting in an adjudicative capacity from those acting in a non-adjudicative capacity, and there is nothing to suggest that courts in the many states that have adopted the ABA definition of "tribunal" – which uses the same distinction – have had any difficulty applying it.

The definition as proposed would not inhibit a client's right to petition because the duty is limited to administrative bodies that are acting in an adjudicative capacity. There is nothing to suggest that the right to petition is different in scope when a court, arbitrator, or ALJ is acting in an adjudicative capacity versus when an administrative body does so. Finally, the Commission is not aware of any issues relating to the right to petition in the numerous jurisdictions that have adopted the ABA Model Rule definition of "tribunal" – which is broader and includes "legislative" bodies.

- Cons: Given practical considerations, imposing the same duties of candor as are owed a court of general jurisdiction on a lawyer appearing before an administrative body will risk violating the right of petition of the client's lawyer.

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

    - Pros: This term is used throughout the Rules and conforms to California law. Moreover, including the second sentence clarifies that an electronic signature (or other modern forms of signature) are sufficient to establish that the writing is "signed." This sentence, based on the second sentence in Model Rule 1.0(n) and also accepted by the first Commission, should avoid potential confusion over whether electronic or other modern forms of signature will suffice.

    - Cons: None identified.

Introduction to Comments to Proposed Rule 1.0.1. The Commission has recommended six Comments which are largely derived from the Model Rule Comments.

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

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

    - Pros: Comment provides helpful interpretive guidance for determining whether a grouping of lawyers might constitute a law firm, e.g., for purposes of conflicts or fee splitting.

- Cons: None identified.

20. Recommend adoption of Comment [2] concerning the concept of a lawyer who is "of counsel" to a law firm, or is designated as such by use of a similar term. The Comment has no counterpart in the Model Rule.

    - Pros: The Comment provides helpful guidance on determining whether certain lawyers associated with a law firm should be considered part of the firm for purposes of a rule that uses the term "law firm" or "firm." The term "of counsel" (and similar terms) can have a variety of meanings and have been the subject of litigation. Providing guidance on what the term means in a particular situation will permit lawyers to better determine whether a rule applies and thus enhances compliance with the Rules.

    - Cons: There is no reason to include this guidance in the rule. Sufficient guidance is available in the case law, e.g., the two opinions cited in the Comment.

21. Recommend adoption of Comment [3] concerning the definition of fraud.

    - Pros: As noted, (see paragraph 6, above), this Comment provides important qualifications on what constitutes fraud for purposes of the Rules and also provides an explanation for these qualifications. Also as noted, the qualification on the definition belongs in a Comment, not in the blackletter of the Rule.

    - Cons: None identified.

22. Recommend adoption of Comment [4] to clarify the term, "informed consent."

    - Pros: The Comment clarifies that the definitions of "informed consent" and "informed written consent" are global definitions that are not limited to the conflicts context. As a result, the communication necessary to provide such consent will vary depending on the rule involved and the circumstances giving rise to the consent requirement.

    - Cons: The blackletter of paragraph (e) does not require any further elaboration. It already identifies the components of a disclosure sufficient to render the client's consent informed: disclosure of "the reasonably foreseeable adverse consequences and material risks of the proposed conduct" and "reasonably available alternatives."

23. Recommend adoption of Comments [5] and [6] regarding the term "screened."

    - Pros: Provides important, concise guidance on the implementation of an effective ethical screen.

- Cons: Similar guidance can already be found in California case law. (See, e.g., *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010); *Hendriksen v. Great Am. Sav. & Loan*, 11 Cal.App.4th 109 (1992).

B. Concepts Rejected (Pros and Cons):

1. Retain the definitions in current rule 1-100(B)(4) and (5) for "associate" and "shareholder," respectively.

   - Pros: In current rule 1-100(B).

   - Cons: It is recommended that these terms be removed because they do not appear in proposed Rules. Compare, for example, current Rule 2-200 (refers to "associate") to proposed Rule 1.5.1 (refers only to "law firm" and "lawyers") concerning fee splitting. See also the definition of "partner," above, which includes a shareholder in a law corporation.

2. Retain the definition of "member" in current rule 1-100(B)(2).

   - Pros: None identified.

   - Cons: "Member" as defined in current Rule 1-100(B)(2) has been retained in only one Rule, proposed Rule 5.3.1 [current Rule 1-311]. That is not a sufficient reason to retain that term in a global terminology rule and, in any event, the term is defined in proposed Rule 5.3.1. Moreover, member is used often in the proposed Rules to mean something entirely different, e.g., a "member" of a law firm (Rule 1.0.1(g)), a member of a legal services organization (Rule 6.3), or even as a member of the legal profession (Rule 1.0, Cmt. [5].)

3. Retain the definition of "lawyer" in current rule 1-100(B)(3).

   - Pros: None identified.

   - Cons: The Commission recommended that the word "lawyer" be substituted throughout the rules for "member," except in proposed Rule 5.3.1, which defines the word "member" for purposes of that rule. That global substitution obviates the need to define "lawyer" and proposed Rule 8.5 adequately explains which lawyers are covered by the rules.

4. Add the following concepts to the terminology rule: advance for fees; client (Evidence Code § 951); independent lawyer; law clerk; matter; of counsel; personally and substantially; public official (defined in proposed Rule 4.2); retainer (defined in proposed Rule 1.5); substantially related; practice of law.

   - Pros: All of the foregoing terms are used either in the Model Rules or the first Commission's proposed Rules, or both.

- Cons: The foregoing terms are not used with sufficient frequency to warrant their inclusion in a global terminology rule, have a common meaning that is not subject to misunderstanding, or have various meanings that are better left to explanation in the specific rule in which it is used.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The Commission believes that none of the proposed revisions of current Rule 1-100(B) constitutes a change in duties for California lawyers.

2. The only change that is arguably a substantive change is the definition of "firm" or "law firm." The proposed term is defined by reference to its organizational attributes rather than its constituent members. See Section IX.A.5, above.

D. Non-Substantive Changes to the Current Rule:

1. The Commission believes that the proposed definitions in proposed Rule 1.0.1 are non-substantive changes for the following reasons:

   a. Although the current California Rules of Professional Conduct do not include a global terminology rule other than Rule 1-100(B), for the most part proposed Rule 1.0.1 incorporates terms that are already recognized in California case law.

   b. Some terms already have counterparts in the current rules, e.g., "law firm" is defined in current Rule 1-100(B)(1), "informed consent" and "informed written consent" are defined in current Rule 3-310(A)(2), and "writing" is defined in current Rule 3-310(A)(3). None of these proposed terms and definitions change the duties of California lawyers.

   c. None of the proposed terminology paragraphs derived primarily from language in Model Rule 1.0 alter current duties of California lawyers. These definitions include terms that might be referred to as "scienter" terms or standards that are already found in the current rules. This category would include proposed Rules 1.0.1(a) ("belief"); 1.0.1(f) ("knows"); 1.0.1(h) ("reasonable"); 1.0.1(i) ("reasonable belief"); 1.0.1(j) ("reasonably should know"). Similarly, proposed Rule 1.0.1(l) ("substantial") is a term found in the current rules. All of these definitions would provide guidance on what is intended when the word or phrase is used in the proposed Rules. OCTC objects to the use of "knows" and "knowingly" but that objection should be evaluated in the context of a specific rule to determine whether a substantive change is being made. Simply by including in a terminology rule a definition of "knows" and "knowingly" the Commission is not making a sweeping change to

the concept of "willfulness" as basic requirement for finding culpable misconduct.

d. Proposed Rule 1.0.1(d) ("fraud") clarifies that when the term "fraud" and "fraudulent" appears in the rules, the meaning is to be determined by the law of the applicable jurisdiction, which would be determined by reference to proposed Rule 8.5 (Disciplinary Authority; Choice of Law).

e. When the State Bar submitted its brief on the first Commission's proposed Rule 1.0.1, it identified only three definitions that might arguably be substantive changes: (i) proposed Rule 1.0.1(e-2) ("information protected by Business and Professions Code § 6068(e)"); (ii) proposed Rules 1.0.1(k) ("screened"); and proposed Rule 1.0.1(m) ("tribunal")). The Commission has declined to recommend the first Commission's paragraph (e-2).[9] As to the first Commission's definition of tribunal, which this Commission has modified to add "administrative body," the Commission agrees with the first Commission that the definition of tribunal should omit legislative bodies because of potential issues relating to the constitutional right to petition. (See Section IX.A.17, above), As to the term "screened," the Commission does not believe that either the blackletter definition or the Comments related to the definition are contrary to California law.

2. Substitute the term "lawyer" for "member."

- Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

3. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). This Rule is numbered 1.0.1 rather than 1.0 as in the Model Rules or in nearly every jurisdiction that has adopted a version of the Model Rules. That is because the Commission has assigned the number "1.0" to the Rule that sets forth the purpose and scope of the Rules, which in

[9] The Commission did not include a definition of "information protected by Business and Professions Code § 6068(e)(1)" for three reasons. First, in an April 15, 2014 letter, the Supreme Court directed the State Bar to remove paragraph (e-2), which defined the term by reference to comments in another rule. Second, even assuming that the Court's concern was with a definition that appeared in a comment to another Rule, the Commission declined to recommend adoption of any definition of the term, even in proposed Rule 1.6's black letter. Third, it is uncertain whether a rule of professional conduct can define what is in effect a statutory term.

Model Rules jurisdictions is typically set out in unnumbered Preamble and Scope sections.

- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would assist them in complying with their duties under the Rules, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

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

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.0.1 [1-100(B)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.0.1 [1-100(B)] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.0.1(m)

This message states my dissent from proposed Rule 1.0.1(m), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

The Commission's Charter directs us to "…ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Proposed Rule 1.0.1(m) presents a serious violation of those directions, would cause a radical change in California's current standards,[1] and would intrude on the rule-making authority and the customs and practices of of administrative agencies.

Proposed Rule 1.0.1 defines terms that are used in multiple places in the proposed Rules (definitions used only in a single Rule are contained in that Rule). One of the important definitions is the term "tribunal".

Here is the first Commission's definition:

> "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.

The first Commission carefully limited the definition to courts and their equivalent. The current Commission has expanded the proposed definition to include administrative agencies:

> "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, *or an administrative body 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. (italics added)

The term "tribunal" is used in nine other Rules. The extreme time limitations under which we are operating make it impossible for me to discuss the foreseeable consequences of this expanded definition in all nine Rules. Instead I will restrict myself

[1] I don't intend to repeat this thought in each of my Dissents, but it is important to keep in mind that California has a rich body of established civil and disciplinary case law and advisory ethics opinions that provide a solid foundation for lawyers, OCTC and the State Bar Court, and civil courts. Each proposed change in the current Rules of Professional Conduct should be examined carefully to be certain that it will not cause needless confusion or other harm. OCTC has made this point in several of its dissents and, while I don't always agree with its conclusions, I believe its concern is both valid and important.

to a few observations that I hope will show the scope and depth of the error in the proposed expanded definition:

First, there is no definition of "administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved". There likely will be future conflicts about when the expanded definition would apply, but the language appears broad enough to include every federal, state, and local administrative agency that has the authority to grant or deny licenses, permits, or approvals of any sort. The Federal Register lists 440 federal administrative agencies.[2] These include the obvious, such as the IRS and the SEC. It also includes the less generally known, such as the Comptroller of the Currency[3] and Federal Motor Carrier Safety Administration.[4] It goes without saying that none of us could begin to understand the full significance of the "tribunal", such as whether one or more of the proposed Rules would conflict with the requirements or practices of those administrative agencies or with the statutory schemes that created them. The problem is multiplied many times over by adding California state and local administrative agencies and agencies outside California with which California lawyers deal. Because we do not know, and the Commission made no attempt to consider, these application issues, I believe that the expanded definition of "tribunal" is an aspirational statement that is inappropriate in California, with its robust and professional disciplinary system. It also is inappropriate because our Rules of Professional Conduct routinely are used in civil litigation as standard of conduct, and the expanded definition therefore poses an indefinitely broad threat to California lawyers. We would be flying blind In attempting to tell lawyers, and what no doubt are thousands of administrative agencies, how to deal with one another. As an example, proposed Rule 3.4(d) prohibits payment to a witness dependent on the outcome of the testimony, but is this improper with experts testifying on regulatory matters? Proposed Rule 3.5 provides another example. This proposal, titled "Contact With Judges, Officials, Employees, and Jurors", for the most part applies to courts and their equivalents as shown by the paragraph (b) prohibitions regarding communications with a "judge or judicial officer". However, its paragraph (a) prohibits gifts to any "employee of a tribunal". This likely would conflict with administrative regulations governing dealings between its employees and ….

Second, there are Rules that are perfectly understandable if applied to courts or their equivalent, but whose application makes little sense if applied to administrative agencies. One example is in Rule 3.3. It is based largely on current rule 5-200 ("Trial Conduct") – a rule that, based on its title and content, is perfectly well understood as

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[2] https://www.federalregister.gov/agencies

[3] It is an agency of the U.S. Department of the Treasury and, among other things, rules on applications for one bank to buy another. See: http://www2.occ.gov/topics/licensing/corporate-activities-weekly-bulletin/public-comments-on-applications.html

[4] The FMCS web site describes it as responsible for development and enforcing regulations for motor carriers (truck and bus companies). See https://www.fmcsa.dot.gov/mission/we-are-fmcsa-brochure

applying to a lawyer's dealings with courts.[5] That clarity would be lost with the proposed expanded definition. For example, proposed Rule 3.3(d) states in full:

> (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, 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 to the position of the client.

Many license and other regulatory applications typically are heard *ex parte*. At the federal level this might include applications to the SEC to issue securities permits, liquor license applications at the state level, and building permit, rezoning, and zoning variance applications locally. Proposed paragraph 3.3(d) easily can be read as imposing an affirmative burden on a lawyer who represents an applicant in any of those situations to file trial- like declarations of the sort an imagined opponent would file arguing facts that might give pause to the administrative agency. If this were required, the predictable result is that applicants would not hire lawyers to advance their regulatory interests in any *ex parte* application, and the applicants either would go it alone or use lawyers *sub rosa.* An applicant who nevertheless uses a lawyer to advocate on its behalf would be faced with pointless delay and substantial additional expense.

Third, there are Rules that contain "tribunal" only in a portion of the Rule, but the presence of that term with its expanded application to administrative agencies would permit the argument that other portions of the Rule apply in administrative proceedings. Rule 3.4 is an example. The defined term is used in its proposed paragraphs (e) and (f). Does that mean that proposed paragraph (a) (saying that a lawyer may not "unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.") should be understood as applying to administrative agencies? Perhaps, and if so, what is "evidence" in the workings of different administrative agencies (he term has a technical and well-understood meaning only in court proceedings), and by what measure could obstruction be "unlawful"? Similarly, does the reference to trials in proposed paragraph (g) (saying that a lawyer shall not "(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.") apply in an administrative proceedings? We no longer can be certain that a "trial" is something that happens in a court room or its equivalent. Would labeling them as "trials" in this context lead to argument that other trial requirements would apply?

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[5] The fact that it is understood as applying to courts perhaps is shown most simply by the fact that it is discussed in California Practice Guide: Professional Responsibility (The Rutter Group), at Ch. 8-C, which is titled: "Restrictions on Advocacy in Court Proceedings".

Fourth, some administrative agencies are involved in matters that involve intense policy differences and personal and political passions. At the local level there are land-use issues that pit adverse developers against one another or pro- and anti-development forces (develop or preserve?). The latter point is echoed at the state level with the work of California's Coastal Commission. One of many possible federal examples is the Bureau of Land Management, whose web site states: "The BLM has responsibility for coal leasing on approximately 570 million acres where the coal mineral estate is owned by the Federal Government. Surface ownership of these lands belongs to either the BLM, the United States Forest Service, private land owners, state land owners, or other Federal agencies."[6] Lawyers are understood, correctly in my view, as having a special role in the functioning of courts, and that special role is the basis for current rule 5-200. Courts to a substantial degree must rely on the information provided to them by the lawyers appearing in the court; a court (unlike administrative agencies) has no independent investigatory arm and, except through the work of the appearing lawyers, has no way of learning the relevant facts. This significant degree of reliance explains each of the five subparagraphs of current rule 5-200.

The proposed expanded definition would limit the ability of lawyers to engage in the sort of robust advocacy now common in administrative proceedings and, perhaps even more important, will make lawyers the target of their client's adversaries. Lawyers who advocate for a client in an administrative hearing regarding, say, the grant or denial of a coal lease, a permit for off-shore drilling, the licensing of a nuclear power plant or the grant or denial of a building permit within the coastal zone regulated by the Coastal Commission, will be accused by the client's opponents of having violated proposed Rule 3.3(a) by (shall not "knowingly make a false statement of fact or law to a tribunal"). It is one thing for a lawyer's statement of facts to be challenged, as now happens. It would be quite a different thing for the lawyer to be accused of professional misconduct – a charge that, even if we think it baseless, would wrongly injure the client's interests by injuring the lawyer's reputation and ability to advocate for the client.[7] The disciplinary argument would be fodder for an argument about the credibility of the lawyer/advocate that would carry weight in some jurisdictions. It also is predicable that this will lead disciplinary complaints for tactical reasons and to additional burden on the disciplinary system.[8]

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[6] Coal leases are only one example but, as a reminder of the passions involved, I have been told that the EPA has been directed to remove from its web site all information on climate change.

[7] One commenter predicted the following: "Dear Sierra Club counsel, you have made a false statement or fact or law to the public agency (tribunal). You are required to take the following remedial measure (which is to inform the tribunal that what the developer told the tribunal is the correct information). If you do not do so, I will report you to the State Bar." In place of the Sierra Club, one could substitute in this example any for or against an administrative application of most any kind.

[8] Although not mentioned in the proposed Rules 3.3 or 3.4, there of course is a First Amendment aspect to governmental petitioning. Even assuming that eventually would prevent the imposition of professional discipline, it would do nothing to save the lawyer and client from

For reason suggested by these abbreviated comments, I respectfully dissent from proposed Rule 1.0.1(m).

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.0.1(m)

The dissent objects to the inclusion of "an administrative body acting in an adjudicative capacity" in the definition of "tribunal" contained in proposed rule 1.01(m). According to the dissent, this inclusion creates "aspirational" rules that violate the Commission's Charter, represents a "radical" change in the law, and intrudes "on the rule-making authority and the customs and practices of administrative agencies." But as a threshold matter, the dissent overlooks the fact that ABA Model Rule 1.0(m) contains an even broader definition of tribunal:

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

Thus, the ABA Model Rule definition of tribunal encompasses not only an administrative body acting in an adjudicative capacity, it also encompasses "[a] legislative body" or any "other body acting in an adjudicative capacity."

Forty-four jurisdictions, including the District of Columbia, have either adopted verbatim the ABA Model Rule definition of tribunal or a modified version of that definition that includes both an administrative and a legislative body acting in an adjudicative capacity.[9] Thus, in adopting the definition of tribunal proposed by the Commission, California would *not* be "flying blind" as asserted by the dissent. In fact, the experience of these 44 jurisdictions is instructive here. The Commission is aware of nothing – and the dissent has cited nothing – to suggest that any of these jurisdictions has

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reputational damage or the client from the risk of diluted advocacy due to the lawyer's instinct for self-preservation.

[9] The following jurisdictions have adopted a definition of tribunal that includes both an administrative body and a legislative body acting in an adjudicative capacity: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The remaining six jurisdictions (Alabama, Alaska, Florida, Michigan, Minnesota, and Virginia) have not adopted a definition of tribunal.

experienced the parade of horribles identified by the dissent, much less any difficulty in applying their rules of professional conduct to lawyers when they appear before administrative bodies acting in an adjudicative capacity. This alone refutes the arguments made by the dissent.

In any event, there are compelling reasons why the Commission has recommended joining the 44 other jurisdictions that expressly apply their rules of professional conduct to lawyers when they appear before administrative bodies acting in an adjudicative capacity. Contrary to the dissent's assertion, these bodies do depend in whole or in part on the lawyers appearing before them and the parties they represent to provide relevant facts. Further, lawyers appearing before these bodies in a representational capacity are acting in their professional capacity as lawyers. More fundamentally, most people, including the adjudicators, the parties, and the general public, presume that any lawyer appearing in an adjudicatory proceeding conducted by an administrative body is acting in his/her legal capacity and is therefore adhering to his/her ethical obligations. As such, the large number of federal, state, and local agencies identified by the dissent actually supports the Commission's recommendation to include those agencies in the definition of tribunal. Excepting lawyers from their ethical obligations in the many adjudicatory proceedings conducted by these agencies even though those lawyers are acting in their legal capacity simply makes no sense.

Allowing this exception would also make no sense because the term tribunal already includes administrative law judges (ALJs) and arbitrators. The dissent does not dispute that the proposed Rules should apply to lawyers appearing before an ALJ. Yet, the dissent apparently objects to the application of those same rules to lawyers appearing before the administrative body that reviews that ALJ's decision. (See, e.g., *California Teachers Assn. v, Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1068, 1076 ["When a party files a statement of exceptions to an ALJ's proposed decision, the [Public Employment Relations] Board review the record *de novo*, and is empowered to reweigh the evidence an draw its own factual conclusions"]; *Governing Bd. of the Alum Rock Union Elem. School Dist. v. Superior Court* (1985) 167 Cal,.App.3d 1158, 1162 [ALJ decision rejected by governing board of school district].) Requiring lawyers to adhere to their ethical obligations when appearing before an ALJ while relieving them of those same obligations when they appear before an administrative body that is reviewing the ALJ's decision defies common sense.

The same is true with respect to arbitrations. As a general rule, arbitral decisions are subject to far less judicial review than adjudicatory decisions by an administrative body. (Compare *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 11 ["it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law] with *Strumsky v. San Diego Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45 ["if the order or decision of the agency substantially affects a fundamental vested, right, the court . . . must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record"].) Moreover,

arbitrators may not be "strictly bound by evidence, law, or judicial oversight." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 832.) As a result, arbitral decisions in California do not have nonmutual collateral estoppel effect. (*Ibid.*) By contrast, adjudications by administrative bodies are accorded due process protections (*Horn v. County of Ventura* (1979) 24 Cal.3d 609, 612), and may have nonmutual collateral estoppel effect (*People v. Sims* (1982) 32 Cal.3d 468, 483; *B&B Hardware, Inc. v. Hargis Indus. Inc.* (2015) 135 S.Ct. 1293, 1303 ["[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose" (internal quotations omitted)].) To require lawyers to adhere to their ethical obligations in an arbitration but not in an adjudicatory proceeding before an administrative body – even though the arbitration is far less formal, provides far less due process protections, and has far less impact than the administrative adjudication – further defies common sense.

The speculative concerns identified by the dissent, even if they were not belied by the actual experience of the 44 jurisdictions that have adopted a broader definition of tribunal, do not support a contrary conclusion.

First, the dissent suggests that the application of the proposed rules to adjudicatory proceedings before administrative bodies may "conflict with the requirements or practices of those" bodies "or with the statutory schemes that created them." But the two examples cited by the dissent demonstrate otherwise. Proposed rules 3.5(a) and (b) both make clear that they do not prohibit any conduct that is permitted by the rules or regulations of an administrative agency. Moreover, the prohibition of gifts to "employees of a tribunal" merely mirrors existing restrictions imposed on those employees by the Political Reform Act and other ethics statutes and regulations. Likewise, it is hard to see how the prohibition against compensating witnesses on a contingency fee basis will create great confusion or unduly penalize lawyers appearing before an administrative body, even if the body allows for such arrangements.

Second, the dissent's concern about the applicability of some of the proposed rules that use the term tribunal to administrative agencies does not appear problematic upon closer scrutiny. The dissent cites proposed rule 3.3 as a potential source of confusion. But that rule largely prohibits lawyers from deceiving a tribunal – a principle that should be readily applicable in adjudicatory proceedings before an administrative body. Similarly, the dissent's concerns about proposed rule 3.3(d) appear to be overblown. First, that rule only applies to proceedings – and not to every ex parte communication with the administrative body. Second, lawyers can comply with their ethical obligation under proposed rule 3.3(d) by providing notice of the ex parte proceeding to any known opposing party. Upon doing so, the lawyer need not inform the body of any "material facts," much less file "trial-like declarations." Thus, any resulting expense or delay would likely be minimal at best.

Third, the dissent's concerns about confusion over the applicability of rules that do not contain the term tribunal also appear overblown. As to proposed rule 3.4(a), there is unlikely to be confusion over what constitutes "evidence" in an adjudicatory proceeding

before an administrative agency because that agency's decision is likely subject to judicial review. Thus, there will be statutes, rules, or case law, similar to the statutes, rules or case law that governs court proceedings, that identify what "evidence" the agency may consider in rendering its adjudicatory decision. Likewise, identifying the equivalent of a "trial" for purposes of proposed rule 3.4(g) should pose little difficulty. Indeed, the ABA Model Rule provides guidance: an administrative body "acts in an adjudicative capacity when a neutral official, *after the presentation of evidence or legal argument by a party or parties*, will render a binding legal judgment directly affecting a party's interests in a particular matter." (Emphasis added.)

Finally, the dissent's concerns about the impact of the proposed rules on matters before administrative agencies "that involve intense policy differences and personal and political passions" are equally applicable to many court proceedings. One can hardly deny that recent court litigation over the constitutionality of same-sex marriage or President Trump's travel ban involves intense personal and political differences and passions. The application of the proposed rules did not limit the ability of lawyers to engage in robust advocacy in those court cases. And it should not do so in adjudicatory proceedings before an administrative agency.

The inclusion of administrative bodies acting in an adjudicative capacity in the definition of tribunal is not aspirational or radical; it's already been done with no apparent ill effects in 44 jurisdictions. More importantly, the inclusion fulfills the Commission's Charter by promoting "confidence in the legal profession and the administration of justice," ensuring "adequate protection to the public," and promoting "a national standard with respect to professional responsibility issues."

Proposed Rule 1.0.1 [1-100(B)] Terminology
Synopsis of Public Comments

TOTAL = 10 *A = 1* *D = 2* *M = 5* *NI = 2*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
2016-32a	Law Professors (Zitrin) (07-25-16)	Y	M	(m)	The expanded definition of "tribunal," although not quite as broad as the ABA definition that we suggested in the first ethics professors' letter, is a marked improvement over the first rules commission's draft.	No response required.
X-2016-43c	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A		COPRAC supports the adoption of proposed rule 1.0.1.	No response required.
2016-52a	Law Professors (Zitrin) (08-24-16)	Y	M	(m)	The expanded definition of "tribunal," although not quite as broad as the ABA definition that we suggested in the first ethics professors' letter, is a marked improvement over the first rules commission's draft.	No response required.
7/26/16 Public Hearing Testimony	Miller, Jerry (Provided oral public hearing testimony on July 26, 2016. See pages 56-57 of the public hearing transcript.)	N			In reviewing the proposed new and amended rules, I notice that, unlike the existing rules, you have chosen not to give a definition to the word "member," which is presently found in Rule 1-100(B)(2). 1-100(B)(3) contains a definition for the word "lawyer," but no definition for that word is included in the proposed rules either. I am seeing omissions of what I consider to be important definitions. I don't know the reason why they were dropped	The definition of "member" is no longer necessary because the proposed Rules have largely substituted "lawyer" for the term "member throughout, with the exception of rule 5.3.1 – which defines "member" for purposes of that rule. The former definition of "lawyer" was necessary to distinguish lawyer from member. This is no longer necessary, and the definition of lawyer is self-evident.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					from the proposed rules.	
2016-68a	Law Professors (Zitrin) (09-21-16)	Y	M	(m)	The expanded definition of "tribunal," although not quite as broad as the ABA definition that we suggested in the first ethics professors' letter, is a marked improvement over the first rules commission's draft.	No response required.
X-2016-83d	Garrett, Christopher (09-26-16)	N	D		1. The proposed amendments to Rules 1.0.1 and 3.3 through 3.5 transform routine proceedings, hearings, and other meetings before municipal and other local governments into trial-like environments and therefore unnecessarily place licensed attorneys at risk for discipline even when exercising their free speech and petition rights before a public entity.	1. The Commission disagrees that the rule unnecessarily complicates routine proceedings. The Commission found no reasoned basis for distinguishing an administrative body acting in an adjudicative capacity from an arbitrator or an ALJ. Like arbitrators and ALJs, administrative bodies acting in an adjudicative capacity apply specific rules, i.e., statutes, ordinances, and regulations, to specific facts. Adjudicative proceedings before administrative judges receive far greater protections, including greater judicial review by courts, than arbitration proceedings. Lawyers should be held to the same ethical standards when they appear before an administrative body acting in an adjudicative capacity

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						because that body, like an arbitrator or ALJ, will presume that the lawyer is providing legal opinions and therefore adhering to his or her ethical obligations as a lawyer.
					2. Proposed rule 1.0.1 adds a number of new definitions to what is currently Rule 1-100(B). In particular, the new subdivision (m) defines "Tribunal" as either a "court, an arbitrator, an administrative law judge," but also includes "an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved." The latter portion of the definition of tribunal arguably applies to hearings, petitions, and meetings with local governments, such as cities and counties. In combination with proposed Rules 3.3 through 3.5, which set forth trial-like rules for conduct before truly trial-type proceedings, the proposed Rules 1.0.1, 3.3, 3.4, and 3.5 are exceedingly overbroad and threaten the practicing lawyer's ability to effectively advocate for his or her clients. Public agencies in California often act in both a quasi-legislative and a quasi-	2. The Commission did not remove an "administrative body" from the definition of "tribunal" in part because the definition contemplates action in an adjudicative capacity. California courts have determined what substantive and procedural limitations must be placed on adjudicatory decisions made by an administrative body. (See, for example, Strumsky v. San Diego Employees Retirement Assn. (1974) 11 Cal.3d 28, at p. 34, footnote 2.) In general, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts. To the extent there are some ambiguities, those ambiguities can be resolved in the ordinary course of litigation. The ABA definition of "tribunal" uses the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					adjudicative capacity, and thus, the proposed rules seem likely to indirectly deprive both individuals and lawyer representatives of free speech and petition rights protected by the California Constitution. 3. The proposed rules seem likely to facilitate strategic claims of ethical violations against lawyer representatives, thereby effectively depriving a party from legal representation in public hearings before cities and counties and favoring speech by non-lawyer representatives or other persons over the speech of a practicing lawyer. There is no rational basis for this distinction.	same distinction – "acting in an adjudicative capacity" – and applies that distinction more broadly to a "legislative body." The Commission does not believe that extension of the definition is warranted. 3. The Commission disagrees with this point in part because the rule imposes the same ethical standards as when a lawyer appears before an arbitrator or ALJ. (See above response to point #1.)
X-2016-97a	Freedman, Daniel (09-27-16)	N	D		Proposed Rule 1.0.1 includes within the definition of "tribunal" administrative bodies acting in an adjudicative capacity. As drafted, this rule is unclear as to its scope and creates significant uncertainty about professional standards required in connection with various administrative hearings, particularly those held on the local level. For instance, not considered in this definition is the reality that in many instances local bodies can act concurrently	See above response to point #2 from commenter Christopher Garrett, X-2016-83d.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					as an adjudicatory and administrative body within the same hearing, which makes it nearly impossible for an attorney to know what professional standards apply and when. In fact, in some instances, the issue of what capacity a local body acts under (i.e., administrative or adjudicative) is actually a triable issue. Accordingly, we believe this modified definition of tribunal is too vague as drafted, overly broad, and should not be adopted as drafted.	
X-2016-104b	Office of Chief Trial Counsel (Dresser) (09-27-16)	Y	M		1. OCTC supports most of this proposed rule, but is concerned with the definition of "knowingly," "known," or "knows" in subsection (f) as meaning actual knowledge of the fact in question. As discussed in the General Section of this letter, the use of actual knowledge in several of the proposed rules is contrary to the State Bar Act and well-established disciplinary law in California; will lower the minimum professional standards required of attorneys in this State; mislead attorneys as to their professional obligations; and create confusion in disciplinary law. Moreover, this definition is	1. The Commission has not made any changes to the proposed definition of "knows." *First*, to the extent that the global definition might be too narrow for a particular rule, the mental state requirement for a violation can expanded for that rule. For example, proposed Rule 8.2 does just that by prohibiting a lawyer from making "a statement of fact that the lawyer knows to be false or *with reckless disregard as to its truth or falsity* . . . ." The Commission therefore continues to believe there is no need to change the global definition of "knows." Indeed, the Commission purposely

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					too narrow and will allow attorneys to use willful blindness or a lack of diligence in searching for facts or law when they have a duty to do so. Allowing knowledge to be proven by circumstantial evidence does not solve this problem. First, in State Bar proceedings, intent and facts are always provable by circumstantial evidence. (*Geffen v. State Bar* (1975) 14 Cal.3d 843, 853; *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.) Second, there is a difference between circumstantial evidence of intent and willful blindness or gross negligence. OCTC recommends that this definition include the following: "knowing" or "knowingly" means the attorney has actual knowledge of a fact *or deliberately closed his or her eyes to facts he or she had a duty to see or recklessly stated as facts things of which he or she was ignorant*. 2. OCTC supports the Comments to this rule.	limited the mental state requirement of many of the rules cited by OCTC to actual knowledge for legal and/or policy reasons. *Second*, OCTC's concerns about willful blindness appears overblown. In fact, the Review Department of the State Bar has recently held that "willful blindness . . . is tantamount to having actual knowledge . . . ." (*In Matter of Carver* (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, *4.) In reaching this conclusion, the Review Department cited a 1901 California Supreme Court decision which recognized that "willing ignorance" may be "regarded as equivalent to actual knowledge." (*Levy v. Levine* (1901) 134 Cal. 664, 671-672.) The Commission believes that the definition covers willful blindness by providing "knowledge can be inferred from circumstances." 2. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-115f	Lamport, Stanley (09-29-16)	N	M		The Proposed Rule definition of "Tribunal" should be revised to clarify that "the term 'Tribunal' relates to administrative agencies that exercise comparable judicial powers to courts and does not include public agencies acting in a legislative or quasi-adjudicatory capacity, such as when making a decision concerning land use." Judicial/Adjudicatory proceedings and quasi-judicial/quasi-adjudicatory proceedings are not the same. The "Tribunal" definition is unclear. Proposed Rule 3.5 is not designed for quasi-adjudicatory proceedings. Extending the tribunal definition to quasi-adjudicatory proceedings exposes lawyers to unique risks that can adversely affect the representation of client. Quasi-adjudicatory proceedings are not subject to the same limitations on client conduct that exist in judicial proceedings.	See above response to point #2 from commenter Christopher Garrett, X-2016-83d. In addition, the California Supreme Court treats adjudicative decisions by local agencies no differently than adjudicative decisions by state agencies that cannot exercise judicial powers under the California Constitution. (See *Strumsk*y, 11 Cal.3d at p. 44 ["the rule of review which was affirmed by us in *Bixby v. Pierno, supra*, for application to adjudicatory decisions by legislatively created agencies of statewide jurisdiction is equally applicable to adjudicatory decisions by 'local agencies' as well"].) Moreover, the Court has expressly recognized that both state and local agencies exercise "judicial-like" powers even though they may not exercise "true" judicial powers as defined by the California Constitution. (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372.)[2] The inability of local

[2] See also

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					I request "tribunal" be revised as follows (blue=additions; red=strike out): "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body exercising judicial powers conferred on the body by the California Constitution or by the Legislature ~~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. The term "Tribunal" does not include a public agency acting in a legislative or quasi-adjudicatory or quasi-judicial capacity, such as when making a decision concerning land use.	agencies to exercise judicial power under the California Constitution provides no basis for treating a local administrative body that is acting in an adjudicative capacity any differently than an arbitrator or ALJ, much less a state agency that acts in an adjudicative capacity without exercising judicial powers under the California Constitution. The Commission also notes that the commenter's proposal is not consistent with his argument. The proposal would continue to include "an administrative body exercising *judicial powers* conferred on the body . . . *by the Legislature* . . . ." But the Legislature cannot confer "judicial powers" as defined by the California Constitution. (See *Strumsky*, *supra*, 11 Cal.3d at p. 41.) By including state administrative bodies that exercise "judicial-like" powers in the definition of tribunal, the commenter undercuts his own argument for excluding local agencies that exercise the same "judicial-like" powers.

TOTAL = 10 *A = 1* *D = 2* *M = 5* *NI = 2*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-126a	Ivester, David (09-27-16)	N	D		Proposed Rule 1.0.1 would define "Tribunal" to include not only a "court, an arbitrator, [and] an administrative law judge," but also "an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved." This definition could be read to encompass many individuals in a position to make any of various decisions for federal, state, or local agencies: a District Engineer of the U.S. Army Corps of Engineers, a city planning administrator, the executive officer of a regional water quality control board, the general manager of a water agency or special district, the Executive Director of the Coastal Commission, the Environmental Program Manager of the Department of Fish and Wildlife (who may sign streambed alteration agreements), a city building inspector, and the list goes on. This broad definition would in effect extend the application of other rules such as Proposed Rules 3.3, 3.4 and 3.5, which are designed for judicial	See above response to point #2 from commenter Christopher Garrett, X-2016-83d.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					proceedings, to all manner of communications and interactions with employees of administrative agencies. While such rules make sense for proceedings of courts, arbitrators, and administrative law judges since all three exclusively exercise the same type of judicial function, they are not designed for and do not make sense for the widely varied proceedings of federal, state, and local agencies that do not exclusively perform judicial functions.	
X-2016-129a	California Building Industry Association (Cammarota) (09-27-16)	Y	M		We draw your attention to the definition of "Tribunal" contained in Proposed Rule 1.01. The definition should make clear that "Tribunal" does not include public agencies acting in a legislative or quasi-adjudicatory capacity. When public agencies act on land use proposals they typically act in a quasi-adjudicator (or quasi-judicial) capacity. It may be appropriate to apply the Proposed Rules 3.3, 3.4, and 3.5 – which apply the definition of "Tribunal" – to courts, administrative law judges, arbitrators or even to a public agency that exclusively performs judicial functions. However, there are significant differences	See above response to commenter Stanley Lamport X-2016-115f.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					between judicial proceedings and quasi-judicial proceedings that militate extending those restrictions. First, the California Constitution authorizes some agencies to exercise judicial powers (see, e.g., Art. 12, section 6), however it does not authorize local agencies – those involved in land use decision making such as cities, counties, cities and counties, regional agencies, public agencies and other political subdivisions – to exercise judicial powers. Local agencies instead exercise *quasi*-judicial powers in making land use decisions. Second, quasi-judicial proceedings are reviewed under Code of Civil Procedure section 1094.5. The standard of review is whether the findings support the decision and whether there is any substantial evidence in the record to support the findings. This is not a preponderance of the evidence standard. Rather, the decision will be upheld if any credible evidence supports the findings even if the preponderance of the evidence is to the contrary. See e.g., 14 California Code of	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Regulations, section 15384. Third, local elected officials – those who make land use approvals – are not expected to conduct themselves in the way judges do. "A councilman has not only a right but an obligation to discuss issues of vital concern to his constituents…. He may not be instructed on many of the technical matters to which he is called to pass judgment. He…talks with businessmen and voters about all sorts of questions that may come before the council." *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780-781.) Accordingly, it is for good reason that there is not the same strict prohibitions on ex parte communications for local decision makers as there is with judges. If Proposed Rule 3.5(b) is construed to prohibit ex parte communications in "quasi-judicial proceedings," clients and other non-lawyers could engage in legal ex parte communications but lawyers who are hired specifically to communicate with government on their behalf, could not. This will have a chilling effect on the ability of builders and	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					developers to retain counsel to represent them in the land use context. Disparate treatment against attorneys also runs counter to California's Constitution. We believe that the public has a right to communicate with government in the context of land use proceedings. "The people have the right to instruct their representatives [and] petition government for redress of grievances." (California Constitution Art. I, Section 3). This necessarily includes their legal representatives. In the judicial context, both lawyers and clients are subject to the same rules. That is not the case for all participants in the local land use decision making context. This chills the use of attorneys in communicating with local agencies to the extent that the term "tribunal" is also used in Proposed Rules 3.3 and 3.4. To rectify this disparate treatment, we recommend that the definition of "tribunal" in Proposed Rule 1.01 be modified as shown in the included redline.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.1
(Current Rule 3-110)
Competence

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-110 (Failing to Act Competently) in accordance with the Commission Charter, including consideration of the national standard of the ABA counterpart, Model Rule 1.1 (Competence). The result of the Commission's evaluation is proposed rule 1.1 (Competence).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting proposed Rule 1.1 was whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence in order to substitute a standard like Model Rule 1.1 which states affirmatively that a lawyer must provide competent representation to a client. The Commission is recommending that the current California standard be retained as this is consistent with applicable Supreme Court precedent that has been repeatedly applied in State Bar Court disciplinary proceedings.

In *Lewis v. State Bar* (1981) 28 Cal.3d 683, the Supreme Court reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence." In *In Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149, the State Bar Review Department emphasized: "We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation." It is important to note that under California's approach a lawyer's single act of gross negligence is not given a free pass. The Commission is recommending that paragraph (a) of the proposed rule be amended to include an explicit reference to gross negligence. In addition, gross negligence might also be regarded as an act constituting moral turpitude (See Business and Professions Code § 6106 and proposed rule 8.4).

Although the essential prohibition of the current rule is retained, proposed rule 1.1 includes three substantive changes. First, the concept of "diligence" as a component in the definition of competence has been deleted. The Commission is recommending a separate rule on a lawyer's duty of diligence consistent with the approach used in most jurisdictions (see the executive summary of proposed rule 1.3 (Diligence)). A new comment in proposed rule 1.1, Comment [2], would cross reference rule 1.3.

Second, in paragraph (c), in situations where a lawyer lacks sufficient learning and skill to handle a client's case or matter, the Commission is recommending the addition of an option for the lawyer to refer a matter to another attorney whom the lawyer reasonably believes is competent.

Third, the Commission is recommending deletion of the existing Discussion paragraph that provides case citations addressing a lawyer's supervision obligations. Rather than relying on case citations, the Commission is recommending three new separate rules on supervision (see the executive summaries of proposed rules 5.1 (Responsibilities of Managerial and Supervisory

Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistants). This is consistent with the approach to the duty of supervision in most jurisdictions.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.1 [3-110]

Commission Drafting Team Information

Lead Drafter: Robert Kehr
Co-Drafters: Judge Clopton, Joan Croker, Howard Kornberg, Toby Rothschild

I. CURRENT CALIFORNIA RULE

Rule 3-110 Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the
1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.1 [3-110]
Vote: 16 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.1 [3-110]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.1 [3-110] Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-110)

Rule 1.1 [3-110] ~~Failing to Act Competently~~Competence

(~~A~~a) A ~~member~~lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(~~B~~b) For purposes of this ~~rule, "~~Rule, "competence~~"~~" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(~~C~~c) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service is~~services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services competently~~may provide competent representation by (1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~believes* to be competent, ~~or~~ (2) ~~by~~ acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency~~, however, assistance should~~ must be limited to that reasonably* necessary in the circumstances.

~~Discussion~~Comment

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

V. RULE HISTORY

Current rule 3-110 originated in 1975 with former rule 6-101, which prohibited a lawyer from "willfully or habitually"[1] performing legal services "if the lawyer knows or reasonably should know" that the lawyer "does not possess the learning and skill ordinarily possessed by lawyers" who perform "similar services" in the "same or similar locality." (rule 6-101(1)).

[1] The "habitual" standard was derived from California case law which, at the time former rule 6-101 was adopted, was the primary California authority providing for discipline of incompetent members of the State Bar. See *Ridley v. State Bar* (1972) 6 Cal.3d 551, 560 [99 Cal.Rptr. 873]; *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [87 Cal.Rptr. 368]; *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-84 [58 Cal.Rptr. 564].

In a separate paragraph (2), former rule 6-101 also prohibited a lawyer from failing to "use reasonable diligence and his best judgment" in exercising his skill and learning "to accomplish, with reasonable speed, the purpose for which he was employed."

Rule 6-101 was amended in 1983 to state that a lawyer "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." The operative term "willfully" was replaced by "intentionally or with reckless disregard" to address concern that "willfully" is confused with the concept of a "willful breach" of the Rules under Business and Professions Code § 6077. The substitution avoided that confusion but preserved the meaning of the original language. (See Bates stamp page 00008 of "Memorandum In Support Of Request That Proposed Amendments To Rule 6-101, Rules Of Professional Conduct Of The State Bar Of California Be Approved By The Supreme Court Of California And Supporting Documents," August 11, 1983 ("1983 Memorandum").)

Another amendment in 1983 substituted "repeatedly" for "habitually." The word "repeatedly" was regarded as a more accurate description of the intended disciplinary standard.

The 1983 amendments also added a definition of competence. Rule 6-101(A)(1) provided that: "Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation." The language of the definition was intended to accomplish two objectives: (1) incorporate the concept of "diligence" into the definition; and (2) emphasize that competence means the lawyer's application and performance of skill and knowledge, and does not merely reflect that the lawyer possesses those qualities. On the latter point, the 1983 Memorandum states:

> "The rule's definition of competence focuses upon whether or not the lawyer has performed legal services on behalf of the client competently rather than upon innate or inherent abilities, skills or qualities. The rule provides for an examination of an attorney's conduct and actions, rather than an attorney's intent, in the performance of legal services." (See page 4 of the 1983 Memorandum.)

In 1989, former rule 6-101 was renumbered 3-110 as part of a comprehensive revision and renumbering of the entire rules. Rule 3-110 did not entail any major substantive revisions. (See page 31 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

Rule 3-110 was last amended in 1992. (See page 13 of Supreme Court File No. 24408, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991.) No substantive changes were made to paragraph (A) but the provision was stated more succinctly as: "A member

shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

In paragraph (B), the phrase "to perform legal services competently" in the definition was reduced to a single word, "competence." Also, the term "ability," defined in the 1987 version of rule 3-110(C), was merged into the definition of competence.

Model Rule 1.1: Recent Amendments Concerning Outsourcing Legal Services and Technological Competence

In 2012, as part of the ABA Ethics 20/20 Commission's review of attorney standards to determine whether any revisions were warranted in light of recent technological changes and global legal practice developments, the ABA adopted two new Comments to Model Rule 1.1 (Competence) and amended a third. The two new Comments provide:

> ***Retaining or Contracting With Other Lawyers***
>
> [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.
>
> [7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

The ABA also amended Comment [6] (now renumbered Comment [8]):

> [~~6~~8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports adding gross negligence to this rule because that is consistent with case law.

   Commission Response: No response required.

2. OCTC is concerned with the proposals to separate competence, diligence, and supervision into separate rules. Current rule 3-110 works well, is well understood, and enforceable. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Further, there is well-established case law concerning the current rule.

3. A failure to perform diligently is a failure to perform competently, because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping. Choosing the wrong rule to charge will result in a dismissal even though respondent was on notice as to what the charge was about. For instance, if an attorney does not know or learn the timelines for filing pleadings in a case and, thus, does not perform them in a timely manner, is that a failure to perform diligently or a failure to perform competently?[2] At the very least, it will cause an unnecessary proliferation of the charges filed against attorneys and make enforcement more difficult.

4. Segregating supervision from competence is even more difficult, confusing, and artificial than separating diligence and competence. It will make proper charging of respondents more difficult. Supervision by an attorney is a part of lawyer competence. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3–110(A)), to adequately communicate with his clients (rule 3–500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4–100)]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Bernstein v. State Bar* (1990) 50 Cal.3d 221; *Gadda v. State Bar* (1990) 50 Cal.3d 344,

[2] Former rule 6-101 stated in part: "A member shall not wilfully or habitually … (2) fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed."

353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.)

5. Also, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry, unclear, and overlapping. Choosing the wrong rule to charge will result in a dismissal, even though respondent was on notice as to the basis of the charge. For instance, many attorneys dispute allegations, but never contend that the misconduct occurred because of a lack of supervision until they are testifying at trial, long after the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. (See e.g. *In the Matter of Bolanos*, Case No. 15-O-10896 [dismissing failure to communicate allegation, although conduct could have been classified as a competence issue].)[3]

   Commission Response: The following Commission response applies to OCTC points 2 – 5, above. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).

6. OCTC is concerned about Comments [1] and [2]. Those Comments are not necessary or correct, even if the concepts of competence, diligence, and supervision are separated. The Comments are unnecessary because each rule already explains what it governs. Further, as discussed, supervision of an attorney's employees, office, and case is an essential part of lawyer competence and cannot be separated from competence.

   Commission Response: The Commission believes it is important to retain Comments [1] and [2], which provide cross-references to the supervision rules [5.1 to 5.3] and the diligence rule [1.3], respectively. It is important to provide those references because those concepts had both previously been found within the competence rule.

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

[3] Also, without some indication from the respondent or others that the misconduct was a result of supervision, the State Bar does not have probable cause to allege a failure to supervise.

VII. PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seven public comments were received. Four comments agreed with the proposed Rule, one comment disagreed, two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony did not take a position on the proposed Rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Refer to Rule History section above (Section V, above). For background on the concepts relating to the duty to supervise refer to Reports and Recommendations for proposed Rules 5.1 – 5.3 . For background on the concept of diligence, refer to Report and Recommendation for proposed Rule 1.3.

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.1: Competence," revised May 15, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.pdf

- Thirty-nine jurisdictions have adopted Model Rule 1.1 verbatim.[4] Seven jurisdictions have adopted a slightly modified version of Model Rule 1.1.[5] Five jurisdictions have adopted a version of the rule that is substantially different to Model Rule 1.1.[6]

[4] The thirty-nine jurisdictions are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[5] The seven jurisdictions are: Alaska, District of Columbia, Georgia, Louisiana, Nebraska, New York, and North Carolina.

[6] The five jurisdictions are: California, Michigan, New Hampshire, New Jersey, and Texas.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend changing from passive to active voice the language in current paragraph (C) that a lawyer may consult with "another lawyer reasonably believed to be competent".

   - Pros: The use of the passive voice leaves open the question of from whose perspective the reasonable belief is measured. Changing this to "another lawyer whom the lawyer reasonably believes to be competent" clarifies that the Rule addresses the reasonable belief *of the lawyer making the consultation* and therefore would be measured by the facts and circumstances known to that lawyer. Also, the use of the active voice is preferred under § 2.3 of the Guidelines for Drafting and Editing Court Rules.

   - Cons: None identified.

2. Recommend augmenting the standard of "recklessly" by the addition of "grossly negligent." This addition was suggested by the law professors' March 3, 2004 letter/

   - Pros: This change conforms the disciplinary rule to disciplinary case law. The inclusion of this language should advance Charter principle #4 and facilitate compliance and enforcement of the Rule.

   - Cons: The current standards of intentional, reckless, and repeated are well-established and well-understood in California law and have been the subject of multiple Supreme Court opinions; there is no evidence that they fail to meet disciplinary needs. Moreover, the meaning of "reckless" is conduct so far wide of the mark as to permit the inference that the deficiency was intended, in other words, conduct so extreme as to make it unnecessary for OCTC to produce any direct evidence of an intent to harm the client. See, *e.g.*, *Spindell v. State Bar of California*, 13 Cal. 3d 253, 260 (1975): "However, even if we accept petitioner's contention that he lacked knowledge of Mrs. Amey's attempts to communicate with him and that he did not deliberately intend to ignore her needs, his conduct in the instant case fully supports the Board's finding of a willful dereliction in the discharge of his professional duties to Mrs. Amey. Failure to communicate with, and inattention to the needs of, a client are proper grounds for discipline. (citations omitted) Petitioner's failure to communicate with his client despite her persistent efforts to speak with him and his delay in obtaining a dissolution of marriage demonstrate, in his own words, 'extreme neglect.'" Thus, the standard of recklessness is treated as the same as gross negligence. To the same effect is *Davis v. State Bar*, 33 Cal. 3d 231, 238 (1983): "[Petitioner's] usurpation of his client's decision can only be characterized as willful. If petitioner doubted either his client's credibility or the

legitimacy of her claim, he should have questioned her closely and, if his doubts persisted, withdrawn from employment. (See Rules Prof. Conduct, rule 2-111(C)(1)(a).) Even if ignorant of the applicable professional standards, he is nonetheless culpable of gross negligence in his usurpation of his client's privilege and in his subsequent failure to represent her. We have previously noted that grossly negligent failure to represent a client warrants discipline. (See Doyle v. State Bar (1976) 15 Cal.3d 973, 978 [126 Cal.Rptr. 801, 544 P.2d 937].)"

3. Recommend adoption of versions of Model Rules 5.1 to 5.3 rather than retaining the duty to supervise only as an element of the duty of competence, as set forth in the Discussion to current rule 3-110.

   Summary of Model Rules 5.1 to 5.3. Model Rule 5.1 states, among other things, a lawyer's duty to supervise other lawyers, and Model Rule 5.3 extends this concept to the supervision of non-lawyer personnel. The first paragraph of the *Discussion* to current rule 3-110 cites to a long line of California disciplinary cases that stand for the proposition that a lawyer's duties "include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." The fact that lawyers are subject to discipline and have been disciplined for failing to supervise make it arguable that Model Rules 5.1 and 5.3 are not necessary. However, as discussed more fully in the Reports for those rules, the Commission recommends the adoption of versions of these two Model Rules (and of Model Rule 5.2, which addresses a subordinate lawyer's duties).

   - Pros: There are a number of reasons to support this recommendation: (1) Current rule 3-110 works reasonably well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in larger law firms is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten, twenty or even forty lawyers working on a major project?

     (2) Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty of firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent not just to competent representation but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110.

     (3) The broader application of Model Rules 5.1 and 5.3 to all rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule, but also to supervision and control of

subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.

(4) Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except as to the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would also provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.

(5) Model Rules 5.1 and 5.3 clarify that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. An example would be local counsel who reports to and is directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.

(6) Model Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the firm.

(7) Adopting versions of the Model Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.

- Cons: Model Rule 5.1 has been criticized as being too vague. For example, the first Commission received a public comment letter dated October 19, 2006 from Michael D. Schwartz, Special Assistant District Attorney for the County of Ventura, supporting the adoption of paragraph (c) but objecting to paragraphs (a) and (b) by saying, among other things: "It is not clear to me what actions the managing or supervising attorneys would be required to undertake to ensure that the other attorneys in the firm obey the rules. Enacting an office policy that attorneys must follow the rule would be superfluous since, as licensed professionals, every attorney is already legally obligated to comply with the rules."

  In response to this criticism, the Commission notes:

  (1) Although an individual lawyer might be disciplined or suffer civil consequences after the fact, material client protection would be provided by

having Rules that impose duties on supervising lawyers, leading to greater compliance before the fact.

(2) There are some duties that require firm-wide systems, such as the creation and enforcement of conflict checking policies in order to avoid conflicts of interest.

(3) Although Mr. Schwartz's letter addressed Model Rule 5.1, his comments and the Commission's response apply equally to Model Rule 5.3.

- Recommendation: The Commission's recommendations for Rules 5.1 – 5.3 are contained in a separate Report and Recommendation for each proposed Rule.

4. Recommend that the concept of diligence, now encapsulated in paragraph (B) of current rule 3-110, be moved into a new, standalone rule, numbered 1.3 to correspond to the Model Rule counterpart.

   - Pros: See proposed Rule 1.3, Report & Recommendation.

   - Cons: See proposed Rule 1.3, Report & Recommendation.

5. Recommend the adoption of two Comments, one that cross-references the supervision rules (5.1 to 5.3), (see paragraph 3, above), and the other that cross-references proposed Rule 1.3, (see paragraph 4, above).

   - Pros: Including these cross-references will direct lawyers to the rules that, if adopted, will address the concepts that are recommended for these new, standalone rules.

   - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Revise the Rule to reject the long-standing California standard that subjects a lawyer to professional discipline only for intentional, reckless, or repeated acts of incompetence and instead subject lawyers to discipline for acts of simple negligence as provided in Model Rule 1.1.

   - Pros: The essential argument in favor of adopting the ABA Model Rule approach is that it would create greater national uniformity and widen the scope of discipline for lawyers' professional errors. It would also "promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public," (Charter principle #1), by expressly stating that lawyers "shall provide competent representation to a client."

   - Cons: Examining the difference between the current California disciplinary standard for competence ("intentionally, recklessly, or repeatedly fail to

perform legal services with competence") and the ABA Model Rule standard ("A lawyer shall provide competent representation to a client.") raises fundamental questions about the nature of professional discipline and the manner in which the disciplinary rules should be written.

California's rationale for professional discipline is as follows: "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *In re Kreamer*, 14 Cal. 3d 524 (1975). For additional discussion of the purpose of professional discipline, see Robert L. Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, Or Disciplinable Offense?*, 29 W. St. U. L. Rev. 235, 257-64 (2002). This applies in the context of competence.

A lawyer's single act of simple negligence should not be the basis for discipline because it does not imply that the lawyer is unfit to practice law or that permitting the lawyer to practice would present a danger to the public. However, a lawyer's repeated, reckless, or intentional lack of competence in providing legal services does rise to that level. A lawyer's garden variety error therefore should continue to be limited to its civil consequences and should be remedied only through the civil courts. The disciplinary system should not be burdened by claims against lawyers based on an isolated act of simple negligence and lawyers should not be threatened by such claims. See *In the Matter of Torres*, 4 Cal. State Bar Ct. Rptr. 138, 149 (Rev. Dept. 2000) where the State Bar Court states: "We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation." See also *In the Matter of Riley*, 3 Cal. State Bar Ct. Rptr.91, 113 (Rev. Dept. 1994) and cases cited therein. Civil proceedings claiming common negligence should not be skewed by an allegation that the lawyer has violated a fiduciary standard or is a danger to the public, but the proposed Rule properly would be informative in civil proceedings in which it is claimed that a lawyer's conduct rose above common negligence and violated fiduciary standards. The Model Rule standard is a prime example of an aspirational expression that should not be confused with a disciplinary standard.

In fact, the ABA aspirational standard has led some jurisdictions to discipline for what appears to be simple negligence, and in other situations to use Model Rule 1.1 in circumstances that suggest greater culpability. Stating a disciplinary rule in terms of best practices will result in unpredictable consequences and a lack of effective notice to lawyers and to disciplinary authorities. See 29 W. St. U. L. Rev. 235, at 262 n. 134-137.

There is an additional problem with Model Rule 1.1 in that its second sentence is written so as to focus on a lawyer's possession of the components of competence rather than requiring the lawyer to use and apply legal knowledge, skill, and thoroughness in the performance of legal

services. The wording of that sentence leaves open the possibility that Model Rule 1.1 makes it possible for a lawyer to be disciplined (or threatened with professional discipline) simply for not having demonstrated the appropriate level of legal knowledge, skill, or preparation even though there was no malpractice and no client harm (compare this current rule 3-110(B), which more clearly is definitional of competence and not itself the basis for professional discipline). The Model Rule wording creates a potential trap for a lawyer who performed competently, but provides no additional protection to the public. The ABA language is informative in telling lawyers they should develop knowledge and skill and be prepared, but the ABA Rule is not connected to the outcome of the lawyer's work. Compare this to the current and proposed California rules, both of which say that a lawyer "shall … apply …" diligence, learning, etc.

Retaining California's current standard would be consistent with the Commissions' charter in avoiding aspirational standards, would avoid changes to California rules that now work well, and would avoid an indefinite standard that would lead to unpredictable disciplinary and civil consequences.

2. In public comment dated May 4, 2015, Lisa Wilbur suggested specifically addressing the cognitive impairment of aging lawyers.

   - Pros: None identified.

   - Cons: The Commission recognizes that impairment due to aging is an important topic, but is unable to identify any way in which impairment due to age differs from impairment having any other cause. The Commission also cannot see how to address any specific sort of competence in a disciplinary rule. In addition, the Commission does not see any way to write a disciplinary standard that would provide meaningful protection against any particular cause of deficient performance, whether the cause is age, substance abuse, or anything else.

3. Recommend augmenting paragraph (c) by adding "*4) thoroughness, and 5) preparation reasonably necessary for the representation"* as OCTC recommended in a letter dated September 27, 2001.

   - Pros: Including this language is a fuller statement of what a lawyer should do in representing a client.

   - Cons: From the standpoint of providing information to lawyer, as would be done in a practice guide, it would be correct to say that thoroughness and preparation are important. However, we conclude that thoroughness and preparation already are covered sufficiently by proposed paragraph (b), which speak of the application of diligence, learning and skill, so that adding this additional language would make the Rule wordier but not more accurate.

In any event, the Commission has recommended the adoption of proposed Rule 1.3 (Diligence).

4. Recommend adoption of the Comments to Model Rule 1.1.

   - Pros: None identified.

   - Cons: The Comments to Model Rule 1.1 for the most part either are incorrect in that they conflict with the long-standing California approach to competence in a disciplinary rule, (see paragraph B.1, above), conversational, expressions of good practices, or not necessary because included as part of the recommended Rule.

5. Recommend that proposed Rule 1.1 address a lawyer's responsibilities concerning the use of technology.[7]

   - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA revised Comment [8] to Model Rule 1.1 to state that maintaining competence includes knowledge of the "benefits and risks associated with relevant technology." Public protection might be enhanced by lawyers avoiding violations that are caused by inadequate knowledge of technology.

   - Cons: Any obligation a lawyer might have to understand the technology used in or available for use in the practice of law does not differ in kind from anything else a lawyer needs to utilize in providing legal services and would be the equivalent in an earlier generation of singling out Corpus Juris Secundum. In addition, advisory ethics opinions in California address this topic and provide adequate guidance. See, for example, Cal. State Bar Formal Op. No. 2010-179 (discussing confidentiality and competence issues when using "cloud" systems for client information) and Cal. State Bar Formal Op. No. 2012-184 (discussing virtual law offices). Special reference to technology in the Rule would not change its meaning; special reference in a Comment, as does the ABA, does not explain the Rule.

6. Recommend that proposed Rule 1.1 address outsourcing or offshoring of legal services.[8]

   - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA added new Comments [6] and [7] that address a lawyer retaining or contracting with "other lawyers outside the lawyer's own firm." In part, this

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[7] Model Rule, Comment [8] states: " To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

[8] Model Rule Comment [6] discusses at some length the situation in which a lawyer retains or contracts with other lawyers.

guidance alerts lawyers to the fact that the "ethical environments" of the jurisdictions in which other lawyers work is an important consideration in ethical outsourcing. Including a similar advisement might lead to better decision making by lawyers who outsource legal services.

- Cons: The Commission concluded that there was nothing in this topic that would make the proposed Rule more complete. As a Comment, the topic would not explain the Rule but instead would provide practice guidance on the possible risks of using outside lawyers.

7. Recommend that proposed Rule 1.1 include a Comment explaining proposed paragraph (c).

   - Pros: There are circumstances in which it is not practical for a lawyer to consult with others or otherwise obtain sufficient knowledge to handle novel matter. As an extreme example, a lawyer's first criminal case should not be the prosecution or defense when the potential outcome is the death penalty.

   - Cons: Paragraph (c) confirms that a lawyer's competence is not measured by what the lawyer knew previously but only by the quality of the lawyer's work for a client. The Commission concluded that no Comment is needed to clarify that consultation with others, or the other steps described in paragraph (c), would be adequate for a lawyer to provide competent legal services.

8. Recommend adoption of a Comment that explains what is meant by "repeatedly".

   - Pros: None identified

   - Cons: The question of when a lawyer's errors are sufficiently numerous to rise to a disciplinary level is entirely contextual. The Commission concluded that a Comment would not be helpful or reliable in capturing those various contexts.

9. Recommend a definition of "competence" in Proposed Rule 1.1(b) that would recognize that differences in legal resources, skills, and expectations may exist between different communities? This was a comment made to the first Commission by State Bar's Law Practice Management & Technology Section. The Commission disagreed with this novel suggestion and recommends against it. The Commission is unaware of any evidence that resources vary by locale, and in fact in the age of the Internet, the opposite would appear to be true. In summary, there should not be different and indefinite standards of competence for disciplinary purposes.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Proposed Rule 1.1 would not substantively change current rule 3-110. Proposed Rule 5.1 and 5.3 do not substantively change a lawyer's obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers. (See Reports and Recommendations for proposed Rules 5.1 and 5.3).

D. Non-Substantive Changes to the Current Rule:

1. Proposed Rule 5.2 does not alter the fact that each lawyer is responsible for acting ethically but defines the balance between those responsibilities and a subordinate lawyer's organizational obligation to follow directions. Also, adding a Rule that expresses the subordinate lawyer's obligations should make it easier for a subordinate lawyer to influence the decisions of his or her supervisors. (See Report and Recommendation for proposed Rule 5.2).

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.1 [3-110] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.1 [3-110] in the form attached to this Report and Recommendation.

Proposed Rule 1.1 [3-110] Competence
Synopsis of Public Comments

TOTAL = 7 *A = 4* *D = 1* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32b	Law Professors (Zitrin) (07-25-16)	Yes	A		We are gratified to see the inclusion of a separate rule on diligence along with a definition of diligence. Moreover, the commission has corrected the overly narrow standard required for a violation of MR 1.1 by adding the phrase "gross negligence" to the rule itself and eliminating the comment to MR 1.1 regarding "a single act of negligent conduct…."	No response required.
X-2016-43d	Committee on Professional Responsibility and Conduct (Baldwin) (08-12-16)	Yes	A		COPRAC supports the revised Rule as proposed	No response required.
X-2016-52b	Law Professors (Zitrin) (08-24-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission's response to the Law Professors' comments.
X-2016-68b	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission's response to the Law Professors' comments.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.1 [3-110] Competence
Synopsis of Public Comments

TOTAL = 7 *A = 4* *D = 1* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Castaneda, Jose (Provided oral public hearing testimony on July 26, 2016. See pages 81-82 of the public hearing transcript.)	Uncertain			The Castaneda comments at the public hearing related personal experiences and were not directed to the content of the proposed rule	No response required.
X-2016-104c	OCTC	Yes	M		1. OCTC supports adding gross negligence to this rule because that is consistent with case law. 2. OCTC is concerned with the proposals to separate competence, diligence, and supervision into separate rules. Current rule 3-110 works well, is well understood, and enforceable. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Further, there is well-established case law concerning the current rule. 3. A failure to perform diligently is a failure to perform competently, because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping.	1. No response required. 2 – 5. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Choosing the wrong rule to charge will result in a dismissal even though respondent was on notice as to what the charge was about. For instance, if an attorney does not know or learn the time lines for filing pleadings in a case and, thus, does not perform them in a timely manner, is that a failure to perform diligently or a failure to perform competently? At the very least, it will cause an unnecessary proliferation of the charges filed against attorneys and make enforcement more difficult. 4. Segregating supervision from competence is even more difficult, confusing, and artificial than separating diligence and competence. It will make proper charging of respondents more difficult. Supervision by an attorney is a part of lawyer competence. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3–110(A)), to	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					adequately communicate with his clients (rule 3–500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4–100)]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Bernstein v. State Bar* (1990) 50 Cal.3d 221; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.) 5. Also, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry, unclear, and overlapping. Choosing the wrong rule to charge will result in a dismissal, even though respondent was on notice as to the basis of the charge. For instance, many attorneys dispute allegations, but never contend that the misconduct occurred because of a lack of supervision until they are testifying at trial, long after	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. (See e.g. *In the Matter of Bolanos*, Case No. 15-O-10896 [dismissing failure to communicate allegation, although conduct could have been classified as a competence issue].) 6.OCTC is concerned about Comments 1 and 2. Those Comments are not necessary or correct, even if the concepts of competence, diligence, and supervision are separated. The Comments are unnecessary because each rule already explains what it governs. Further, as discussed, supervision of an attorney's employees, office, and case is an essential part of lawyer competence and cannot be separated from competence.	6. The Commission believes it is important to retain Comments [1] and [2], which provide cross-references to the supervision rules [5.1 to 5.3] and the diligence rule [1.3], respectively. It is important to provide those references because those concepts had both previously been found within the competence rule.
X-2016-76b	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los	Yes	M		PREC notes that subpart (a) of Proposed Rule 1.1 [Competence (current Rule 3-110)] adds the term "with gross negligence" to the list of conduct in which a	Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that "gross negligence" is an existing basis for discipline.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
	Angeles (PREC) (Schmid) (09-24-16)				lawyer may not engage if his or her obligation to perform legal services with competence is to be met. PREC believes that discipline relating to a lawyer's failure to practice in a competent manner should be limited in this rule to conduct that is repeated, intentional, or reckless, as in currently Rule 3-110. PREC is concerned that including gross negligence among the conduct supporting a finding of a lack of competence creates a significant risk that a lawyer who is found to have acted with gross negligence, and therefore not competently, will also be found to have engaged in an act of moral turpitude. Cases dealing with lawyer competence typically do not involve the habitual disregard of client interests and therefore could not support a finding of moral turpitude. Nevertheless, if gross negligence is incorporated into the lawyer competency rule, PREC believes this will result not only in charges regarding a lawyer's competence, but also in additional, unnecessary charges of moral turpitude. Such a result is inconsistent with the definition of "competence" set forth in subpart (b) of Proposed Rule 1.1,	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					which does not include acts of moral turpitude. Moreover, because charges are posted on the State Bar website as soon as they are filed (although there is a disclaimer that they are allegations only), those charged with competence issues could be prejudiced by allegations that they engaged in an act of moral turpitude even though the facts underlying the competency charge do not involve a habitual disregard of client interests. Furthermore, even if a competency case does demonstrate a habitual disregard of client interests, and therefore involves moral turpitude, it would be duplicative to charge an attorney with a violation of Proposed Rule 1.1, given that the lawyer could be charged with a violation of Business and Professions Code section 6106, which would support greater discipline.	
X-2016-76I	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	D		Supplemental comment. 1. As Proposed Rule 1.1 [Competence] defines competence to include diligence, PREC believes Proposed Rule 1.3 [Diligence] is unnecessary and inappropriate.	1. Rule 1.1 does not define competence to include diligence.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. Unlike Proposed Rule 1.1, a violation of Proposed Rule 1.3 does not necessarily implicate the duty of loyalty or require harm or the potential for harm to the client. PREC recommends that the definition of "reasonable diligence" in subpart (b) of Proposed Rule 1.3 be moved to Proposed Rule 1.1, and the term "diligence" in Proposed Rule 1.1 be modified to be "reasonable diligence."	2. The Commission has not made the suggested change. The decision to separate diligence and competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid. Most of the comments the Commission has received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).
X-2016-75a	Steven Kerins	No	M		1. The existing "competence bases" for imposing discipline are more than adequate for public protection, and gross negligence should not be added to intentional, reckless, or repeated conduct as a basis for possible discipline. 2. A comment should be added to address "competence creep", or the effect of specialization on the legal profession. It should be clarified that generalists' learning and skill will be judged against that of other generalists - a matter of particular significance to attorneys practicing in rural areas, and presumably, to their	Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that "gross negligence" is an existing basis for discipline. 2. The Commission has not made the suggested change. The Commission is not aware of any effort to discipline lawyers based on the level of skill of a specialist or expert, although it believes that would be proper for a lawyer who claims to be an expert.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					clients.	
X-2016-66a	San Diego County Bar Assoc.	Yes	A		We commend and support the Commission's choice of a separate rule that establishes an ethical duty of diligence, removing it from the Comment in the current competence rule, Rule 3-110, and also providing a definition of "reasonable diligence" for purposes of discipline. While the concepts of competence and diligence are linked, we believe they are sufficiently different, particularly from a client's perspective, that they warrant separate treatment. A lawyer may be technically competent—i.e., have the requisite skill—but still not pay adequate attention to, or even grossly neglect obligations to, a client. This addition of proposed Rule 1.3 makes clear that a lawyer has the ethical obligation both to be competent and to act with commitment and dedication to the interests of the client. We also support the inclusion of "gross negligence" into the scope of both the competence and the diligence rule.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.2
(Current Rule 3-210)
Scope of Representation and Allocation of Authority

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-210 (Advising the Violation of Law) in accordance with the Commission Charter, including the national standard of the "ABA counterpart, Model Rule 1.2 (Scope Of Representation and Allocation Of Authority Between Client and Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although this proposed rule has no direct counterpart in the current California Rules of Professional Conduct, the concept of limiting the scope of representation is addressed in California Rules of Court 3.35-3.37 & 5.425. The concept of allocation of authority is derived from the California Constitution, the California Penal Code, and California Supreme Court precedent. The result of this evaluation is proposed rule 1.2 (Scope of Representation and Allocation of Authority).

Rule As Issued For 90-day Public Comment

The concepts addressed in current rule 3-210 are carried forward with modification in proposed rule 1.2.1. An executive summary for proposed rule 1.2.1 is provided separately. Proposed rule 1.2 addresses the allocation of authority within the lawyer-client relationship and the ability of a lawyer to undertake representation on a limited scope basis.

The primary objectives of proposed rule 1.2 were to clarify the relationship between lawyer and client, to contribute to access to justice, and to eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of ABA Model Rule 1.2. In furthering its objectives, the Commission considered whether the concepts addressed in the proposed rule were necessary in the disciplinary rules in light of the fact that they were already present in statutes or case law.

Paragraph (a) is derived from ABA Model Rule 1.2(a) relating to the allocation of authority within the lawyer-client relationship. Under the proposed rule, the client retains authority to make decisions concerning the objectives of the representation, including whether to settle, which plea to enter, whether to waive a jury trial, and whether to testify, while the lawyer is impliedly authorized to take such action on behalf of the client as long as lawyer can do so without disclosing confidential communications.

Paragraph (b) relates to a lawyer's ability to limit the scope of representation. Allowing lawyers and clients to engage in limited scope agreements is consistent with California case law and rules of court, and contributes to access to justice by making the availability of legal services more affordable.

Comment [1] identifies the specific statutory authority for the express exception in paragraph (a) regarding the client's right to enter a plea in a criminal matter. The comment likewise identifies the seminal California Supreme Court case regarding the allocation of authority between lawyer and client.

Comment [2] clarifies that while a client possesses the authority to settle, a lawyer may settle a matter on the client's behalf with client's advance authorization.

Comment [3] addresses the concept that a lawyer's decision to undertake a client's matter does not constitute an endorsement of the client's views or activities. Including this concept as part of the rules was criticized as being aspirational and was stricken from the black letter of an earlier draft version of the rule.

Comment [4] provides interpretive guidance regarding the application of paragraph (c) as well as providing cross-references to the California Rules of Court expressly permitting limited scope representation under certain conditions.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made a few non-substantive grammatical or stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.2

Commission Drafting Team Information

Lead Drafter: Carol Langford
Co-Drafters: Nanci Clinch, Hon. Dean Stout, Dean Zipser

I. CURRENT CALIFORNIA RULE

There is no current California rule that corresponds to proposed Rule 1.2, which is derived from Model Rule 1.2, paragraphs (a) through (c). However, Model Rule 1.2(d) corresponds to current California rule 3-210. The Commission has recommended that the concept in current rule 3-210 be carried forward as a separate, standalone rule, proposed Rule 1.2.1. See the Report and Recommendation for proposed Rule 1.2.1 Report.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.2 [3-210]
Vote: 10 (yes) – 6 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.2 [3-210]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

Independence from Client's Views or Activities

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

IV. RULE HISTORY

There is no counterpart to proposed Rule 1.2, which is based on paragraphs (a) through (c) of Model Rule 1.2, in the California Rules of Professional Conduct. However, current rule 3-210 is analogous to Model Rule 1.2, paragraph (d). See Report and Recommendation for proposed Rule 1.2.1 for the history of current rule 3-210.

Although the origin and history of Model Rule 1.2 was not the primary factor in the Commission's consideration of proposed Rule 1.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 47 - 64, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

V. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule. OCTC believes, however, that subsection (b) should also require that the limitation be fully explained to the client and that the client's consent be in writing.

   Commission Response: The Commission agrees and has revised paragraph (b) to require that a client's consent be in writing. Thus, the Rule will use the phrase "informed written consent" which is defined in proposed Rule 1.0.1(e-1) and encompasses an explanation of relevant circumstances and material risks.

2. OCTC supports Comments [1] and [2].

   Commission Response: No response required.

3. OCTC believes that Comment [3] is unnecessary and aspirational. It does not explain or clarify the rule.

   Commission Response: The Commission did not make the requested change because this Comment incorporates Model Rule 1.2(b) but as a Comment rather than black letter text.

4. OCTC is concerned that Comment [4] is unnecessary. Further, nowhere in Comment [4] are attorneys advised that even where the scope of the representation is expressly limited, the attorney still has a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.)

   Commission Response: The Commission did not make the requested change because this Comment promotes client protection by assuring that a lawyer who renders limited scope services is on notice that there might be other applicable law outside of the Rules of Professional Conduct, in particular Rules of Court for certain types of cases.

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

VI. PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. Both of the commenters agreed with the proposed Rule only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

The California Rules of Professional Conduct have no counterpart to ABA Model Rule 1.2(a) through (c), the concepts of which have been included in proposed Rule 1.2. However, the policies promoted in ABA Model Rule 1.2 are currently reflected in California case law, statutory law, rules of court, and a rule of professional conduct.

1. ABA Model Rule 1.2(a) [Proposed paragraph (a)] – Allocation Of Authority Between Client And Lawyer

The concepts that (i) the client retains the authority to make decisions concerning the objectives of the representation, and (ii) the lawyer may make decisions that the lawyer is impliedly (or expressly) authorized to make in order to carry out the client's representation, are expressed in California case law. (See *Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 403-405 [212 Cal.Rptr. 151] [a lawyer has the implied authority to bind a client with respect to "procedural" matters arising during the course of the representation, but the client retains the right to make decisions that might "impair the client's substantial rights or the cause of action itself"].)[1]

Paragraph (a) also specifically provides that a lawyer must abide by a client's decision whether to settle a matter. This duty is consistent with existing California case law. Lawyers have been disciplined for settling a client's claim without the client's knowledge or consent. (See *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [255 Cal.Rptr. 422] [attorney found culpable of moral turpitude for settling a claim without the client's knowledge or consent notwithstanding that the attorney's retainer agreement purported to give the attorney the power to settle and endorse checks or releases]. See also, *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314 [in finding that an attorney committed misconduct by settling a client's case without the client's knowledge or consent, the State Bar Court Review Department stated: "Clients have the unilateral right to control the outcome of their cases, including the right to settle or to refuse to settle a claim."].)

2. ABA Model Rule 1.2(b) – Representation Of Client Is Not An Endorsement Of Client's Views Or Activities

Model Rule 1.2(b) provides that a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's views or activities. The purpose of paragraph (b) is articulated in Comment [5] of the Rule:

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of unpopular

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[1] See also, *Stewart v. Preston Pipeline Inc*. (2005) 134 Cal.App.4th 1565, 1581-1582 [36 Cal.Rptr.3d 901] [comparing cases that state a lawyer has the implied authority to "bind his or her client with respect to procedural matters" with cases that state there is no implied authority for a lawyer to take actions that impair the "client's substantial rights."].

disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Business and Professions Code section 6068(h) states that it is the duty of an attorney to "[n]ever reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Similarly, current rule 2-400(B)(2) states that a member shall not unlawfully discriminate, or knowingly permit unlawful discrimination, when accepting or terminating the representation of a client. These authorities are intended to support the policy of promoting access to justice. Promulgating such concepts should avoid a potential obstacle to access to justice and zealous representation by assuring members of the legal profession and the public that a lawyer's representation of an unpopular or otherwise notorious client is not an endorsement of the client's views or actions.

Although the Commission is not recommending the adoption of Model Rule 1.2(b), it does recommend a Comment addressing this issue. See Comment [3] which, in part, provides that a lawyer's representation of a client does not constitute an endorsement of the client's views.

3. ABA Model Rule 1.2(c) [proposed paragraph (b)] – Limited Scope Representation

Paragraph (c) states that a lawyer "may limit the scope of the representation if the limitation is reasonable and the client gives informed consent." Permitting attorneys and clients to engage in limited scope agreements is consistent with California case law and rules of court. In particular, the "reasonable" limitation is consistent with California case law which clarifies that a lawyer may still have a duty to inform the client of reasonably apparent "legal problems," even though a potential claim or defense might fall outside of the scope of the limited engagement.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601], a lawyer representing an injured worker sought to limit the scope of the representation to the client's workers' compensation claim and entered into an express agreement to that effect. The agreement did not mention the potential for a third-party tort claim. Subsequently, when the tort case was time-barred, the client brought a negligence action against the attorney for failing to inform the client about a potential third-party tort claim.

In analyzing this claim, the Court of Appeal stated: "One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered." (*Nichols v. Keller*, *supra*, 15 Cal.App.4th at pp. 1683-1684.)[2]

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[2] See also, *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940 [14 Cal.Rptr.3d 751], where the First District Court of Appeal discussed whether a defendant lawyer could be sued for malpractice for failing to raise claims beyond the scope of a retainer agreement. The

In addition to case law, California Rules of Court, rules 3.35-3.37 (limited scope rules applicable in civil matters generally) and 5.425 (limited scope rule applicable in family law matters) permit limited scope representation under certain circumstances. Both of these rule provisions define limited scope representation as "a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person."[3]

ABA Model Rule 1.2(c) requires that a lawyer obtain the informed consent of the client who will receive a limited scope representation. This concept appears in current rule 1-650 (Limited Legal Services Programs), Discussion paragraph [2], which states: "A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation." The guidance provided in rule 1-650's Discussion paragraph is narrower than the informed consent requirement in the Model Rule because the former applies only to services in the context of a limited legal service program (e.g., services sponsored by a court, government agency, bar association, law school, or nonprofit organization), while the latter is a broader standard applicable to the provision of limited scope representation in any context.

B. ABA Model Rule Adoptions

- **Arizona Rule 1.2** is identical to Model Rule 1.2:

  Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

  (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's

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court stated: "True, the extent of an attorney's duty to act necessarily depends on the scope of the attorney-client relationship [citation], and the scope of this relationship may be limited by the agreement between the attorney and the client [citation]. But an attorney who undertakes one matter on behalf of a client owes that client the duty to at least consider and advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client's interests."

[3] See also, the Discussion paragraph to current rule 3-400 (Limiting Liability to Client), which states: "Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, *nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation*." (Emphasis added.) And, Discussion paragraph [2] to current rule 1-650 (Limited Legal Services Programs), which states in part: "A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited representation."

decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **Alaska Rule 1.2** is a substantial departure from the Model Rule, including an enhancement of paragraph (c) concerning limited scope representation, and the addition of new paragraphs (e) and (f):

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to offer or accept a settlement. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client ' s political, economic, social, or moral views or activities.

(c)[4] A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

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[4] Other jurisdictions that have expanded paragraph (c) regarding limited scope representation include: Colorado, Florida, Maine, Maryland, Montana, New Hampshire, and Wyoming.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.[5]

(f)[6] A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

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[5] Note that a similar provision is found in Model Rule 1.4(a)(5), which provides that a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Further note that this Commission has declined to include a provision similar to Model Rule 1.4(a)(5) in its proposed Rule.

[6] Other jurisdictions that have provisions addressing legal advice relating to the jurisdiction's marijuana laws include: Colorado (Comment), Hawaii (rule), Illinois (rule & Comment), Nevada (Comment), Oregon (rule), and Washington (Comment). This topic is discussed more fully in the Report & Recommendation for proposed Rule 1.2.1. The Commission has recommended including a Comment similar to those in Colorado, Nevada and Oregon in that rule.

- **New York Rule 1.2** is also a substantial departure from the Model Rule, including the addition of new paragraphs (e) through (g):

  Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

  (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

  (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

  (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

  (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

  (e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

  (f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

  (g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

- **Model Rule 1.2**. The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2," revised October 28, 2016, is available at:

  - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf [Last accessed on 2/7/17.]

- Every jurisdiction except California has adopted some version of ABA Model Rule 1.2. Among these jurisdictions, fourteen have adopted the Rule verbatim,[7] ten have adopted substantially similar variations of the Model Rule,[8] and twenty-six have a substantially modified version of Model Rule 1.2.[9]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 1.2, as revised, includes two paragraphs, (a) and (b) to expressly address allocation of authority between client and lawyer and address a lawyer's duties with respect to limiting the scope of representation, respectively. Proposed paragraph (d) of the Model Rule, which would carry forward current rule 3-210, as modified, has been assigned its own rule number, Rule 1.2.1. See Rule 1.2.1 Report.

   - Pros: Paragraph (a) and (b) clarify the relationship between lawyer and client and eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of Model Rule 1.2. Further, the concepts in these paragraphs already exist in California law; the provisions will provide ease of access to for lawyers seeking to understand their duties as set forth in those paragraphs. The specific advantages of expanding the scope of the rule are discussed in relation to each paragraph, below.

   - Cons: Question whether it is necessary to include the concepts of paragraphs (a) and (b) in a set of disciplinary rules when they are already present in statutes or case law. In addition, paragraph (b) is permissive.

2. Recommend adoption of Model Rule 1.2(a), which relates to the allocation of authority within the lawyer-client relationship and which has been modified as follows:

   a. Limit a lawyer's implied authority to act on the client's behalf by the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], in recognition

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[7] The fourteen jurisdictions are: Arizona, Arkansas, Delaware, Idaho, Iowa, Kentucky, Minnesota, Nevada, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont and Washington.

[8] The ten jurisdictions are: Colorado, Florida, Indiana, Louisiana, Maryland, New Jersey, New Mexico, Oklahoma, South Carolina and Tennessee.

[9] The twenty-six jurisdictions are: Alabama, Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Virginia, West Virginia, Wisconsin and Wyoming.

of this Commission's decision not to include such a provision in proposed Rule 1.6.

b. Limit the requirement of a lawyer to abide by a client's decision to enter a plea in capital cases, in which guilty pleas require the lawyer's consent. (See Penal Code § 1018).

- Pros: The provision does not change California law; all of the concepts in paragraph (a) are found in California law:

  a. The concepts that (i) the client retains the authority to make decisions concerning the objectives of the representation, and (ii) the lawyer may make decisions that the lawyer is impliedly (or expressly) authorized to make in order to carry out the client's representation, are expressed in California case law. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-405 [212 Cal.Rptr. 151].)

  b. That a lawyer must abide by a client's decision whether to settle a matter is consistent with existing California case law. Lawyers have been disciplined for settling a client's claim without the client's knowledge or consent. (See, *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [255 Cal.Rptr. 422]. See also, *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314.)

- Cons: See "Cons" in Section IX.A.1, above. There is no reason to include these concepts in disciplinary rules when they already are found in statutes or case law, particularly the permissive second sentence concerning a lawyer's implied authority.

3. Recommend adoption of Model Rule 1.2(c), relating to a lawyer's ability to limit the scope of representation.

   - Pros: Permitting lawyers and clients to engage in limited scope agreements is consistent with California case law and rules of court, and contributes to access to justice by making the availability of legal services more affordable. The "reasonable" limitation is consistent with California case law which clarifies that a lawyer may still have a duty to inform the client of reasonably apparent "legal problems," even though a potential claim or defense might fall outside of the scope of the limited engagement. This limitation also is consistent with the principle that a lawyer cannot obtain an advance waiver of the duty of competence, so any limitation must leave the lawyer able to provide competent representation within the defined scope of representation. See proposed Comment [4] to this Rule and proposed Rule 1.8.1.

     For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601], a lawyer representing an injured worker sought to limit the scope of the representation to the client's workers' compensation claim and entered into an express agreement to that effect. The agreement did not mention the potential for a third-party tort claim. Subsequently, when the tort

case was time-barred, the client brought a negligence action against the attorney for failing to inform the client about a potential third-party tort claim. In analyzing this claim, the Court of Appeal stated:

> "One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered." (*Nichols v. Keller, supra*, 15 Cal.App.4th at pp. 1683-1684.)

In addition to case law, California Rules of Court, rules 3.35-3.37 (limited scope rules applicable in civil matters generally) and 5.425 (limited scope rule applicable in family law matters) permit limited scope representation under certain circumstances. A driving force behind the adoption of these rules was increasing access to justice. Both of these rule provisions define limited scope representation as "a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person."

- Cons: The provision is permissive and has no place in a set of disciplinary rules. The concept is already adequately addressed in Rules of Court and case law.

4. Recommend adoption of Comment [1], which is derived from the first Commission's Comment [1], and which identifies the specific statutory authority for the express exception in paragraph (a) concerning the client's right to enter a plea in a criminal matter, and also provides a citation to a seminal California Supreme Court opinion on the allocation of authority between client and lawyer.

   - Pros: The citations to the statute and case provide additional explanation to lawyers on how paragraph (a) should be applied, thus enhancing both enforcement and compliance with the Rule.

   - Cons: None identified.

5. Recommend adoption of Comment [2], which is identical to Model Rule 1.2, Comment [3] and the first Commission's Comment [3], and which clarifies that a lawyer may settle a matter on the client's behalf with the client's advance authorization.

   - Pros: The Comment provides important interpretive guidance regarding the meaning of a client's decision to settle a matter, i.e., that the client's decision to settle within specific parameters can be given in advance, revocable at any time. (See California State Bar Formal Ethics Op. 2002-160).

   - Cons: None identified.

6. Recommend adoption of Comment [3], which moves the aspirational Model Rule 1.2(b) into the Comment of the proposed Rule.

    - Pros: The purpose of Model Rule 1.2(b) is articulated in proposed Comment [3] of the Model Rule:

      "Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of unpopular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."

      Business and Professions Code section 6068(h) states that it is the duty of an attorney to "[n]ever reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Similarly, current rule 2-400(B)(2) states that a member shall not unlawfully discriminate, or knowingly permit unlawful discrimination, when accepting or terminating the representation of a client, a provision whose concept is carried forward in proposed Rule 8.4.1. These authorities are intended to support the policy of promoting access to justice. Promulgating such concepts should avoid a potential obstacle to access to justice and zealous representation by assuring members of the legal profession and the public that a lawyer's representation of an unpopular or otherwise notorious client is not an endorsement of the client's views or actions.

    - Cons: Although the provision has been relegated to a Comment, it remains aspirational and has no place in a set of disciplinary rules. It serves neither to explain the application or the meaning of the proposed Rule. If it were to be placed anywhere in the Rules, it should perhaps be a Comment to proposed Rule 1.0 or in a Preamble.

7. Recommend adoption of Comment [4], which includes concepts from the first Commission's Comments [7] and [8], and which provides interpretative guidance regarding the application of paragraph (b), as well as providing cross-references to the California Rules of Court that expressly permit limited scope representation under certain conditions.

    - Pros: Limited scope representation is an important component in the pursuit of making justice more accessible. (See discussion in Section IX.A.3, above.) This Comment provides important guidance that an agreement to limit the scope of representation is not an agreement to limit the lawyer's duty of competence and that the lawyer might still be required to advise the client of other rights or liabilities not within the scope of representation. Finally, the Comment cross-references the Rules of Court that sanction limited scope representation.

    - Cons: See "Cons" related to paragraph (b), in Section IX.A.3, above.

B. Concepts Rejected (Pros and Cons):

The only concept rejected was to include Model Rule 1.2(d) within this proposed Rule. However, the Commission instead has recommended that the paragraph, which corresponds to current rule 3-210, be assigned its own rule number. See Rule 1.2.1 Report.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

Although the proposed Rule would add two provisions that are not currently found in the California Rules, neither of these provisions would be a substantive change in the current law of California. (See discussion in paragraphs A.2 and A.3, above.)

D. Non-Substantive Changes to the Current Rule:

In proposed paragraph (a), substituting "lawyer" for "member" is intended as a non-substantive change that more accurately reflects the current scope of the Rules, i.e., their application is not limited to members of the State Bar.

1. Substituting the term "lawyer" for "member."

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites

to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. As noted in paragraph C.0, above, paragraphs (a) and (c) of Model Rule 1.2 are not substantive changes.

E. Alternatives Considered:

None.

IX. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.2 in the form attached to this Report and Recommendation.

Proposed Rule 1.2 [3-210] Scope of Representation and Allocation of Authority
Synopsis of Public Comments

TOTAL = 2	A = 0
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43e	Committee on Professional Responsibility and Conduct (Baldwin) (8-12-16)	Y	M	1.2	The language "Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation" is ambiguous or confusing.	The Commission made no change to this language. Including the restrictive reference to the duty of confidentiality is necessary because unlike Model Rule 1.6, neither § 6068(e) nor proposed rule 1.6 [3-100] includes the concept of implied authorization.
X-2016-104d	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(b), cmt. 3, cmt. 4	Subsection (b) should require that limitation be fully explained to client and that client's consent be in writing. Comment 3 is aspirational and should be deleted. Comment 4 is unnecessary and likewise fails to explain lawyer's duty to alert client to legal issues according to case law.	The Commission agrees and has revised paragraph (b) to require that a client's consent be in writing. Thus, the rule will use the phrase "informed written consent" which is defined in proposed rule 1.0.1(e-1) and encompasses an explanation of relevant circumstances and material risks. The Commission did not make the requested change because this comment incorporates Model Rule 1.2(b) but as a comment rather than black letter text. The Commission did not make the requested change because this comment promotes client protection by assuring that a

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.2 [3-210] Scope of Representation and Allocation of Authority
Synopsis of Public Comments

TOTAL = 2 *A = 0* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						lawyer who renders limited scope services is on notice that there might be other applicable law outside of the Rules of Professional Conduct, in particular Rules of Court for certain types of cases.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.2.1
(Current Rule 3-210)
Advising or Assisting the Violation of Law

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-210 (Advising the Violation of Law) the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated the national standard of ABA Model Rule 1.2 (Advising or Assisting the Violation of Law). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed rule 1.2.1 (Advising or Assisting the Violation of Law).

Rule As Issued For 90-day Public Comment

Proposed rule 1.2.1 carries forward the substance of current rule 3-210 but with additional clarifying language derived from ABA Model Rule 1.2(d) which provides that a lawyer may explain the legal consequences of a client's proposed course of conduct without running afoul of the rules. This additional language serves as an important public protection as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct. The proposed rule has been further modified by dividing the Model Rule's single sentence substantive provision into three paragraphs for clarity.

Comment [1] addresses paragraph (c), a new clause being added to current rule 3-210 that assists lawyers by giving them an additional tool to dissuade a client from undertaking a proposed course of action. Given that the clause would be new to the rule, comment [1] explains that lawyers are not given carte blanche to advise clients on how to conduct their affairs in a manner that avoids criminal prosecution.

Comment [2] clarifies that the rule also applies when a client's conduct has already begun and is continuing. Moreover, the comment explains that a lawyer must comply with his or her duty of confidentiality and that a lawyer's only recourse if the client persists in illegal conduct may be resignation or withdrawal.

Comment [3] clarifies the application of paragraph (a) by providing interpretive guidance concerning a client's desire to test the validity of a law, rule, or ruling of a tribunal.

Comment [4] addresses a lawyer's provision of legal advice and services to a client who contemplates engaging in civil disobedience. The last sentence of the comment provides guidance on the application of the proposed rule.

Comment [5] addresses a lawyer's obligation to communicate his or her ethical limitations with a client who expects assistance not permitted by the rules.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of the rule to use the language of the Model Rule counterpart, Model Rule 1.2(d), but unlike the Model Rule the proposed rule is organized in two main paragraphs ((a) and (b)) and two subparagraphs ((b)(1) and (b)(2)). Paragraph (a) states the general prohibition against counseling a violation of law and paragraph (b) describes conduct that is permitted notwithstanding the general prohibition. The implementation of two subparagraphs in (b) is for clarity because discussion of consequences of a proposed course of conduct is distinct from counseling/assisting a client in a good faith effort to determine the scope or validity of a law. Subparagraph (b)(2) includes language from current California Rule 3-210 that refers to a rule of ruling of tribunal as "law" that can be tested as to its meaning or application.

The Commission also revised the rule comments in response to public comments. First, in Comment [2], the Commission added a reference to a lawyer's statutory duty to uphold the law (Business and Professions Code § 6068(a)). Comment [2] also includes a non-substantive stylistic revision was made to the citation to a lawyer's duty of confidentiality. Second, a new Comment [6] was added to describe situations where conflicts of law may render it challenging for a lawyer, for example, to avoid counseling a federal law violation when the client's conduct expressly is permitted under state law. A public comment argued in favor of adding an explicit medical marijuana example in the rule but the Commission did not make that change because the relevant laws are subject to change in the near future.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission combined Comments [3] and [4] to be a single comment numbered as Comment [3], with subsequent comments renumbered accordingly. In the second sentence of the new Comment [3], the word "thus" was added to read: "Paragraph (b) *thus* authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal. . . ."

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.2.1

Commission Drafting Team Information

Lead Drafter: Carol Langford
Co-Drafters: Nanci Clinch, Hon. Dean Stout, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.2.1 [3-210]
Vote: 14 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.2.1 [3-210]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.2.1 Advising or Assisting the Violation of Law

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

Comment

[1] There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code § 6068(a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and Rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and 1.16.

[3] Determining the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (b) thus authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust or invalid.

[4] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

[5] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-210)

Rule ~~[3-210]~~ 1.2.1 Advising or Assisting the Violation of Law

(a) A ~~member shall not advise the~~lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal~~ unless the member believes in good faith that such law, rule,~~.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) ~~or ruling is invalid. A member may take appropriate steps in~~counsel or assist a client to make a good faith effort to ~~test~~determine the validity ~~of any~~, scope, meaning or application of a law, rule, or ruling of a tribunal.

Comment ~~Discussion~~

~~Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)~~

[1] There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code § 6068(a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and Rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and 1.16.

[3] Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal,* or of the meaning placed upon it by governmental authorities. Paragraph (b) thus authorizes a lawyer to advise a client on the

consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

[4] If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

[5] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes* is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

V. RULE HISTORY

A. History of California Rule 3-210

Rule 3-210 originated with the 1928 rules as rule 11. Former rule 11 stated: "A member of the State Bar shall not advise the violation of any law. This rule shall not apply to advice, given in good faith, that a law is invalid."

When the rules were revised operative January 1, 1975, rule 11 became new rule 7-101 (Advising the Violation of Law). The Special Committee to Study the ABA Code of Professional Responsibility recommended that new rule 7-101 retain the identical text contained in rule 11. However, the State Bar ultimately submitted, and the Supreme Court approved, an amended rule providing that: "A member of the State Bar shall not advise the violation of any law, rule or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. A member of the State Bar may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal."

This rule was last amended effective May 27, 1989. Rule 7-101 was renumbered as rule 3-210, and the rule filing stated "no substantive changes to current rule 7-101 are proposed." The Supreme Court ultimately approved a rule that deleted the phrase "of the State Bar" and changed "he" to "the member." In addition, the Supreme Court also approved the State Bar's proposed Discussion paragraph providing:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client form the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the

owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

B. History of ABA Model Rule 1.2

Although the origin and history of Model Rule 1.2 was not the primary factor in the Commission's consideration of proposed Rule 1.2.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 47 - 64, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. Proposed rule fails to prohibit attorney from attempting to violate rules.

   Commission Response: In connection with Model Rule 8.4, the Commission considered but rejected the concept of an overarching prohibition on attempts to violate a rule. The Commission believes that attempts should be addressed on a rule-by-rule basis. 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.

2. First sentence of Comment 1 should be stricken as contrary to established case law.

   Commission Response: The Commission did not make the requested deletion because it provides needed explanation that this rule draws a distinction between a lawyer's legal analysis and a lawyer's recommendation of the means by which a crime or fraud might be committed. If this is contrary to case law, then allegations of misconduct should be brought under those cases rather than by charging this rule.

3. Comment 3 is incomplete because an attorney must first openly refuse to comply with the order before challenging it.

   Commission Response**:** The Commission did not make the requested change because the openly refuse requirement might not be available in all circumstances.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

1. OCTC is concerned that the proposed rule fails to prohibit an attorney from attempting to violate the rules.

   Commission Response**:** The Commission disagrees that Rule 1.2.1 should be expanded to include an "attempt" to advise or assist the violation of law. Most of the cases OCTC cites deal with attempts to commit a crime which itself may be a crime under the Penal Code and a separate basis for discipline. The Commission is not aware of a rule in any other jurisdiction that imposes discipline for attempting to advise or assist the violation of law, or for that matter, conduct that constitutes a crime or other violation involving moral turpitude. OCTC's comment appears to go beyond the scope of Rule 1.2.1 and deals with attempts to violate a rule or provision of the State Bar Act, which should be addressed under proposed Rule 8.4 rather than this rule.

2. Supports Comments [2], [4], & [5].

   Commission Response: No response required.

3. First sentence of Comment 1 is confusing as it does not address when attorneys provide information in a manner or under circumstances that suggests or implicitly recommends a violation of law.

   Commission Response: The Commission disagrees and has not made the suggested change. The referenced sentence provides a necessary explanation that this rule draws a distinction between a lawyer's legal analysis and a lawyer's recommendation of the means by which a crime or fraud might be committed. If this is contrary to case law, then allegations of misconduct should be brought under those cases rather than by charging this rule.

4. Comment 3 is incomplete. When challenging a court ruling or order, the attorney must first openly and unequivocally refuse to comply with the order.

   Commission Response: The Commission does not believe any change to Comment [3] is required. The authorities cited by the commenter deal mainly with other states' versions of Model Rule 3.4(c) and not this rule.

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

VII. PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seven public comments were received. All seven comments agreed with the proposed Rule only if modified. During the 45-day

public comment period, two public comments were received. Both comments agreed with the proposed Rule only if modified. Public comment synopsis tables, with the Commission's responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Business and Professions Code section 6068(a) states it is the duty of an attorney to do the following: "To support the Constitution and laws of the United States and of this state."

As a result, discipline may be imposed for violating any state or federal law. [See, *In Re Brimberry* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 397 fn. 9 ("Section 6068(a) is a conduit for disciplining attorneys who violate laws and are not otherwise disciplinable under the State Bar Act.").] The exposure to discipline exists for failing to comply with case law, as well as statutory law. [See, *Matter of Field* (Rev. Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 183-184.]

Proposed Rule 1.2.1, which is patterned on Model Rule 1.2(d), prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. The proposed Rule is similar to current rule 3-210, which prohibits a lawyer from advising the violation of any law, rule, or ruling of a tribunal.

Both the Model rule and current rule 3-210 permit the lawyer to test the validity of a law. Under the Model Rule, a lawyer may "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Current rule 3-210 states that a lawyer "may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal." A significant difference between the Model Rule and current rule 3-120 is that the Model Rule expressly permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client."

B. ABA Model Rule 1.2(d) Adoptions

- **Arizona Rule 1.2(d)** is identical to Model Rule 1.2(d):

  Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

  * * *

  (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **Alaska Rule 1.2(d)** is a substantial departure from Model Rule 1.2(d), as it is qualified by the addition of new paragraphs (e) and (f):

  Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

  * * *

  (d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

  (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.[1]

  (f)[2] A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

- **New York Rule 1.2(d)** is also a departure from Model Rule 1.2(d), being qualified by the addition of new paragraph (f):

  Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

  * * *

  (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

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[1] Note that a similar provision is found in Model Rule 1.4(a)(5), which provides that a lawyer shall:

> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Further note that this Commission has declined to include a provision similar to MR 1.4(a)(5) in its proposed Rule.

[2] Other jurisdictions that have provisions addressing legal advice relating to the jurisdiction's marijuana laws include: Colorado (Comment), Hawaii (Rule), Illinois (Rule & Comment), Nevada (Comment), Ohio (Rule), Oregon (Rule), and Washington (Comment).

* * *

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

- **Model Rule 1.2(d)**. The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2," revised October 28, 2016, is available at:

  - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf (Last accessed on 2/7/17.)

  - Every jurisdiction except California has adopted a version of ABA Model Rule 1.2(d). Among the other jurisdictions, 43 have adopted the Model Rule paragraph verbatim, four have adopted a substantially similar variation of the Model Rule,[3] and four have a substantially modified version of Model Rule 1.2(d).[4]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 1.2(d), which would carry forward the substance of current rule 3-210, but with the additional clarifying language that a lawyer may explain the legal consequences of a client's proposed course of conduct.

   a. Current rule 3-210 is modified by adding the aforementioned clause concerning the consequences of a client's proposed course of conduct.

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[3] The four jurisdictions whose provision is substantially similar to the Model Rule are Connecticut, Florida, New Mexico and Texas. Connecticut has added parenthetical numbers before each clause of the Model Rule paragraph, and Florida and New Mexico have added a subtitle for the paragraph ("Criminal or Fraudulent Conduct" in Florida and "Course of Conduct" in New Mexico. Otherwise, the rule language is identical to the Model Rule. Texas divides the single Model Rule sentence into two sentences, but otherwise the language is the same.

[4] The four jurisdictions that substantially diverge from the language and scope of the Model Rule are Alaska, Illinois, New York and Ohio. Of these, Alaska simply adds the clause "Except as provided in paragraph (f)," to except advice regarding medical marijuana. Both Illinois and Ohio add a subparagraph permitting advice or assistance with respect to state law, e.g., medical marijuana, that conflicts with federal law. New York has deleted the last clause of the rule, which provides: "and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

b. Modifications to the Model Rule paragraph include:

(i) Dividing the Model Rule's single sentence substantive provision that encompasses two separate concepts into two subparagraphs for clarity.

(ii) Substituting current rule 3-210's term, "law, rule, or ruling of a tribunal" for the Model Rule's term, "law."

- Pros: The paragraph, as amended, will carry forward the substance of current rule 3-210, which expressly prohibits a lawyer from counseling or assisting a client in a criminal or fraudulent conduct, but permits the lawyer to counsel or assist the client in a good faith attempt to test the validity of a law, etc. The addition of the Model Rule clause that permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" is an important public protection addition, as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct.

- Cons: The addition of the permissive Model Rule clause, proposed paragraph (b), does not belong in a set of disciplinary rules.

2. Recommend adoption of Comment [1], which is a substantially shortened version of Model Rule 1.2, Comment [9] and the first Commission's Comment [9], and which explains the new clause that is being added to current rule 3-210, i.e., a lawyer's ability to explain the consequences of a proposed course of conduct.

   - Pros: The added clause is critical in providing the lawyer with an added tool in dissuading a client from a proposed course of action. Given that the clause would be new with this Rule, it is important that lawyers understand that they do not have carte blanche to explain to a client how to conduct their affairs as to avoid criminal prosecution.

   - Cons: The blackletter language is sufficiently clear. There is no need for further explanation.

3. Recommend adoption of Comment [2], which is derived from Model Rule 1.2, Comment [10] and the first Commission's Comment [10], and which clarifies that the Rule also applies when the client's conduct has already begun and is continuing. It also cautions that the lawyer must comply with the lawyer's duties under Bus. & Prof. Code § 6068(a) and Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], and that the lawyer's only recourse if the client persists in illegal conduct may be resignation or withdrawal.

   - Pros: This Comment brings proposed Rule 1.2.1 in line with the Commission's proposed Rule 1.6 and Bus. & Prof. Code § 6068(e)(1) by re-emphasizing that a client's proposed illegal course of conduct does not necessarily permit the lawyer to report it to the authorities. It also emphasizes that central to

compliance with the Rule is compliance with the lawyer's duties under § 6068(a).

- Cons: A lawyer's options when a client is intent on pursuing an illegal course of conduct is already adequately addressed in Rule 1.16 [3-700].

4. Recommend adoption of Comments [3],which is based on the first Commission's Comment [11] and has no counterpart in Model Rule 1.2, clarifies the application of subparagraph (b)(2) concerning a client's testing the validity of a law, rule, or ruling of a tribunal. Comment [4] discusses a lawyer's duty to advise the client on the lawyer's limitations if the client expects assistance not permitted by the Rules or other law or if the intends to act contrary to the client's instructions.

   - Pros: In addition to providing interpretive guidance concerning subparagraph (b)(2), Comments [3] also addresses a lawyer's provision of legal advice and services to a client who contemplates engaging in civil disobedience. This Comment, particularly the example contained the Comment's last sentence, provides critical guidance on the application of the subparagraph.

   - Cons: The language of the blackletter of subparagraph (b)(2) speaks for itself. There is no need for further clarification.

5. Recommend adoption of Comment [4], which is derived from Model Rule 1.2, Comment [13] and the first Commission's Comment [12], and which clarifies that a lawyer is obligated under proposed Rule 1.4(a)(4) to consult with a client about the limitations on the lawyer's ability to advise or assist the client in illegal or criminal activity.

   - Pros: As noted, this Rule alerts a lawyer to the lawyer's obligation under proposed Rule 1.4(a)(4) to consult with the client when the lawyer's advice or assistance is not permitted under the Rules. This is an important duty warranting the cross-reference. As to the con argument that if it is important, the duty belongs in the black letter of *this* Rule, it in fact was paragraph (e) of original Model Rule 1.2. However, the Ethics 2000 Commission reasoned that the duty, which is part of a lawyer's duty to communicate with the client, was more appropriately placed in Model Rule 1.4, and the vast majority of jurisdictions have followed suit. Following this approach will remove an unnecessary difference between the California Rules and the rules adopted in a substantial majority of the jurisdictions.

   - Cons: The language of the blackletter of proposed Rule 1.4(a)(4) speaks for itself. There is no need for further clarification in this Rule. If it is an important duty related to a lawyer's ability to advise or assist a client, then it should be in the blackletter of this Rule, not in Rule 1.4.

6. Recommend adoption of Comment [5], which has no counterpart in Model Rules or the current California Rules, but is based on blackletter text and Comments in

Model Rule 1.2 counterparts in other jurisdictions that have addressed, in either the blackletter or a Comment, the conflict that exists between federal and state law in jurisdictions that permit the use of medical marijuana. See, e.g., the rules in Alaska (rule); Colorado (Comment), Hawaii (rule), Illinois (rule & Comment), Nevada (Comment), Ohio (rule), Oregon (rule), and Washington (Comment). See also L.A. County Bar Ethics Op. 527, available at: http://www.lacba.org/docs/default-source/ethics-opinions/archived-ethics-opinions/ethics-opinion-527-rev.pdf and Bar Association of San Francisco Ethics Op. 2015-1, available at https://www.sfbar.org/ethics/opinion_2015-1.aspx

- Pros: Advising a client how to comply with California law that permits the cultivation and sale of medical marijuana necessarily also constitutes advice on violating federal law regulating controlled substances, including marijuana. Lawyers should be able to provide advice to clients on how to comply with the law without the lawyer being subject to the specter of discipline for unavoidably "facilitating" the violation of federal law. Including such a provision that would provide lawyers with sufficient assurance that they will not be subject to discipline. Although there are two recent ethics opinions that reason that a lawyer can provide legal advice and assistance to medical marijuana growers and sellers,[5] the opinions are advisory only with no precedential effect. At least eight jurisdictions have adopted similar provisions,[6] and Vermont has a similar provision under consideration. The Comment is an important clarification of the scope of application of the proposed Rule in situations where state or local might conflict with federal law, e.g., medical marijuana or sanctuary cites. Thus, notwithstanding the recent legalization of marijuana use in 2016, this is not necessarily a transitory issue. Further, because the Comment provides interpretative guidance by clarifying the scope of the Rule's application, its substance is appropriately placed in a Comment rather than the blackletter text of the Rule.

- Cons: In light of the recent legalization of marijuana use in California, this is a transitory issue that does not need to be addressed in a rule of professional conduct. The two local bar association ethics opinions cited above provided sufficient clarification on the Rule's application. There is no apparent crisis in providing such services so there is no compelling need for a change in the Rule. Further, if it is determined that a provision is necessary, it more appropriately belongs in the blackletter text of the Rule, not in a Comment, because it provides an exception to the application of the Rule.

B. Concepts Rejected (Pros and Cons):

1. Include a provision similar to Model Rule 1.2, Comment [10], which states that in some circumstances, a lawyer might be justified in making a "noisy withdrawal"

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[5] See paragraph A.6, above.

[6] See note 2, above.

and disaffirm a document or opinion that the lawyer has provided to a client.

- Pros: Noisy withdrawal is appropriate in some circumstances to avoid harm to the public.

- Cons: The concept of noisy withdrawal is inimical to California's strong defense of client confidentiality. Any such withdrawal would be a violation of the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

1. The addition in subparagraph (d)(1) of the clause from the Model that provides a lawyer may discuss the consequences of a client's proposed course of conduct is a substantive change. (See discussion in Section IX.A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member."

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the Rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent

adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.2.1 [3-210] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.2.1 [3-210] in the form attached to this Report and Recommendation.

Proposed Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
Synopsis of Public Comments

TOTAL = 3	*A = 1*
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27c	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	A		The changes appear to be non-substantive, with the exception of the comment in section (6) which clarifies the role of defense counsel in regard to conflicting state and federal law. We support the proposed changes to the Rule.	No response required.
Y-2016-21b	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	1.2.1, Cmts. 1-5	1. OCTC is concerned that the proposed rule fails to prohibit an attorney from attempting to violate the rules.	1. The Commission disagrees that Rule 1.2.1 should be expanded to include an "attempt" to advise or assist the violation of law. Most of the cases OCTC cites deal with attempts to commit a crime which itself may be a crime under the Penal Code and a separate basis for discipline. The Commission is not aware of a rule in any other jurisdiction that imposes discipline for attempting to advise or assist the violation of law, or for that matter, conduct that constitutes a crime or other violation involving moral turpitude. OCTC's comment appears to go beyond the scope of Rule 1.2.1 and deals with attempts to violate a rule or provision of the State Bar Act, which should be addressed under proposed

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						Rule 8.4 rather than this rule.
					2. Supports Comments 2, 4, & 5.	2. No response required.
					3. First sentence of Comment 1 is confusing as it does not address when attorneys provide information in a manner or under circumstances that suggests or implicitly recommends a violation of law.	3. The Commission disagrees and has not made the suggested change. The referenced sentence provides a necessary explanation that *this rule* draws a distinction a lawyer's legal analysis and a lawyer's recommendation of the means by which a crime or fraud might be committed. If this is contrary to case law, then allegations of misconduct should be brought under those cases rather than by charging this rule.
					4. Comment 3 is incomplete. When challenging a court ruling or order, the attorney must first openly and unequivocally refuse to comply with the order.	4. The Commission does not believe any change to Comment [3] is required. The authorities cited by the commenter deal mainly with other states' versions of Model Rule 3.4(c) and not this rule.
Y-2016-22	Stewart, John	N	M		The Board is requesting comment on whether the rule should include an express exception for a situation where a lawyer believes in good faith that a law, rule or ruling is invalid." Yes there should be an express exception. Judges are not Kings and if a judge makes a void order	The Commission believes that the paragraph (b)(2) of the rule already permits the conduct sought to be addressed by an express exception. However, to respond to this concern, the Commission has clarified the comments to the rule by combining Comments [3] and

Proposed Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
Synopsis of Public Comments

TOTAL = 3 *A = 1* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					I can legally tell a client to ignore it, see *In re Berry* (1968) 68 Cal.2d 137.	[4] and adding the phrase "as permitted by paragraph (b)(2)" to the first sentence of this combined comment.

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on January 20, 2017 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

Comment

[1] There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code § 6068(a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and Rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and 1.16.

[3] Determining the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities.

~~[4]~~ Paragraph (b) thus authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust or invalid.

[~~5~~4] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

[~~6~~5] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.3
(See Current Rule 3-110(B))
Diligence

EXECUTIVE SUMMARY

In connection with the consideration of current rule 3-110 (Failure to Act Competently), the Commission has evaluated American Bar Association ("ABA") Model Rule 1.3 (Diligence) and relevant California disciplinary case law concerning the issue of diligence. While there is no direct counterpart in the current California rules, the concept of diligence is found in current rule 3-110 as a part of a lawyer's duty of competent representation.[1] The result of the evaluation is proposed rule 1.3 (Diligence).

Rule As Issued For 90-day Public Comment

Two main issues were considered in drafting proposed rule 1.3. The first issue was the threshold question of whether to retain diligence as a part of competence or move it to a standalone rule. The second issue was whether a specific duty of "promptness" should be included with a standalone rule on diligence.

Regarding the first issue, as of the 1983 amendments to the rules, the rule on failing to act competently has included a definition of competence that imposes an express duty of diligence in a lawyer's performance of legal services. Rule 3-110(B) states:

> For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

This standard has been routinely used by the State Bar Court in finding culpability for a competence violation when a lawyer possessed requisite knowledge and skills but nevertheless failed to perform services in a diligent manner.[2] (See, for example, *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377 and *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684.)

Although there is no deficiency in California law impairing the prosecution of disciplinary actions for lawyer misconduct involving diligence, the Commission is recommending that the concept of diligence be moved to a separate, standalone rule. This recommendation furthers that part of the Commission's Charter encouraging the Commission to consider proposed rule amendments that eliminate "unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard[3] with respect to professional

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[1] A separate executive summary is provided for the Commission's proposed amendments to rule 3-110. See the summary of proposed rule 1.1 (Competence).

[2] Similar to the current California rule, the Restatement 3d of the Law Governing Lawyers, § 16, Reporter's Note to Comment *d* treats diligence as being a component of competence and not a separate duty.

[3] Every jurisdiction, except California, has adopted Model Rule 1.3, has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence, or addresses diligence as a separate duty in its competence rule (Texas).

responsibility issues whenever possible." In addition to furthering the national uniformity goal of the Commission's Charter, proposed rule 1.3 would enhance respect for and confidence in the legal profession by highlighting the concept of diligence as a key professional responsibility, rather than subsuming it within the competence rule. "Perhaps no professional shortcoming is more widely resented than procrastination . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, comment [3].

Regarding the second issue of a specific duty of "promptness," the Commission is recommending that "promptness" not be included in proposed rule 1.3. The Commission believes that the combination of separate rules on competence and diligence adequately guards against the misconduct that is intended to be prohibited. Including the concept of "promptness" might lead to confusion when a lawyer is charged with both failing to act competently and failing to perform diligently. It is not clear what the concept of "promptness" adds if there are separate rules on competence and diligence. Most significantly, there are other rules that by their own terms already include a timing requirement of prompt compliance. As just two examples: (1) rule 3-500 (Communication) requires "promptly complying with reasonable requests for information" from a client; and (2) rule 3-700 (Termination of Employment) requires that upon termination of a client's representation, a lawyer must "[p]romptly refund any part of a fee paid in advance that has not been earned." The overlay of an across-the-board requirement of "promptness" would be redundant in the case of these rules and other rules that include their own timing requirement.

In addition to these two main issues, other proposed amendments include the following.

- In paragraph (a), clarifying that the prohibition concerning diligence is aligned with the longstanding standard on competence by specifically formulating the prohibition to provide that a lawyer shall not "intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable diligence."
- In paragraph (b), adding to the Model Rule's definition of "reasonable diligence," the qualification that a lawyer act "with commitment and dedication to the interest of the client."
- In Comment [1], providing a cross reference to a lawyer's duty to supervise in proposed rules 5.1 and 5.3.
- In Comment [2], providing a cross reference to the competence rule, proposed rule 1.1.

National Background – Adoption of Model Rule 1.3

As California does not presently have a direct counterpart to Model Rule 1.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

> **Illinois Rule 1.3 Diligence**
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.3: Diligence," revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf

Thirty-nine states have adopted Model Rule 1.3 verbatim.[4] Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.[5] two states have adopted a version of the rule that is substantially different to Model Rule 1.3.[6]

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment, the Commission reordered paragraph (a) to more clearly identify the fact that "gross negligence" is an existing basis for discipline. In paragraph (b), "without just cause" was deleted to avoid a misunderstanding there could be "just cause" to "unduly delay" a legal matter.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

[4] The forty-two states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[5] The seven jurisdictions are: Alabama, District of Columbia, Georgia, Massachusetts, New York, Oregon, and Virginia.

[6] The two states are: California and Texas.

Commission Member Dissent, Submitted by Robert Kehr, on the Recommended Adoption of Proposed Rule 1.3

OCTC has explained in its detailed objection to proposed Rule 1.3 why creating a stand-alone diligence Rule, separating diligence from the duty of competence where it now and always has been, will cause needless problems for it. *See, e.g., Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971) (treating diligence as part of the standard of care). I believe that this proposed Rule suffers from defects that go beyond OCTC's concerns.

Current rule 3-110 sets a standard for the quality of a lawyer's representation of a client. The rule 3-110 focus is on client harm because competence is not an abstraction (that is why a lawyer can meet the competence standard by obtaining sufficient learning to do a job properly, even if the lawyer lacks needed skill when accepting an engagement).

Placing diligence in a separate Rule will lead to claims that a lawyer has violated the Rule by delaying a client's work even in the absence of client harm. In fact, the delay might have been at the client's request. An opposing party, to whom the lawyer owes no fiduciary duties, could threaten disciplinary action to try to motivate the lawyer and could claim that it was injured by delay. Any such threat or claim would conflict with the duty of undivided loyalty owed only to the client.

In Commission discussions, my concern was answered by saying that delay in general would be covered by proposed Rule 3.2,[1] so proposed Rule 1.3 deals with client harm. This is not clear. Proposed Rule 3.2 by its terms deals only with litigation, and proposed Rule 1.3 says it applies "in representing a client." That easily is read as a temporal limitation rather than a reference to client injury.

Two drafting points: *First*, it is not clear what is meant by "unduly delay" in proposed paragraph (b) (it presumably means something other than client injury or else there would be no need to separate diligence from the competence Rule, but is it something more than feel-good language?). *Second*, current rule 3-110 permits discipline for lack of competence that is intentional, reckless or repeated, and proposed Rule 1.1 follows this, only adding a standard of gross negligence because that phrase has been used in disciplinary cases (and is taken to mean the same as "reckless". A single act of simple negligence does not suggest the lawyer is unfit to practice law and therefore never has served as the basis for professional discipline. Proposed Rule 1.3 repeats the standard of intentional, reckless, with gross negligence or repeated. Does this mean that two acts of negligence might satisfy either the Rule 1.1 standard, but the lawyer might not be subject to discipline if one is a lack of diligence coming under Rule 1.3?

Current rule 3-110 is not broken with respect to the need for diligence and does not need fixing. Proposed Rule 1.3 expresses a best practices concept. The application of the current rule is the subject of countless existing authorities and is free from doubt.

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[1] Rule 3.2 ("Delay of Litigation") states: "In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense."

I respectfully dissent from proposed Rule 1.3 and would leave diligence in Rule 1.1.

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.3

The Commission believes there are compelling reasons for having a separate rule on the duty of diligence. Both the Model Rules and the Restatement Third The Law Governing Lawyers (ALI 2000) as well as text books, ethics opinions and other resources consistently refer to the lawyer's duty of competence and diligence separately. See, e.g., Model Rule 1.7(b)(1); Restatement Third Law Governing Lawyers §16(2). Rule 1.3 is also consistent with the Commission's other proposed rules that refer to competence and diligence separately. See, e.g., proposed Rule 1.7(b)(1).

Every jurisdiction, except California and Texas, has adopted Model Rule 1.3 or has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence. Texas addresses diligence as a separate duty in its competence rule. Having a separate rule on the duty to act with reasonable diligence is consistent with the national standard and will enhance public protection and provide greater uniformity and understanding.

Rule 1.3 underscores that lawyers have a professional responsibility to be both competent and to act with commitment and dedication to the interests of the client. The law provides that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. See, e.g., Restatement Third Law Governing Lawyers §16, Comment d.

The dissenter is incorrect that diligence has always been subsumed with competence. California previously treated diligence in a separate paragraph (2) in former Rule 6-101 (1975-1983). Allowing the rules to continue to conflate competence and diligence would serve only to confuse lawyers about these separate and distinct obligations and result in less public protection. Proposed Rule 1.3 is consistent California case law. See Vapnek, et. al. California Practice Guide: Professional Responsibility (The Rutter Group. 2015) ¶¶. 6:92 ff.

The dissenter contends that the proposed Rule creates a standard for discipline that conflicts with the duty of undivided loyalty to the client. This has not been an issue, however, with ABA Model Rule 1.3 and the many states that have adopted it. Moreover, the language of the proposed Rule is not correctly read as creating any duty that would conflict with an attorney's duty of loyalty to the client. Paragraph (b) ties the neglect, disregard, or undue delay that would violate the Rule to "commitment and dedication to the interests of the client." Only where undue delay intrudes on commitment and dedication to client interests (which may occur even where there is no direct harm to the client's interests and the delay causes only needless anxiety to the client) would Rule 1.3 subject the attorney to discipline.

The problems the dissenter perceives in having a separate rule defining the lawyer's duty of diligence have simply not materialized in the 35 years Rule 1.3 has been in existence. It has not been shown, for example, that Rule 1.3 results in claims of delay by opposing counsel or creates confusion between the duty not to neglect the client's matter with the duty to reasonably expedite litigation. (See proposed Rule 3.2).

Having a separate rule on the duty of diligence provides needed public protection: “Perhaps no professional shortcoming is more widely resented than procrastination . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.” Model Rule 1.3, Comment [3].

COMMISSION REPORT AND RECOMMENDATION: RULE 1.3

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: George Cardona, Carol Langford

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.3, from which proposed Rule 1.3 is derived.]

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer

relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.3
Vote: 13 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.3
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable* diligence in representing a client.

(b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional diligence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.3)

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable* diligence ~~and promptness~~ in representing a client.

(b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional diligence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

~~[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.~~

[2] ~~A lawyer's work load must be controlled so that each matter can be handled competently~~See Rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

~~[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from~~

~~agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.~~

~~[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.~~

~~[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).~~

V. RULE HISTORY

The closest counterpart to proposed Rule 1.3 is current rule 3-110. Rule 3-110 prohibits a lawyer from reckless, intentional or repeated acts of incompetent provision of legal services. Competence for purposes of this rule is defined to include diligence.

A. History of Rule 3-110 Failing to Act Competently

Current rule 3-110 originated in 1975 with former rule 6-101, which prohibited a lawyer from "willfully or habitually"[1] performing legal services "if the lawyer knows or reasonably should know" that the lawyer "does not possess the learning and skill ordinarily possessed by lawyers" who perform "similar services" in the "same or similar locality." (Rule 6-101(1)).

[1] The "habitual" standard was derived from California case law which, at the time former rule 6-101 was adopted, was the primary California authority providing for discipline of incompetent members of the State Bar. See *Ridley v. State Bar* (1972) 6 Cal.3d 551, 560 [99 Cal.Rptr. 873]; *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [87 Cal.Rptr. 368]; *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-84 [58 Cal.Rptr. 564].

In a separate paragraph (2), former rule 6-101 also prohibited a lawyer from failing to "use reasonable diligence and his best judgment" in exercising his skill and learning "to accomplish, with reasonable speed, the purpose for which he was employed."

Rule 6-101 was amended in 1983 to state that a lawyer "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." The operative term "willfully" was replaced by "intentionally or with reckless disregard" to address concern that "willfully" is confused with the concept of a "willful breach" of the Rules under Business and Professions Code § 6077. The substitution avoided that confusion but preserved the meaning of the original language. (See Bates stamp page 00008 of "Memorandum In Support Of Request That Proposed Amendments To Rule 6-101, Rules Of Professional Conduct Of The State Bar Of California Be Approved By The Supreme Court Of California And Supporting Documents," August 11, 1983 ("1983 Memorandum").)

Another amendment in 1983 substituted "repeatedly" for "habitually." The word "repeatedly" was regarded as a more accurate description of the intended disciplinary standard.

The 1983 amendments also added a definition of competence. Rule 6-101(A)(1) provided that: "Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation." The language of the definition was intended to accomplish two objectives: (1) incorporate the concept of "diligence" into the definition; and (2) emphasize that competence means the lawyer's application and performance of skill and knowledge, and does not merely reflect that the lawyer possesses those qualities. On the latter point, the 1983 Memorandum states:

> "The rule's definition of competence focuses upon whether or not the lawyer has performed legal services on behalf of the client competently rather than upon innate or inherent abilities, skills or qualities. The rule provides for an examination of an attorney's conduct and actions, rather than an attorney's intent, in the performance of legal services." (See page 4 of the 1983 Memorandum.)

In 1989, former rule 6-101 was renumbered 3-110 as part of a comprehensive revision and renumbering of the entire rules. Rule 3-110 did not entail any major substantive revisions. (See page 31 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

Rule 3-110 was last amended in 1992. (See page 13 of Supreme Court File No. 24408, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991.) No substantive changes were made to paragraph (A) but the provision was stated more succinctly as: "A member

shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

In paragraph (B), the phrase "to perform legal services competently" in the definition was reduced to a single word, "competence." Also, the term "ability," defined in the 1987 version of rule 3-110(C), was merged into the definition of competence.

B. ABA Model Rule 1.3 Diligence

Although the origin and history of Model Rule 1.3 was not the primary factor in the Commission's consideration of proposed Rule 1.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 65 - 710, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. As discussed in OCTC's comment to proposed Rule 1.1, OCTC is concerned with segregating and separating diligence, competence, and supervision into separate rules.

   Commission Response: The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).

2. OCTC is concerned with Comments 1 and 2, because, as discussed, supervision of an attorney's employees, office, and case is part of lawyer competence. Further, these Comments are unnecessary, even if those concepts are separated, because each rule explains what it covers.

   Commission Response: The Commission believes it is important to retain Comments [1] and [2], which provide cross-references to the supervision rules [5.1 to 5.3] and the competence rule [1.3], respectively. It is important to provide those references because those concepts had both previously been found within the competence rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. OCTC is concerned with separating diligence, competence and supervision into separate rules. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Under the proposed new rules, California will have to develop new [case] law to distinguish among competence, diligence, and failure to supervise. It is noted the first Commission did not support distinguishing between competence and diligence.

     Commission Response: Separating the duty to act with reasonable diligence in a separate rule enhances public protection by providing greater uniformity and understanding as well as consistency with the rules in other jurisdictions. The distinction between competence and diligence is reflected in former rule 6-101. The Commission disagrees that new law will have to developed because the distinction among competence, diligence and the duty of supervision is already well developed in the law governing lawyers.

  2. A failure to perform diligently is a failure to perform competently. The is because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping. These proposals will cause OCTC to file more charges against each respondent, i.e. OCTC will have to file three [competence, diligence, supervision] charges for what used to be one charge.

     Commission Response: Highlighting the concept of diligence as an important professional responsibility rather than it being subsumed within the competence rule promotes public protection and furthers the Commission's charge in eliminating "unnecessary differences between California's rules and the rules used by a preponderance of the states." There is no reported history of charging or enforcement difficulties by having the duties of competence, diligence and supervision in separate rules. The distinction between these separate duties are well defined in the law and is not artificial.

  3. OCTC is concerned with Comments [1] and [2] because these Comments are unnecessary, even if those concepts are separated, because each rule explains what is covered.

     Commission Response: The Commission believes Comments [1] and [2] are necessary to explain the rule and are comparable to Comments [1] and [2] in Rule 1.1 which the Board of Trustees previously approved.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, eight public comments were received. Four comments agreed with the proposed Rule, one comment disagreed, and three comments agreed only if modified. During the 45-day public comment period, three public comments were received. Two comments agreed with the proposed rule, and one comment disagreed with the proposed rule. Public comment synopsis tables, with the Commission's responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V.A for a discussion of related California law. In addition to the foregoing, the Commission considered the following authorities:

- Business and Professions Code § 6128(b) (misdemeanor liability where attorney willfully delays a client's suit with a view to the attorney's own gain)
- *Butler v. State Bar* (1986) 42 Cal.3d 323, 328
- *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684
- *In re Sanders* (1999) 21 Cal.4th 697 [87 Cal.Rptr.2d 899]
- *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.3: Diligence," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.authcheckdam.pdf (Last accessed on 2/7/17.)

- Forty-two jurisdictions have adopted Model Rule 1.3 verbatim.[2] Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.[3] Two jurisdictions have not adopted a separate rule concerning diligence.[4]

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[2] The forty-two jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[3] The seven jurisdictions are: Alabama, District of Columbia, Georgia, Massachusetts, New York, Oregon, and Virginia.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a standalone rule that addresses the concept of diligence rather than retain it as a component of the definition of diligence as in current rule 3-110(B).

   - Pros: There are a number of reasons for California addressing the duty of diligence in a separate, standalone rule:

     (1) Every jurisdiction, except California, has adopted Model Rule 1.3, has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence, or addresses diligence as a separate duty in its competence rule (Texas). California should do the same for purposes of clarity and consistency.

     (2) Although competence and diligence are often viewed together, they are distinct concepts of professional responsibility. The Model Rules and the Restatement of the Law Governing Lawyers provide that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. See, e.g., Rest (3d) Law Governing Lawyers § 16, comment d.

     (3) As an example of point (3), competence requires that a lawyer have sufficient learning and skill to ascertain the applicable period of limitations; diligence requires that being aware of the period of limitations, the lawyer must not allow it to expire due the lawyer's neglect and inattention.

     (4) Both the Model Rules and the Restatement (as well as text books, ethics opinions and other resources) consistently refer to the lawyer's duty of competence and diligence separately. See, e.g., Model Rule 1.7(b)(1) ("the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"); Rest. (3d) Law Governing Lawyers §16(2) (a lawyer must . . . "act with reasonable competence and diligence.")

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[4] The two jurisdictions are: California and Texas. Current rule 3-110(B) includes diligence as a component of the definition of "competence." Texas Rule 1.1 (Competent and Diligent Representation) addresses diligence in a separate paragraph (b), which provides:

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(5) Having a separate rule on the duty of diligence that includes a prohibition against undue delay provides needed public protection: "Perhaps no professional shortcoming is more widely resented that procrastination . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, Comment [3].

(6) California case law is consistent with the requirements of Model Rule 1.3. See Vapnek, et. al. CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group. 2015) ¶¶. 6:92 ff.

(7) Having a separate rule on diligence will not materially increase the risk that lawyers will be disciplined for an act of simple negligence. Lack of dedication to a client's matter may be the basis for civil liability but it is not the same as a negligent act or omission under tort law. Rule 1.3 is concerned with indifference and lack of dedication in carrying out the obligations the lawyer has assumed and furthers the lawyer's fiduciary duty of loyalty to zealously represent the client and maintain the client's trust and confidence.

- Cons: There are several reasons not to adopt a standalone rule concerning diligence:

(1) There is good advice in Model Rule 1.3 and in its Comments. As an example, Comment [3] begins: "Perhaps no professional shortcoming is more widely resented than procrastination." However, to the extent that Rule 1.3 were to be applied to the quality of a lawyer's representation of a client, these lawyer's duties are well-understood as being part of current rule 3-110 and new Rule 1.1. Consequently, Rule 1.3 would amount only to advice about best practices and good client relations.

(2) From a disciplinary standpoint, all that is needed is a rule that provides a basis for disciplining a lawyer whose tardiness causes client harm, and there already are two rules that serve that purpose.

The first is proposed Rule 1.1.

In addition, proposed Rule 1.16 [3-700] states the only bases on which a lawyer may terminate a lawyer-client relationship, so that a lack of diligence amounting to client abandonment also can violate rule 3-700/1.16. See, *e.g.*, *In the Matter of Doran*,3 Cal. State Bar Ct. Rptr. 871, 1998 Calif. Op. LEXIS 6 (1998) (lawyer left a social security benefits hearing because he was "too upset" at a ruling to continue; the hearing went on in the lawyer's absence; the client's claim was denied; lawyer found to have violated rules 3-110 and 3-700) and *In the Matter of Aulakh*, 3 Cal. State Bar Ct. Rptr. 690, 1997 Calif. Op. LEXIS 190 (1997) (lawyer held to have violated rules 3-110 and 3-700 for failing to pursue appeal, leading to a default, after having filed a notice or appearance).

(3) The harm in having a Rule 1.3 divorced from any client harm – as this proposed rule would be – is that it would create a standard for criticizing a lawyer that would be inconsistent with the duty of undivided loyalty to the client. Lawyers constantly and intentionally prioritize client needs based on a host of factors, including the lawyer's personal life, and should not have to defend themselves when they have done so unless the lack of diligence creates client harm or violates a court order. A rule of that scope would go beyond any conduct that calls into question a lawyer's fitness to practice law.

(4) Promptness and diligence should be retained where they are. The Restatement 3d of the Law Governing Lawyers, § 16, Reporter's Note to Comment *d* treats diligence as being a component of competence and not a separate duty, as does current rule 3-110. This is the best resolution. Lawyers should aspire to be prompt, but that does not make it a proper subject of professional discipline.

2. Recommend adoption of a Comment that cross-references proposed Rule 1.1 [3-110], concerning a lawyer's duty to provide competent representation.

    - Pros: In light of the duty of diligence being a component of the definition of "competence" in current rule 3-110(B), a cross-reference to that rule is appropriate.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. There were no concepts the Commission considered that were rejected. But see Section IX.E, below.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

The Commission majority concluded that having a separate rule on diligence will not materially increase the risk that lawyers will be disciplined for an act of simple negligence. Lack of dedication to a client's matter may be the basis for civil liability but it is not the same as a negligent act or omission under tort law. Rule 1.3 is concerned with indifference and lack of dedication in carrying out the obligations the lawyer has assumed and furthers the lawyer's fiduciary duty of loyalty to zealously represent the client and maintain the client's trust and confidence.

Those opposing the rule, on the other hand, take the position that proposed Rule 1.3 would create a novel standard that would move diligence as a requirement of the

standard of care and turn it into a duty to the legal system. By divorcing promptness and client harm, this Rule would create the opportunity for a lawyer to be disciplined, or for the lawyer's conduct to be measured for civil purposes (such as in fee collection) by conduct that did not harm and might even have aided the client. Also from a civil standpoint, this Rule if adopted will be used to allege that each unexplained lawyer delay amounts to a breach of fiduciary duty.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

The Commission considered but rejected a rule version that more closely aligned with Model Rule 1.3.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.3 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.3 in the form attached to this Report and Recommendation.

Proposed Rule 1.3 Diligence
Synopsis of Public Comments

TOTAL = 3	A = 2
	D = 1
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-23d	Sall, Spencer, Callas & Krueger (Sall) (01-09-17)	Yes	A		Support the revision of proposed rule 1.3 that moved "with gross negligence" to the end of the series of intent elements in subdivision (a). However, proposed rule 1.1, as approved by the Board, does not contain this revision, such that the language of the two rules no longer parallel each other. The two rules should parallel each other if for no other reason than to ensure the "intentionally, repeatedly, recklessly or with gross negligence" standard is consistently interpreted across the rules.	No response required.
Y-2016-21c	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (1-9-17)	Yes	D		1. OCTC is concerned with separating diligence, competence and supervision into separate rules. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Under the proposed new rules, California will have to develop new [case] law to distinguish among competence, diligence, and failure to supervise. It is noted	1. Separating the duty to act with reasonable diligence in a separate rule enhances public protection by providing greater uniformity and understanding as well as consistency with the rules in other jurisdictions. The distinction between competence and diligence is reflected in former rule 6-101. The Commission disagrees that new law will have to developed because the distinction

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the first Commission did not support distinguishing between competence and diligence.	among competence, diligence and the duty of supervision is already well developed in the law governing lawyers.
					2. A failure to perform diligently is a failure to perform competently. The is because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping. These proposals will cause OCTC to file more charges against each respondent, i.e. OCTC will have to file three [competence, diligence, supervision] charges for what used to be one charge.	2. Highlighting the concept of diligence as an important professional responsibility rather than it being subsumed within the competence rule promotes public protection and furthers the Commission's charge in eliminating "unnecessary differences between California's rules and the rules used by a preponderance of the states." There is no reported history of charging or enforcement difficulties by having the duties of competence, diligence and supervision in separate rules. The distinction between these separate duties are well defined in the law and is not artificial.
					3. OCTC is concerned with Comments [1] and [2] because these Comments are unnecessary, even if those concepts are separated, because each rule explains	3. The Commission believes Comments [1] and [2] are necessary to explain the rule and are comparable to Comments [1] and [2] in Rule 1.1 which the Board

TOTAL = 3
A = 2
D = 1
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					what is covers.	of Trustees previously approved.
Y-2016-7a	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Yes	A	1.3	COPRAC supports the adoption of proposed Rule 1.3 as revised.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4
(Current Rule 3-500)
Communication with Clients

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-500 (Communication) in accordance with the Commission Charter, including consideration of the national standard of the ABA counterpart, Model Rule 1.4 (Communications). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed Rule 1.4 (Communication with Clients).

Rule As Issued For 90-day Public Comment

Proposed rule 1.4 is generally consistent with current rule 3-500 but has added clarifying language from ABA Model Rule 1.4 which has been adopted by the majority of jurisdictions. This language is intended to enhance public protection by more clearly stating a lawyer's obligations to clients with regard to communication.

Paragraph (a)(1) provides a duty to inform clients when written disclosure or informed consent is required.

Paragraph (a)(2) provides a duty to discuss the means by which to accomplish a client's representation objectives.

Paragraph (a)(3) most closely resembles current rule 3-500 and provides a duty to keep the client reasonably informed about significant developments relating to the representation, including providing access to significant documents.

Paragraph (a)(4) requires a lawyer to advise the client about any ethical limitations the lawyer faces when a client expects assistance barred by the rules or the law.

Paragraph (b) provides a duty to sufficiently explain a matter to a client so that the client can make informed decisions regarding the representation.

Paragraph (c) permits a lawyer to delay transmission of information to the client if doing so would prevent a client from harming himself or others.

Paragraph (d) provides that a lawyer's obligation to provide information or documents is subject to any applicable order, agreement, or law.

Comment [1] provides that a lawyer will not be disciplined for failing to disclose insignificant or irrelevant information to a client.

Comment [2] provides that a lawyer may provide documents or information electronically and that the rule does not prevent the attorney for recouping expenses for such in a subsequent legal proceeding.

Comment [3] provides that paragraph (c) applies only during the representation and does not alter a lawyer's duties at the termination of the representation.

Comment [4] provides that the rule does not affect a lawyer's obligation to provide work product to a client.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made a clarifying change in paragraph (d) to include a reference to "decisional law" in order to carry forward the concept found in the discussion section of the current rule 3-500, that a lawyer need not provide information to the client where there is an exception permitted by decisional or statutory law. A non-substantive stylistic change was also made.

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.4 [3-500]

Commission Drafting Team Information

Lead Drafter: Lee Harris
Co-Drafters: Nanci Clinch, Robert Kehr

I. CURRENT CALIFORNIA RULE

Rule 3-500 Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.

I. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.4 [3-500]
Vote: 15 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.4 [3-500]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

II. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.4 [3-500] Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,* is required by these Rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

III. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-500)

Rule 1.4 [3-500] Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,* is required by these Rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) ~~A member shall~~keep ~~a~~the client reasonably* informed about significant developments relating to the ~~employment or~~ representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed~~.~~; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment~~Discussion~~

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code~~,~~ § 6068~~, subd.~~ (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. ~~Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined~~

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

~~A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.~~

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule ~~3-500~~ is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the ~~member~~lawyer to provide work product to the client shall be governed by relevant statutory and decisional law. ~~Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.~~

IV. RULE HISTORY

In 1989, a new rule 3-500, based in part on ABA Model Rule 1.4(a), was approved. This rule was intended to set forth the duty of a lawyer to keep clients reasonably informed as to the status of their matter. The rule had been proposed because of the frequency of client complaints relating to the failure to adequately communicate with a client.

Rule 3-500 is consistent with Business and Professions Code § 6068(m), which requires a lawyer to promptly respond to reasonable client inquiries and to keep clients reasonably informed of significant developments in their matters.[1]

In 1997, amendments to rule 3-500 were made following the State Bar's submission to the Supreme Court of a proposed new rule 3-520 (Provision of Documents to Client). That rule was proposed to respond to California Business and Professions Code § 6068, subdivision (n), which states:

> It is the duty of an attorney . . .
>
> (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

[1] Bus. & Prof. Code § 6068(m) provides it is the duty of an attorney:

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

The Supreme Court declined to approve proposed rule 3-520 but approved the amendments to rule 3-500 that incorporated the substance of the rejected rule. These amendments became operative in 1997. No further amendments have been made to rule 3-500.

V. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC is concerned that subsection (a)(3) excludes requiring that attorneys keep a client reasonably informed about significant developments relating to the employment and not just the representation. The current rule requires an attorney to keep a client informed about significant developments relating to the employment or representation. It is not clear that representation in the new proposed rule includes issues about the employment. Recently, the State Bar Court's hearing department dismissed a 6068(m) allegation that an attorney failed to inform the client that her dental malpractice case fell under MICRA limitations. The hearing department found that this failure did not constitute a failure to keep his client informed of significant developments. It held that the attorney's failure to advise his client that her lawsuit fell under MICRA fee limitations could have been classified as a competency issue pursuant to rule 3-110(A), but not a development. (*In the Matter of Bolanos*, Case No. 15-O-10896.) Prior to the enactment of § 6068(m), failures to communicate were recognized as a common law duty and as part of competent performance. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680.) Since the term employment is in the current rule, some attorneys will argue that the new rules removed any requirement that was included by the language in the old rule. (See e.g. *In the Matter of Hindin*, supra, 3 Cal. State Bar Ct. Rptr. at p. 684.)

   Commission's Response: The Commission did not make the suggested change. The Commission has largely substituted "representation" for "employment" throughout the Rules except where the word "employment" is used to signify a situation where a lawyer is employed by an entity to provide exclusive legal services, e.g., government employment.

2. OCTC is concerned with subsection (c) of this rule, which permits a lawyer to delay transmitting information to a client if the lawyer believes that the client would be likely to react in a way that may cause imminent harm to the client or others. This will probably be used to excuse failures to communicate by simply claiming that the attorney subjectively believed that the client would likely react in a way that may cause imminent harm to the client or others. Attorneys are not trained in psychology and this subsection would make enforcing the duty to communicate much more difficult and would approve the violation of an important duty of the attorney.

Commission's Response: The Commission has not made the suggested change. Proposed Rule 1.3 addresses a lawyer's duty to pursue the client's interest, including the requirement that a lawyer act with commitment and dedication to the interests of the client. The Commission believes the conduct the commenter describes is addressed by Rule 1.3.

3. Comment [1] is unnecessary because subsection (a)(3) already states that the communication requirement is about significant developments.

   Commission's Response: The Commission has not made the suggested change. The Commission believes Comment [1] provides important guidance on the application of the rule, as well as a citation to the corresponding State Bar Act provision governing lawyers' communications with clients.

4. OCTC supports Comments [2], [3], [4].

   Commission's Response: No response required.

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

VI. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. One comment agreed with the proposed Rule, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

State Bar Act. There are two sections of the State Bar Act that contain the same substance as current rule 3-500: § 6068(m) (duty to respond promptly to client requests concerning status of the matter) and § 6068(n) (duty to provide copies of certain documents to client).

Common Law Duty To Communicate. Although Business and Professions Code § 6068(m) was added by statute in 1986 and rule 3-500 was promulgated in 1989, members have been subject to a common law duty to communicate set forth in discipline case law that predates these provisions See *In the Matter of Respondent C* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, at pp. 450-451 [1991 WL 63249] ("Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. The Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)" (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor v. State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky v. State Bar*

(1984) 36 Cal.3d 116, 124-127.) This common law duty to communicate has been affirmed in *Aronin v. State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of § 6068(m), as falling within the parameters of an attorney's oath and duties, under the general provisions of § 6068(a) (duty to support the laws). (See e.g., *Taylor v. State Bar*, *supra*; *Aronin v. State Bar*, *supra*.)

Duty To Communicate With Non-client. Although 6068(m) and rule 3-500 state a duty owed to a "client," case law has interpreted the duty to communicate to apply to a non-client in at least one special circumstance. In *Butler v. State Bar* (1986) 42 Cal.3d 323,329 [228 Cal.Rptr. 499], the Supreme Court found that an attorney's duty to communicate includes the duty to advise people who, to the attorney's knowledge, reasonably believe they are clients, that they are, in fact, not clients. *Butler* was followed in *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar. Ct. Rptr. 547; and Cal. State Bar Ops. 2003-164, 2003-161, and 1995-141. *In the Matter of Kaplan* clarified that the *Butler* standard does not go to the lawyer's actual knowledge in the subjective sense, but facts from which the lawyer reasonably should have recognized the person's belief in the existence of a lawyer-client relationship.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for Model Rule 1.4, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.4: Communication," revised September 27, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.authcheckdam.pdf [Last visited 2/7/2016]

- Eighteen jurisdictions have adopted Model Rule 1.4 verbatim;[2] Five jurisdictions have retained the former, pre-Ethics2000 version of Model Rule 1.4;[3] Twenty jurisdictions have adopted a version that is substantially similar to Model Rule 1.4;[4] seven jurisdictions have adopted a version of Model Rule 1.4 with substantial differences or additions.[5] Only California has not adopted Model Rule 1.4.

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[2] The jurisdictions are: Colorado, Connecticut, Delaware, Illinois, Iowa, Kentucky, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wyoming.

[3] The jurisdictions are: District of Columbia, Mississippi, Michigan, Oregon, and Texas.

[4] The jurisdictions are Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Missouri; New Hampshire, New Mexico, New York, North Dakota, Virginia, Washington, and Wisconsin.

[5] For example, Alaska adds a provision requiring notice of receipt of settlement proceeds; Louisiana adds provision requiring that a lawyer who provides financial assistance to a client provide written disclosures of the terms on which such assistance is being provided; Nevada

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

A. Concepts Accepted (Pros and Cons):

1. Adopting paragraph (a) of Model Rule 1.4, revised to conform to provisions in the proposed Rules (e.g., paragraph (a)(1) references "disclosure" in addition to "informed consent") or to carry forward provisions in current rule 3-500 (e.g., paragraph (a)(3)'s reference to "significant developments"). In contrast to current rule 3-500 and Business and Professions Code § 6068(m), proposed paragraph (a) provides a more detailed statement of a lawyer's obligations to clients with regard to communication. Paragraph (a)(1) states a duty to inform clients when written disclosure or informed consent is required. Paragraph (a)(2) states a duty to discuss the means by which to accomplish a client's representation objectives. Paragraph (a)(3) most closely resembles current rule 3-500 and provides a duty to keep the client reasonably informed about significant developments relating to the representation, including providing access to significant documents. Paragraph (a)(4) requires a lawyer to advise the client about any ethical limitations the lawyer faces when a client expects assistance barred by the rules or the law.

    - Pros: The change improves public protection by identifying with specificity a lawyer's communication obligations, including the duty to inform clients about important aspects of cases. This specificity should also enhance lawyers' compliance by clearly identifying their obligations. Carrying forward current terminology (i.e., "significant developments") retains a provision around which case law has developed.

    - Cons: There is no evidence that current rule 3-500 has caused any problems of compliance or enforcement.

2. Adopting paragraph (b) of Model Rule 1.4, which requires a lawyer to explains matters so that the client can make informed decisions regarding the representation.

    - Pros: This is an important concept. Only a client can make substantive decisions involving the representation, e.g., the decision to waive a jury trial or to settle a civil action or accept a plea bargain in a criminal matter.

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adds a lawyer biographical data disclosure requirement; New Jersey adds provisions requiring the lawyer to inform a client on how the client may communicate with the lawyer and where the client files are kept; Ohio adds provisions requiring disclosure of whether the lawyer maintains professional liability insurance and information about fee divisions; Rhode Island adds "informed consent" requirement; South Dakota also adds a professional liability insurance disclosure requirement.)

(See proposed Rule 1.2, scope of representation and allocation of authority between lawyer and client). However, a client can only make an informed decision if the client's lawyer has provided the client with sufficient information and explanation to weigh the advantages and disadvantages of a particular course of conduct, and to understand the reasonably available alternative courses of action and their pros and cons. Specifying this duty in the proposed Rule should therefore promote compliance with the other Rules, i.e., those that require informed consent or disclosure, and thus enhance public protection. The Commission believes this is consistent with existing case law and that stating these requirements in the Rule will enhance public protection.

- Cons: There is case law that recognizes these lawyer duties. Again, there is no evidence that current rule 3-500 has caused any problems of compliance or enforcement.

3. Adopting paragraph (c), which permits a lawyer to delay transmission of information if "the client would be likely to react in a way that may cause imminent harm to the client or others."

   - Pros: This provision has no counterpart in the blackletter of either current rule 3-500 or Model Rule 1.4. However, Model Rule 1.4 so provides in its Comment [7]. First, the exception is limited: a lawyer may delay transmission of information only if it would cause *imminent* harm to the client or others. This is a public protection measure. Second, because it creates an implied exception to the duty to communicate with a client, the provision belongs in the blackletter rather than in a Comment as in the Model Rule. Paragraph (c) will permit a lawyer to exercise reasonable judgment without suffering disciplinary risk in doing so.

   - Cons: Although the provision appears to be beneficial, it is not clear how a lawyer is to determine when such harm is "imminent." This provision creates the potential for swallowing the duty to communicate.

4. Adopting paragraph (d), which provides an exception to the duty to provide information and documents to the client when non-disclosure is permitted by protective order, non-disclosure agreement, or statutory or decisional law.

   - Pros: This provision simply carries forward the substance of current rule 3-500, Discussion ¶. 3. It belongs in the blackletter text because it provides an exception to the proposed rule's general duty to communicate with the client.

   - Cons: None identified.

5. Adopt several Comments that provide interpretative guidance on the meaning of the Rule's blackletter provisions and scope of their application.

- Pros: All of the Comments conform to the Commission's Charter principle that Comments be used sparingly to elucidate the blackletter and not be conflict with it. Comment [1] clarifies that whether particular information is a "significant development" is a contextual inquiry. Comment [2] clarifies that subparagraph (a)(3)'s requirement of providing significant documents can be satisfied by providing electronic copies and that the lawyer can recover the cost from the client. (Compare current rule 3-500, Discussion ¶. 2. Comment [3] clarifies that, when paragraph (c) applies, it does not supersede obligations to provide the client file at the termination of the representation. Comment [4] clarifies that statutory and decisional law govern the lawyer's duties with respect to providing the client with work product.

- Cons: The black letter is sufficiently specific so as to obviate the need for explanatory Comments.

B. Concepts Rejected (Pros and Cons):

1. Merge the concepts in current rule 3-500 (communication) and 3-510 (communication of settlement offers) in a single rule.

    - Pros: The change would bring California in line with the ABA Model Rule 1.4 and every other jurisdiction in the country, none of which has a separate rule regarding communication of settlement offers.

    - Cons: The concept in current rule 3-510, the communication of settlement offers and plea bargains to the client, is sufficiently important that it should continue to be stated in a separate, standalone rule. As explained in the Rule 1.4.1 [3-510], a lawyer's communicating such information is critical to enable a client to make an informed choice about a decision that only the client has authority to make under proposed Rule 1.2 and California decisional law. Retaining the concept of current rule 3-510 is not an "unnecessary difference" between the California Rules and the rules in a preponderance of jurisdictions that should be eliminated.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

Substantive changes to current rule 3-500 include: (i) Paragraph (a)(1)'s requirement to promptly inform clients of any decision or matter when written disclosure or informed consent is required by the rules; (ii) paragraph (a)(2)'s requirement that a lawyer reasonably consult with the client about the objectives of the representation; (iii) paragraph (a)(4)'s requirement that the lawyer advise the client of limitations on the lawyer's ability to assist or advise the client in criminal or fraudulent conduct (see

proposed Rule 1.2.1); and (iv) paragraph (c)'s exception to the Rule when the client will likely react in a way to cause imminent harm.

D. Non-Substantive Changes to the Current Rule:

The addition of paragraph (d) concerning the application of statutory or decisional law that might preclude compliance with the Rule is not a substantive change as it carries forward current rule 3-500, Discussion ¶.3. The formatting and structure of proposed Rule 1.4 diverges markedly from current rule 3-500 but is consistent with the approach in other jurisdictions, all of which have adopted the formatting and structure of the Model Rules. All other changes, including the numbering of the Rule to conform with the Model Rule numbering scheme and the substitution of "lawyer" for "member" are non-substantive changes.

E. Alternatives Considered:

The only alternative considered was to retain the format and content current rule 3-500.

IX. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.4 [3-500] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.4 [3-500] in the form attached to this Report and Recommendation.

Proposed Rule 1.4 [3-500] Communication with Clients
Synopsis of Public Comments

TOTAL = 4 *A = 1* *D = 0* *M = 3* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43g	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	1.4	Supports adoption of proposed Rule 1.4.	No response required.
X-2016-66c	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(c), (d), cmt.	1. Subsection (c) should clarify the type of harm (bodily or otherwise). 2. The comment should address subsection (d) by stating that a lawyer shall not seek protective order or non-disclosure agreement that limits the duty to communicate unless it fulfills the objectives of representation is least restrictive on the lawyer's duty to communicate.	1. The Commission did not make the suggested change. The rule version circulated for public comment permits the delay of transmission to prevent imminent harm to the client or others. The Commission does not understand how modifying "harm" with the phrase "bodily or other" would provide additional protection to the client or the public. 2. The Commission did not make the suggested change. Proposed Rule 1.3 addresses a lawyer's duty to pursue the client's interest, including the requirement that a lawyer act with commitment and dedication to the interests of the client. The Commission believes the conduct the commenter describes is addressed by Rule 1.3. It is well established that lawyers have the duty to zealously

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						represent their clients within the bounds of the law (see, e.g., *Hawk v. Superior Court*, 42 Cal. App.3d 108, 126 (1974)), and Rule 1.4 doesn't need require a restatement of this concept.
X-2016-93a	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(d), cmt. 4	Paragraph (d) should carry forward the concept found in the discussion section of the current rule 3-500 that a lawyer need not provide information to the client where there is an exception permitted by decisional or statutory law	The Commission agrees and has revised paragraph (d) to include a reference to "decisional law."
X-2016-104g	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(a)(3), (c), cmt. 1	1. Subsection (a)(3) excludes requiring attorney to keep client informed about employment, not just the representation. 2. Subsection (c) will be used to excuse failures to communicate.	1. The Commission did not make the suggested change. The Commission has largely substituted "representation" for "employment" throughout the Rules except where the word "employment" is used to signify a situation where a lawyer is employed by an entity to provide exclusive legal services, e.g., government employment. 2. The Commission has not made the suggested change. Proposed Rule 1.3 addresses a lawyer's duty to pursue the client's interest, including the requirement that a lawyer act with commitment and

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						dedication to the interests of the client. The Commission believes the conduct the commenter describes is addressed by Rule 1.3.
					3. Comment 1 is superfluous.	3. The Commission has not made the suggested change. The Commission believes Comment [1] provides important guidance on the application of the rule, as well as a citation to the corresponding State Bar Act provision governing lawyers' communications with clients.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.1
(Current Rule 3-510)
Communication of Settlement Offers

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-510 (Communication of Settlement Offer) in accordance with the Commission Charter. As the ABA Model Rules have no black letter rule on a lawyer's duty to communicate settlement offers, the Commission considered approaches taken in other jurisdictions with regard to communication of settlement offers. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed Rule 1.4.1 (Communication of Settlement Offers).

Rule As Issued For 90-day Public Comment

Proposed rule 1.4.1 carries forward the substance of current rule 3-510 but has been renumbered to correspond to the ABA Model Rules. The renumbering will help lawyers from other jurisdictions authorized to practice law in California to more easily find corresponding California rules to aid in their determination of whether California imposes different duties. Moreover, it will help California lawyers research case law and ethics opinions that address corresponding rules in other jurisdictions. This will assist California lawyers in complying with their duties, particularly when California does not have such authority interpreting the California rule.

Paragraph (a)(1) provides a duty to promptly inform criminal clients regarding certain enumerated settlement offers. Paragraph (a)(1) would eliminate any ambiguity from current rule 3-510 about whether dispositive offers that fall short of a "plea bargain," e.g., offers made in a pre-charge or pre-indictment context, must also be communicated to a client.

Paragraph (a)(2) carries forward the language of current rule 3-510 and provides a duty to promptly inform a client regarding a written settlement offer in non-criminal matters.

Paragraph (b) carries forward the language of current rule 3-510 and defines to whom a lawyer must communicate settlement offers for purposes of this rule.

The comment carries forward part of the discussion in current rule 3-510 and provides a duty to communicate oral settlement offers in civil cases if the offer constitutes a "significant development" pursuant to proposed Rule 1.4.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to proposed Rule 1.4.1 and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.4.1 [3-510]

Commission Drafting Team Information

Lead Drafter: Howard Kornberg
Co-Drafters: Tobi Inlender, Carol Langford

I. CURRENT CALIFORNIA RULE

Rule 3-510 Communication of Settlement Offers

(A) A member shall promptly communicate to the member's client:

(1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this Rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of Rule 3-500.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.4.1 [3-510]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.4.1 [3-510]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.4.1 [3-510] Communication of Settlement Offers

(a) A lawyer shall promptly communicate to the lawyer's client:

(1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

(b) As used in this Rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under Rule 1.4.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-510)

Rule 1.4.1 [3-510] Communication of Settlement ~~Offer~~Offers

(a)~~(A)~~ A ~~member~~ lawyer shall promptly communicate to the ~~member's~~lawyer's client:

(1) ~~All~~all terms and conditions of ~~any~~a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and

(2) ~~All~~all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

(b)~~(B)~~ As used in this ~~rule~~Rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment~~Discussion~~

~~Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.~~

~~Any~~An oral ~~offers~~offer of settlement made to the client in a civil matter ~~should~~must also be communicated if ~~they are~~it is a "significant~~" for the purposes of rule 3-500.~~ development" under Rule 1.4.

V. RULE HISTORY

Current rule 3-510 originally became operative in 1979 as rule 5-105. The 1979 version required a lawyer to promptly communicate to the lawyer's client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. Rule 5-105 defined "client" to include a person who possesses authority to accept a settlement offer or, in a class action, the class representative.

The rule was revised and renumbered as rule 3-510, operative May 26, 1989, as part of the comprehensive revision of the entire rules. A new provision required that plea offers in criminal matters be promptly communicated, whether written or oral. A new Discussion paragraph cross-referenced rule 3-500, which requires that a lawyer inform the client about significant developments related to the representation, and clarified that oral offers of settlement in a civil matter should be communicated to the client if "'significant' for purposes of rule 3-500." The State Bar's memorandum to the Supreme Court explained:

> Proposed rule 3-510 continues the requirement that an attorney promptly communicate to the client all written settlement offers.
>
> It is proposed that the rule be divided into paragraphs to make it easier to follow. The rule has been expanded to require that an oral offer of settlement made in a criminal matter be promptly communicated to the client because the negotiations in criminal cases are most often oral.

(See page 37 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.).

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule and its Comments.

  Commission's Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule and two comments agreed only if modified. A

public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Business and Professions Code section 6068(m) provides that it is the duty of an attorney: "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

California Rule of Professional Conduct 3-310(D) provides:

> "(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client."

B. ABA Model Rule Adoptions

The ABA Model Rules do not have a black letter rule on a lawyer's duty to communicate settlement offers. No black letter rule in the ABA Model Rules of Professional Conduct expressly addresses a lawyer's duty to *communicate* settlement offers to a client. However, there are other rules or comments in the Model Rules that expressly relate to settlement.

- ABA Model Rule 1.2(a) states: ". . . a lawyer shall abide by a client's decision whether to settle a matter."

- ABA Model Rule 1.4, Comment [1] provides that a lawyer who receives an offer of settlement in a civil controversy or criminal case "must promptly inform the client unless the client has previously indicated that the proposal/offer will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer."

In addition, other Model Rules impliedly impose obligations concerning settlement:

- ABA Model Rule 1.4(a)(1) provides that a lawyer shall "promptly inform the client of any decision or circumstances with respect to which the client's informed consent," as defined in Rule 1.0(e) is required by these Rules. A lawyer cannot settle a client's matter without the client's informed consent. (See Model Rule 1.2(a), above. See also *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156] (Lawyer not permitted by virtue of having been retained by client to impair the client's substantial rights).)

- ABA Model Rule 1.4(a)(3) provides that a lawyer . . . "shall keep the client reasonably informed about the status of a matter."

The ABA State Adoption Chart for the ABA Model Rule 1.2, modified October 28, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf [Last visited 2/7/17]

The ABA State Adoption Chart for the ABA Model Rule 1.4, modified May 13, 2015, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.pdf

- Seven jurisdictions include a blackletter provision that requires attorneys to communicate an offer of settlement or plea bargain.[1]

According to the ABA Chart, 45 jurisdictions have adopted Model Rule 1.4 with identical or slightly modified language.

A. Other Jurisdictions Approaches to Settlement Offers

- **Michigan Rule 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer.**

  (a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this Rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. *A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyers, with respect to a plea to be entered*, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

* * * * *

- **Michigan Rule 1.4(a) Communication**

  (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. *A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.* (Emphasis added).

[1] These jurisdictions are: Arizona, California, District of Columbia, Hawaii, Michigan, New York, Virginia.

- **Minnesota Rule 1.4, Comment [2]**, provides:

  [2] If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. *For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance* unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a). (Emphasis added).

- **District of Columbia** Rule 1.4(a) adds the following language to MR 1.4(a): "A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case, shall inform the client promptly of the substance of the communication."

- **Hawaii Rule 1.4(a)(6)** provides a lawyer shall: "promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case . . ."

- **New York** Rule 1.4(a)(1)(iii) provides that a lawyer shall "promptly inform" the client of "material developments in the matter, including settlement or plea offers."

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

A. Concepts Accepted (Pros and Cons):

1. Retain the dichotomy in current rule 3-510 between plea offers in criminal cases (all offers must be communicated) and settlement offers in civil cases (all *written* offers and any "significant" offer must be communicated).

   - Pros: To require that every offer of settlement in a civil matter, regardless of its merit, be communicated to the client might superficially appear to be reasonable but such a requirement is impracticable in light of the realities of negotiation. A lawyer should not be required to break off potentially fruitful negotiations to communicate every offer, even those that are insignificant. Further, requiring communication of any civil offer would conflict with Business and Professions Code section 6103.5(a).[2]

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[2] Bus. & Prof. Code § 6103.5(a) provides:

(a) A member of the State Bar shall promptly communicate to the member's client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. As used in this section, "client" includes any person employing the member of the State Bar who possesses the authority to accept an offer of settlement, or in a class action, who is a representative of the class.

Communication of all proposed plea bargain or other dispositive offers to an accused is required for two reasons. First, give and take negotiations are less common in criminal matters and second, because the accused's liberty interests are at stake, the accused should be a participant in any negotiations that occur.

- Cons: A lawyer's fiduciary obligation to best serve and protect the client requires that all settlement offers be communicated to the client for consideration and response. (See also Section IX.B.2, below.)

2. Include a more specific description of what must be communicated to an accused in a criminal matter: "any proposed plea bargain or other dispositive offer".

   - Pros: Eliminates ambiguity about whether dispositive offers that fall short of a "plea bargain," e.g., an offer made in a pre-charge or pre-indictment context, must also be communicated to an accused.

   - Cons: None identified.

3. Delete rule 3-510, Discussion ¶.1.[3]

   - Pros: Discussion ¶.1 does not interpret the black letter or explain how the rule should be applied. It merely provides a rationale for why offers in criminal and civil matters are treated differently.

   - Cons: None identified.

4. Retain rule 3-510, Discussion ¶.2, as revised, as the only comment to proposed Rule 1.4.1.

   - Pros: First, the Comment is in current rule 3-510. Second, the Comment provides an important clarification of a lawyers duties under proposed Rule 1.4, which requires the communication of "significant developments" in a matter to the client. Although proposed Rule 1.4.1 does not require communication of oral settlement offers, the Comment clarifies that proposed Rule 1.4's requirement that "significant developments" be communicated mandates that any oral offer that is a "significant development" must also be communicated to the client. Third, cross-referencing the duty to communicate significant developments in Rule 1.4 removes ambiguity of settlement offers that are "significant" in the current rule Discussion, which provides no explanation of what a "significant offer" is. Fourth, in response to the "Con"

[3] Rule 3-510, Discussion ¶.1 provides:

> Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

that the requirement belongs in the blackletter, it is in a comment because the communication is required under proposed Rule 1.4, not Rule 1.4.1.

- Cons: If there is a duty to communicate an oral offer in a civil case that is a "significant development," it belongs in the blackletter of the Rule.

B. Concepts Rejected (Pros and Cons):

1. Merge current rule 3-510 [proposed Rule 1.4.1] with current rule 3-500 [proposed Rule 1.4].

   - Pros: A merger of the two rules would put all of a lawyer's duties concerning communications to a client during a representation in a single rule. That is the approach taken in the ABA Model Rules and in every other jurisdiction, none of which devote a separate rule regulating a lawyer's conduct with respect to settlement offers.

   - Cons: Proposed Rule 1.4.1 [3-510] is an important Rule intended to clarify the important principle that only a client can decide whether to settle a matter and so ensure that only a client will make decision that will affect the client's substantial rights. (See *Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Current rule 3-510 has been separate rule from the general communication rule, rule 3-500, for decades. It should continue to stand on its own to accentuate this important duty.

2. Expand a lawyer's duty to communicate all offers of settlement in a civil matter.

   - Pros: A lawyer's professional and fiduciary obligation to best serve and protect the client clearly requires that all settlement offers be communicated to the client for consideration and response. (See *Beery v. State Bar* (1987) 43 Cal. 3d 802, 813, [239 Cal. Rptr. 121] ["The attorney-client relationship is a fiduciary relation of the very highest character imposing on the attorney a duty to communicate to the client whatever information the attorney has or may acquire in relation to the subject matter of the transaction."]; *Lewis v. State Bar* (1973) 9 Cal. 3d 704, 713 ["Because the attorney client relationship is a fiduciary relationship of the very highest character in which the attorney is the fiduciary and the client is the beneficiary, there can be no question but that an attorney owes his client this duty of full and frank disclosure."].). To limit the lawyer's duty to communicate only written offers in a civil matter is not in the best interest of the client or the judicial system. In both criminal and civil matters, oral negotiations take place and have value in educating and informing the client about the value of a written settlement offer ultimately made. The better approach is to require that a lawyer communicate all settlement offers to the client. This revision would also be consistent with the California Code of Civil Procedure section 283, which states in relevant part, "an attorney has no authority to compromise a client's claim without the client's knowledge . . ."

- Cons: As noted in Section IX.A.1, above, requiring that any offer of settlement in a civil matter, regardless of its merit, be communicated to the client might appear to be reasonable, but such a requirement is impracticable in light of the realities of negotiation. Further, requiring communication of any civil offer would conflict with Business and Professions Code section 6103.5(a).

3. Revise the definition of "client" in current rule 3-510(B) by adding the following clause: "or a representative authorized by the client to communicate with the lawyer regarding settlement offers?" The first Commission made a similar recommendation for inclusion in a comment to its proposed Rule 1.4.

   - Pros: The added clause will better identify the persons to whom a communication required under the rule may be made and thus remove ambiguity in the current rule. It is intended to ensure that a properly authorized representative may accept or reject the settlement offer. This is necessary for many practical reasons including, but not limited to, protection of clients who are minors, disabled, or incompetent.

   - Cons: The definition must be applicable in both the civil and criminal context. The proposed revision would expand the persons to whom a plea or other dispositive offer might be communicated beyond what is permitted under criminal law and procedure.

4. Title: Change the rule title to "Communication of Settlement Offers *in Criminal and Civil Matters*." (Emphasis added.)

   - Pros: It would be a more accurate title and remove any ambiguity that it is intended to apply in a criminal matter.

   - Cons: The change is not necessary. There is no evidence that

5. Add a provision to the proposed Rule that would impose a duty on a lawyer to locate a missing client to communicate an offer of settlement?

   - Pros: California State Bar Formal Opinion No. 2002-160, which identified circumstances under which a lawyer would be required to locate a missing client and proposed possible approaches the lawyer could take to effectuate a successful search.

   - Cons: Because the duty to locate a client and the efforts that must be exerted to the search are fact dependent, any such duty is best addressed in case law and ethics opinions.

6. Include a comment similar to Model Rule 1.4, Cmt. [2], that states a client's instructions not to accept an offer unless it meets specific criteria, relieves the lawyer of the duty to communicate any offer that does not meet the client's specific criteria?

- Pros: Such a comment will clarify that a lawyer need not communicate repetitive communications or irrelevant information that the client's instructions indicate will not be accepted.

- Cons: Including such a comment would be misleading. Circumstances and evidence in the case may materially change or require a client to modify his demands and expectations at any time during the representation. For example, a client might have initially instructed a lawyer that the client would "never settle for a penny less than $500,000" but later learns that the Defendant has no assets and a maximum liability insurance limit of $250,000. Under those circumstances, the client might change the original instructions and authorize lawyer to make a policy limits demand

7. Require that communications of a settlement offers as required under the Rule be in writing.

   - Pros: Such a requirement would reduce civil and disciplinary disputes as to whether or not a settlement offer was communicated to a client and would be consistent with the Rules addressing conflict disclosures and waivers. A writing also provides the client a document that can be discussed and reviewed with another attorney or advisor.

   - Cons: Similar to not requiring that all offers of settlement in a civil matter be in writing, the realities of the give and take of negotiation suggest that such a requirement should remain an aspirational best practice and not a disciplinary requirement.

8. As a corollary to the concept in Section 7 (above), add a requirement that the lawyer retain any writing relating to communication of settlement offers in a criminal or civil matter?

   - Pros: Retaining writings would establish that the lawyer performed his duty to communicate.

   - Cons: See Section 7, Cons.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

None.

D. Non-Substantive Changes to the Current Rule:

All of the proposed revisions to current rule 3-510 are non-substantive clarifying changes. In addition, the Commission recommends the following global, non-substantive changes:

1. Change the Rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substitute the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.4.1 [3-510] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 1.4.1 [3-510] in the form attached to this Report and Recommendation.

Proposed Rule 1.4.1 [3-510] Communication of Settlement Offers
Synopsis of Public Comments

TOTAL = 4	A = 2
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43h	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.
X-2016-76d	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	(a), (b)	The rule should be amended to clarify that the lawyer can meet her duty by communicating settlement offers and pleas to any authorized representative of the client.	The Commission declines to make the suggested change. The Commission has recommended that current rule 3-510(B) be carried forward as proposed rule 1.4.1(b). The Commission is not aware that the current requirement has caused any problems. On the contrary, the suggested substitute language, "any duly authorized representative," begs the question, "authorized to do what?" That language is vague and ambiguous and could be used to justify a lawyer's failure to ensure the appropriate decision maker has been satisfied.
X-2016-82a	Polish, James (9-26-16)	N	M		Lawyers should be required to communicate all settlement offers, not just written ones.	The Commission declines to make the suggested change. Under the rule, every written offer of settlement must be communicated as well as any oral offer that constitutes a "significant development" in the representation. (See

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						proposed Rule 1.4(a)(3).) The Commission sees no reason to require oral offers that do not satisfy that standard to be communicated.
X-2016-104h	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.2
(Current Rule 3-410)
Disclosure of Professional Liability Insurance

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-410 (Disclosure of Professional Liability Insurance) in accordance with the Commission Charter, including consideration of the ABA Model Court Rule on Insurance Disclosure. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 1.4.2 (Disclosure of Professional Liability Insurance).

Rule As Issued For 90-day Public Comment

Current rule 3-410 requires a lawyer who does not have professional liability insurance to disclose that fact to the lawyer's clients. The current rule exempts government lawyers and in-house counsel with regard to the representation of their employer. There is no counterpart to rule 3-410 in the ABA Model Rules. In addition, the ABA Model Court Rule on Insurance Disclosure employs a different approach in not requiring a lawyer to disclose the fact that he or she lacks professional liability insurance directly to his or her client but rather requires a report to the highest court (of the respective jurisdiction) whether he or she is currently covered by professional liability insurance. The reported information is then made available to the public. The Commission is not recommending a change to the approach and policy of the ABA Model Court Rule. The Commission believes that clients ought to receive direct disclosure from a lawyer.

The Commission is not recommending any substantive changes to the current rule. However, the Commission is recommending non-substantive amendments that are intended to make the rule easier to understand. These changes include combining into one paragraph all of the current provisions that identify situations where the rule is not applicable. Another clarifying change is to substitute the phrase "reasonably should know" for "should know" as the former is a term that is defined in proposed rule 1.0.1 (Terminology). Similarly, non-substantive, mostly stylistic, amendments are recommended in the Comments.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made only non-substantive stylistic changes and with these changes, voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.4.2 [3-410]

Commission Drafting Team Information

Lead Drafter: Nanci Clinch
Co-Drafters: Tobi Inlender, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 3-410 Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

> *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."*

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.4.2
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.4.2
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance

(a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.

(c) This Rule does not apply to:

(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);

(2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;

(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;

(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Comment

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I no longer have professional liability insurance."

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know* whether the lawyer is or is not covered by professional liability insurance.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-410)

Rule ~~3-410~~1.4.2 Disclosure of Professional Liability Insurance

(~~A~~a) A ~~member~~lawyer who knows* or reasonably should know* that ~~he or she~~the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the ~~member~~lawyer, that the ~~member~~lawyer does not have professional liability insurance ~~whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours~~.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.

(c) This Rule does not apply to:

~~(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.~~

(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);

(~~C~~2) ~~This rule does not apply to a member~~a lawyer who is employed as a government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity~~.~~;

(~~D~~3) ~~This rule does not apply to~~a lawyer who is rendering legal services ~~rendered~~ in an emergency to avoid foreseeable prejudice to the rights or interests of the client~~.~~;

(~~E~~4) ~~This rule does not apply where the member~~a lawyer who has previously advised the client in writing* under ~~Paragraph (A~~paragraph (a) or (~~B~~b) that the ~~member~~lawyer does not have professional liability insurance.

CommentDiscussion

[1] The disclosure obligation imposed by Paragraph (A) of this rulea) applies with respect to new clients and new engagements with returning clients.

[2] A memberlawyer may use the following language in making the disclosure required by Rule 3-410paragraph (Aa), and may include that language in a written* fee agreement with the client or in a separate writing:

> *"Pursuant to California Rule of Professional Conduct 3-4101.4.2, I am informing you in writing that I do not have professional liability insurance."*

[3] A memberlawyer may use the following language in making the disclosure required by Rule 3-410paragraph (Bb):

> *"Pursuant to California Rule of Professional Conduct 3-4101.4.2, I am informing you in writing that I no longer have professional liability insurance."*

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule areThe exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and dodoes not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know* whether the lawyer is or is not covered by professional liability insurance.

V. RULE HISTORY

Rule 3-410 was first approved in January 2010. If a representation will exceed four hours of the lawyer's time, the rule requires a written disclosure to clients where the lawyer knows or should know that the lawyer does not have professional liability insurance. The rule also requires that the lawyer provide written disclosure if liability insurance coverage is lost and provides express exemptions for government and in-house lawyers, services rendered in an emergency, and where the client was previously advised.

The rule's adoption followed from consideration of an ABA Model Court Rule. In August 2004, the ABA adopted Model Court Rule on Insurance Disclosure requiring lawyers to disclose on their annual registration statements whether they maintain professional liability insurance, and authorizing that the information be available to the public. In May

2005, the State Bar President, in consultation with the California Supreme Court, appointed a special State Bar Insurance Disclosure Task Force.

The Task Force recommended two rules to the Board: (1) a proposed new Rule of Professional Conduct requiring an insurance disclosure to clients; and (2) a proposed new rule of court requiring an insurance disclosure to the State Bar. Based on the controversy raised by consideration of the rule, and the majority of public comments received that opposed a disclosure requirement, a Board Subcommittee was assigned to further consider the rule. The Subcommittee recommended a compromise rule, intended to address the concerns expressed in the public comments while still balancing the need for public protection. The compromise rule added the current exemptions to the rule and did not recommend a parallel Rule of Court. (See State Bar memorandum, "Request that the Supreme Court of California Approve New Rule of Professional Conduct 3-410 and Memorandum and Supporting Documents in Explanation," dated November 20, 2008, Supreme Court case number S168443). The Board recommended the compromise rule as proposed new rule 3-410, which was ultimately approved by the California Supreme Court. Rule 3-410 has not since been amended.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission's Response: No response required.

  2. OCTC supports Comments [1] and [4].

     Commission's Response: No response required.

  3. OCTC is concerned that Comments [2] and [3] do not explain or interpret the rule, but simply.

     Commission's Response: The Commission has retained Comments [2] and [3]. The Supreme Court approved this rule relatively recently, operative January 1, 2010. The Commission believes the comments provide important interpretative guidance on the rule's application. The Commission is also not aware of any problems that have arisen with respect to enforcing the rule because of Comments [2] and [3].

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, one public comment was received. One comment agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California Law Requiring Insurance or Security for Claims

Various statutes in California require either errors and omissions insurance or security for claims against the individual or entity. While different from a disclosure requirement, the following statutes demonstrate that where legal or law-related services are being rendered, policy appears to value insurance as an important public protection.

- Law Corporations: upon its application to register, each law corporation must provide the State Bar with proof of security for claims for errors and omissions of the corporation. See State Bar Rule 3.158, Bus. & Prof. Code § 6171(b), Corp. Code § 13406(b).
- Limited Liability Partnerships: upon its application for certification, LLPs are required to submit a statement to the State Bar that it has complied requirements to maintain security for claims for errors and omissions arising out of the practice of law. See State Bar Rules 3.172 and 3.177, Bus. & Prof. Code § 6174.5, Corp. Code § 16956.
- Foreign Legal Consultants: a registered foreign legal consultant must provide evidence of and maintain at all times security for claims for pecuniary losses, either through insurance, letter of credit, or written guarantee or agreement. See State Bar Rule 3.403.
- Certified Lawyer Referral Services: panel members are required to maintain errors and omissions insurance. See State Bar Rule 3.823(C), Bus. & Prof. Code § 6155(f)(6).
- Legal Document/Unlawful Detainer Assistants: applications for a certificate of registration must be accompanied by a bond in the amount required by statute. See Bus. & Prof. Code § 6405.

2. California Law Related to Current Rule 3-410

Since its adoption in 2010, there have been no published disciplinary cases discussing rule 3-410.

3. Repealed Statutory Requirement for Written Fee Agreements

Under former Business and Professions Code, section 6148(a)(4) disclosures to clients regarding whether the lawyer maintained professional liability insurance was required by the statutory scheme governing written fee agreements.[1] It had provided that where a written fee agreement was required, that agreement must also provide a disclosure to the client if the lawyer did not meet the criteria regarding maintaining errors and omissions insurance coverage. By the terms of the statute, the disclosure provision sunset on January 1, 2000.

4. State Bar Sample Written Fee Agreements

To facilitate a member's compliance with rule 3-410, the State Bar's Sample Written Fee Agreements include an optional provision addressing whether the member has insurance. The Sample Written Fee Agreements are posted at the State Bar website (see links below).

- http://www.calbar.ca.gov/Attorneys/MemberServices/FeeArbitration/FormsResources.aspx
- http://www.calbar.ca.gov/Portals/0/documents/mfa/2015/2015_SampleWrittenFeeAgreementInstructions2-070115_r.pdf

B. ABA Model Rule Adoptions

There is no counterpart to California rule 3-410 in the ABA Model Rules. However, there is an ABA Model Rule on Court Disclosure. An ABA chart captioned, "American Bar Association Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure," revised as of February 10, 2016 is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf (Last accessed on 2/7/17)

According to the chart, twenty-four jurisdictions require some type of insurance disclosure. Seventeen states require an insurance disclosure on annual registration statements,[2] thirteen of which make that information available to the public.[3] Seven

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[1] The statutes mandate that all contingency fee agreements must be writing and that all non-contingency agreements must also be in writing if the total expense to the client, including attorney fees, will exceed one thousand dollars.

[2] The seventeen jurisdictions are: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Virginia, Washington, West Virginia.

[3] The thirteen jurisdictions are: Arizona, Colorado, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, North Dakota, Virginia, Washington, West Virginia.

states, including California, require that the insurance disclosure be provided directly to the client.[4] Six states are considering adoption of the Model Court Rule.[5] Five states studied the ABA Model Rule but decided not to adopt it.[6] One state adopted an insurance disclosure rule but later withdrew it.[7] Oregon is currently the only state that requires lawyers to maintain professional liability insurance.

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

A. Concepts Accepted (Pros and Cons):

1. Implement various non-substantive organizational changes and minor language changes for brevity and clarity.

    - Pros: The current rule was drafted by a special task force that might not have been given the same stylistic instructions (e.g., Garner style manual) and other resources that the Commission is using. These non-substantive changes will avoid inconsistency in organization and style throughout the rules.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. In recognition that the current rule is a recently adopted rule by the Board and the Supreme Court (operative January 1, 2010), the drafting team considered but ultimately concluded that the basic policy and duty imposed was not ripe for comprehensive re-evaluation. The team was not aware of any relevant material changes in circumstances or in California law that have occurred since the adoption of the rule.

2. Adding a new exception for court-appointed lawyers as to those matters in which they have been appointed was considered. The current rule includes exceptions for government and in-house lawyers, but does not provide an exception for court-appointed lawyers as to those matters in which they have been appointed. The first Commission proposed including an exemption for court-appointed lawyers in response to concerns of lawyers who are regularly appointed as counsel for indigent clients that disclosure of the lack of insurance may impede

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[4] The seven jurisdictions are: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota.

[5] The six jurisdictions are: Maine, New Jersey, New York, South Carolina, Utah, Vermont.

[6] The five jurisdictions are: Arkansas, Connecticut, Florida, Kentucky and Texas.

[7] The jurisdiction is North Carolina.

the development of a lawyer-client relationship.[8] This Commission determined there was no reason to provide the exception for criminal defense attorneys because attorneys on court appointed lists are currently required to have liability insurance. This was not true in 2009 when the comment referenced in footnote 9 was received by the first Commission. No comments were received by the second Commission requesting that criminal defense attorneys be exempted from this Rule. After consideration, this exception was not included in the proposed Rule.

- Pros: Indigent clients who receive representation by appointment should not be regarded as "second-class" clients in regards to a lawyer's duty to provide information relevant to the establishment of trust and confidence in the attorney-client relationship.

- Cons: Requiring such appointed lawyers, many of whom do not maintain professional liability insurance, to notify their clients at the outset of the representation that they do not have insurance could well impede the development of a functioning lawyer-client relationship. This concern, together with the public policy of encouraging lawyers to serve as court-appointed counsel, warrants including these lawyers, along with government lawyers and full-time in-house counsel, as the exception to the rule.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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[8] On September 9, 2009, Commission member Robert L. Kehr received an email message from a criminal defense practitioner serving on the Los Angeles County Bar Association Professional Responsibility and Ethics Committee raising concerns with the application of current rule 3-410 to court-appointed lawyers in criminal matters. In part, the email message observed:

> This is going to be an issue for many hundreds of criminal defense lawyers who are appointed in federal and State courts in California.
>
> Most of them do not have liability insurance, and they do not use written retainer agreements with the clients. ¶ What will these lawyers do -- hand the client a one-line notice saying they don't have liability coverage? I don't think that will go over well with clients who already are in the position of having a lawyer they don't know assigned to represent them! ¶ The federal CJA ("Criminal Justice Act") under which CJA Panel attorneys are appointed in federal cases does not requires counsel to have insurance, and one of my colleagues thinks the same is true of State law.
>
> Although insurance is relatively cheap for criminal defense lawyers, most do not have it because of the many hurdles to recovering from criminal defense lawyers – the popular thinking is that "happy clients "generally have nothing to sue about, and unhappy clients generally have admitted guilt or were proven guilty . . . ."

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

The only substantive change to the current rule is the addition of an exception for court-appointed lawyers as to those matters in which they have been appointed.

D. Non-Substantive Changes to the Current Rule:

1. Paragraph (a). This paragraph has been revised to substitute "reasonably should know" for "should know." The substituted phrase is a defined term in the Commission's proposed terminology Rule 1.0.1 and the drafting team believes this phrase implements the intent of the current language.[9] In addition, the exception for services that will not exceed four hours has been moved to new paragraph (c) (see IX.D.2, below).

    - Pros: Use of a defined term will avoid confusion.

    - Cons: None identified.

2. Reorganization of structure and non-substantive revisions for brevity and clarity. All provisions in the current rule that provide for an exception to the general requirement to inform a client regarding professional liability insurance have been consolidated in a new paragraph (c).

    - Pros: This reorganization is consistent with the style of the other rules and facilitates ease of understanding and compliance.

    - Cons: The change in structure is not a necessary change. There is no known evidence of misunderstanding by lawyers.

3. Streamline rule Comments in accordance with the Commission's charter that mandates that comments be used sparingly. Comment [4] has been revised to delete the first two sentences because they simply restate the black letter rule. The remaining language has been slightly revised for brevity and clarity.

    - Pros: These changes will adhere to the charter and promote consistency in style with the other rules.

    - Cons: None identified.

4. Substitute the term "lawyer" for "member".

    - Pros: The current rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The

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[9] Proposed Rule 1.0.1(j) provides that: "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

5. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters). The rule number recommended for amended rule 3-410 is Rule 1.4.2 as this would place the rule in series with other rules concerning the duty to inform a client (e.g., Rule 1.4 (general rule on client communication of significant developments) and Rule 1.4.1 (rule requiring communication of settlement offers to a client).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

(See Section IX.B.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.4.2 [3-410] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 1.4.2 [3-410] in the form set forth in this Report and Recommendation.

Proposed Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
Synopsis of Public Comments

TOTAL = 1	A = 1
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-104i	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		1. OCTC supports this rule. 2. OCTC supports Comments 1 and 4. 3. OCTC is concerned that Comments 2 and 3 do not explain or interpret the rule, but simply provide legal advice to attorneys.	1. No response required. 2. No response required. 3. The Commission has retained Comments [2] and [3]. The Supreme Court approved this rule relatively recently, operative January 1, 2010. The Commission believes the comments provide important interpretative guidance on the rule's application. The Commission is also not aware of any problems that have arisen with respect to enforcing the rule because of Comments [2] and [3].

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5
(Current Rule 4-200)
Fees For Legal Services

EXECUTIVE SUMMARY

The Commission has evaluated current rule 4-200 (Fees for Legal Services) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, Model Rule 1.5 (Fees). The result of the Commission's evaluation is proposed Rule 1.5 (Fees for Legal Services).

Rule As Issued For 90-day Public Comment

A fundamental issue posed by this proposed rule is whether to retain the longstanding "unconscionable fee" standard used in California's current rule 4-200. Nearly every other jurisdiction has adopted an "unreasonable fee" standard for describing a prohibited fee for legal services.[1] The Commission determined to retain California's unconscionability standard as this standard carries forward California's public policy rationale which was stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403:

> In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.
>
> Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. *It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present*. (Emphasis added) (Citations omitted).

The Commission believes that if the foregoing policy was prudent in 1934, it is even more sound today because currently consumer protection against lawyers who charge unreasonable fees is provided through both the civil court system and California's robust mandatory fee arbitration program. (See Bus. & Prof. Code § 6200 et seq.) Under the statutory fee arbitration program, arbitration of disputes over legal fees is voluntary for a client but mandatory for a lawyer when commenced by a client. Accordingly, California's current approach to fee controversies is two-fold: (1) disputes over the reasonable amount of a fee may be handled through arbitration; and (2) fee issues involving overreaching, illegality or fraud are appropriate for initiating an attorney disciplinary proceeding. The Commission is unable to perceive any benefit that would arise from changing to the "unreasonable fee" standard. The downsides of such a change

[1] Only California, Massachusetts, New York, North Carolina and Texas have not adopted the Model Rules' standard of "unreasonable," the latter four having adopted (or more accurately continued from the ABA Code of Professional Responsibility) an "excessive" or "clearly excessive" standard. Michigan, Ohio and Oregon have also carried forward the "excessive" standard but define "excessive" as in excess of reasonable, so they effectively have adopted an unreasonable standard.

include potential unjustified public expectations that a disciplinary proceeding is an effective forum for addressing routine disputes concerning the amount of a lawyer's fee. Finally, with respect to the unconscionable fee standard, the Commission recommends adding two factors, proposed paragraphs (b)(1) and (b)(2), to those factors that should be considered in determining the unconscionability of a fee. Both factors are derived from considerations identified in the *Herrscher* decision for determining unconscionability.

In addition to retaining the "unconscionable fee" standard, proposed rule 1.5 adds three substantive paragraphs not found in the current rule. First, paragraph (c), which is derived from ABA Model Rule 1.5(d), identifies two types of contingent fee arrangements that are prohibited: contingent fees in certain family law matters; and contingent fees in criminal matters. Although there are other kinds of contingent fee cases that might be prohibited, these two types of contingent fee arrangements have traditionally been viewed as implicating important Constitutional rights or public policy. Second, paragraph (d) prohibits denominating a fee as "earned on receipt" or "nonrefundable" except in the case of a true retainer, i.e., where a fee is paid to assure the availability of a lawyer for a particular matter or for a defined period of time. (See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1.) Paragraph (d) is intended to increase protection for clients by recognizing that except for specific circumstances, a fee is not earned until services have been provided. Paragraph (e) expressly provides that a flat fee is permissible only if the lawyer provides the agreed upon services. In part, these new provisions implement a basic concept of contract law; namely that, except for true retainers, an advance fee is never earned unless and until a lawyer provides the agreed upon services for which the lawyer was retained.

Three comments are included in the proposed rule. Comment [1] is derived from Model Rule 1.5 Comment [6] and explains that some contingent fee arrangements related to family law matters are permitted. Specifically, the comment recognizes that certain post-judgment contingent fee arrangements are permitted because they do not implicate the policies underlying the prohibition. Comment [2] provides a cross-reference to the rule governing termination of employment, including a lawyer's voluntary withdrawal from representation. This cross-reference is intended to enhance client protection by helping assure that lawyers comply with the obligation to refund unearned fees when a representation ends. Comment [3] provides a cross-reference to the fee splitting rule. In many other jurisdictions, the provision that governs fee divisions among lawyers is found in a lettered paragraph in the jurisdiction's counterpart to Model Rule 1.5. In California, the provision addressing division of fees is contained in a separate, standalone rule. Providing a cross-reference facilitates compliance.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment, for brevity and clarity the Commission has replaced the phrase "enter into an arrangement for" in paragraph (c) with "make an agreement." The Commission also revised the language in paragraph (e) to refine the definition of a flat fee by removing language that was identified in the public comments as creating a possible ambiguity. Public comments seemed to suggest that this rule was being perceived as governing the placement of an advance fee (e.g., whether to hold such fees in a client trust account or other law firm account). The Commission added a new Comments [2] to make clear that the placement issue is governed by proposed rule 1.15(a) and (b). Other comments were renumbered accordingly. Lastly, the Commission added a new Comment [5] to provide a reference to the State Bar Act provisions that require some fee agreements to be in writing.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.5 [4-200]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: Nanci Clinch, Daniel Eaton, Tobi Inlender

I. CURRENT CALIFORNIA RULE

Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.5 [4-200]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.5 [4-200]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.5 [4-200] Fees for Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

(1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(3) the amount of the fee in proportion to the value of the services performed;

(4) the relative sophistication of the lawyer and the client;

(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) the amount involved and the results obtained;

(8) the time limitations imposed by the client or by the circumstances;

(9) the nature and length of the professional relationship with the client;

(10) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) whether the fee is fixed or contingent;

(12) the time and labor required;

(13) whether the client gave informed consent* to the fee.

(c) A lawyer shall not make an agreement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Comment

Prohibited Contingent Fees

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Payment of Fees in Advance of Services

[2] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).

Division of Fee

[4] A division of fees among lawyers is governed by Rule 1.5.1.

Written Fee Agreements

[5] Some fee agreements must be in writing* to be enforceable. See, e.g., Business and Professions Code §§ 6147 and 6148.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-200)

Rule 1.5 [4-200] Fees for Legal Services

(~~A~~a) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~ unconscionable or illegal fee.

(~~B~~b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. ~~Among the~~The factors to be considered~~, where appropriate,~~ in determining the ~~conscionability~~unconscionability of a fee ~~are~~include without limitation the following:

(1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(~~1~~3) ~~The~~the amount of the fee in proportion to the value of the services performed~~.~~;

(~~2~~4) ~~The~~the relative sophistication of the ~~member~~lawyer and the client~~.~~;

(~~3~~5) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~.~~;

(~~4~~6) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member.~~lawyer;

(~~5~~7) ~~The~~the amount involved and the results obtained~~.~~;

(~~6~~8) ~~The~~the time limitations imposed by the client or by the circumstances~~.~~;

(~~7~~9) ~~The~~the nature and length of the professional relationship with the client~~.~~;

(~~8~~10) ~~The~~the experience, reputation, and ability of the ~~member or members~~lawyer or lawyers performing the services~~.~~;

(~~9~~11) ~~Whether~~whether the fee is fixed or contingent~~.~~;

(~~10~~12) ~~The~~the time and labor required~~.~~;

(~~11~~) ~~The~~13) whether the client gave informed consent ~~of the client~~* to the fee.

(c) A lawyer shall not make an agreement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

Comment

Prohibited Contingent Fees

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Payment of Fees in Advance of Services

[2] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).

Division of Fee

[4] A division of fees among lawyers is governed by Rule 1.5.1.

Written Fee Agreements

[5] Some fee agreements must be in writing* to be enforceable. See, e.g., Business and Professions Code §§ 6147 and 6148.

V. RULE HISTORY

Current rule 4-200 became operative on September 14, 1992. The Model Rule counterpart is ABA Model Rule 1.5. The rule regulates fee arrangements between lawyers and their clients.[1]

The predecessor to current rule 4-200, former rule 2-107, was originally approved and became operative on January 1, 1975, under the same title "Fees for Legal Services." That rule was based on Disciplinary Rule (DR) 2-106 of the ABA Model Code of Professional Responsibility. DR 2-106 had three subparagraphs. DR 2-106(A) prohibited a lawyer from entering into an agreement for, charging or collecting an "illegal" or "clearly excessive" fee. DR 2-106(B) stated a fee is "clearly excessive" when a lawyer of ordinary prudence had a "definite and firm conviction that the fee is ***in excess of a reasonable fee***." (Emphasis added). DR 2-106(B) also provided eight factors to be considered in determining the "reasonableness" of a fee.[2] DR 2-106(C)

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[1] Fee arrangements are also regulated by: rule 2-200 [1.5.1] concerning agreements to divide fees among lawyers who are not in the same law firm; rule 3-300 [1.8.1] concerning agreements between a lawyer and a client that confer on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to a client; and Business and Professions Code §§ 6147 and 6148 concerning the minimum requirements necessary for a contingency fee or other fee contract (hourly, flat fee, etc.), respectively.

[2] The eight factors were:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

prohibited a lawyer from entering into an agreement for, charging, or collecting a contingent fee for representing a defendant in a criminal case.

Although former rule 2-107 was derived from the ABA Code, section (B) of the ABA Code provision was revised by the State Bar Special Committee to Study the ABA Code of Professional Responsibility to reflect California Supreme Court case law that had previously rejected a "reasonable fee" standard in discipline cases. In *Herrscher v. State Bar* (1934) 4 Cal.2d 399, a case seeking disbarment of an attorney for, in part, charging his client exorbitant fees, the California Supreme Court stated:

> We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action.

4 Cal.2d at 402. The *Herrscher* court noted, however, that in some cases a gross overcharge may constitute an offense warranting discipline. In fact, an earlier California Supreme Court decision stated the rule as follows:

> Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.

Goldstone v. State Bar (1931) 214 Cal. 490, 498.

In light of the foregoing Supreme Court precedent, the Special Committee substituted an unconscionability standard for the ABA Code's "clearly excessive [of a reasonable fee]" standard. Paragraph (B) stated a fee "is unconscionable when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community." Curiously, there was a disjunction between the first and the second and third sentences of paragraph (B), i.e., despite the substitution of the unconscionability standard, paragraph (B) also listed factors to be considered when determining the "reasonableness of a fee."[3]

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[3] The second and third sentences of paragraph (B) provided:

> *Reasonableness* shall be determined on the basis of circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the *reasonableness* of a fee are the following:
>
> (1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

The Special Committee declined to recommend paragraph (C) of DR 2-107, which provided: "A lawyer shall not enter into, charge, or collect a contingent fee for representing a defendant in a criminal case."

Former rule 2-107 was amended in 1989 as part of the comprehensive study and revision of the Rules of Professional Conduct. The amendments included changing the numbering of the rule from 2-107 to 4-200 and deleting the references to "reasonableness" that had been retained in former rule 2-107(B). The change was implemented because of rule 2-107(B)'s aforementioned conflict in containing two inconsistent standards, unconscionability and unreasonableness:

1. The unconscionability standard reflects existing California Supreme Court decisions to the effect that the State Bar has no power to regulate the amount of the fees charged by its members unless such fees are so "outlandish" or the conduct of the attorney in negotiating for or attempting to collect a fee merit discipline. (See Code. Civ. Proc., § 1021.)

2. A fee structure based upon "reasonableness" necessarily implies both the existence and knowledge of an agreed upon standard against which particular fees can be judged. Such a standard could not be developed or communicated without violating federal antitrust laws.

3. At the present time, a client having a fee dispute with a member may require the member to submit the dispute to arbitration under California's Fee Arbitration Program. (See Bus. & Prof. Code, § 6200 et seq.) The arbitration procedure does not, per se, involve a threat or risk of disciplinary proceedings. If clients were able to use the threat of disciplinary action simply by alleging that the member's fees were "unreasonable," members of the State Bar would be placed in an unwarranted disadvantage in fee dispute resolution.

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(3) The amount involved and the results obtained.

(4) The time limitations imposed by the client or by the circumstances.

(5) The nature and length of the professional relationship with the client.

(6) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(7) Whether the fee is fixed or contingent.

(8) The time and labor required.

(9) The informed consent of the client to the fee agreement. (Emphasis added).

The Special Committee did delete the ABA Code factor, "the fee customarily charged in the locality for similar legal services," which traditionally is an indicator of whether a fee is *reasonable*, but it is not apparent why the "reasonableness" standard was retained in the second sentence of the rule 2-107(B).

(See 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, Supreme Court Case No. Bar. Misc. 5626, pp. 43-44 (September 1988) ("1998 Report")).

In addition to removing the word "reasonableness," subparagraphs (B)(1) and (2) were added as factors because it was believed they were important factors to be considered in determining the conscionability of a fee.[4]

Rule 4-200 was amended again in 1992. The amendments included removing the word "agreement" from paragraph (B) and subparagraph (B)(11). These amendments were intended to: (1) clarify that paragraph (B) addressed the broad issue of the unconscionability of the fee obtained as opposed to the narrower issue of the unconscionability of the fee agreement itself; and (2) conform paragraph (B) and subparagraph (B)(11) to the text of paragraph (A) which refers to the amount of the fee, not the fee agreement. (Supreme Court Case No. SO24408 p. 18.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. Unconscionable Fees. OCTC finds the term "unconscionable fee" vague, difficult to understand, confusing, and very difficult to enforce. Moreover, there is no reason for California to use a different term than the rest of the country.

   Commission's Response: The issue was considered by the Commission in its prior deliberations. As set forth in its Report and Recommendation, retaining the unconscionability standard will carry forward the public policy rationale stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403.). Using a reasonableness standard would bog down the discipline system with ordinary fee disputes. California law, unlike other states, provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee.

2. OCTC also urges the Commission to consider adding an additional factor to the list set forth in subsection (b): whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate.

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[4] The two added factors to be considered in determining whether a fee is "unconscionable" were:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

Commission's Response: The Commission did not make the suggested change, which it believes is unnecessary in a rule that regulates "fees for legal services." The Rule cannot exhaustively address all possible factors that might make a fee unconscionable.

3. OCTC recommends that the rule be amended to make the failure to have a written fee agreement disciplinable. Written fee agreements protect the public and are an integral part of an attorney's duty to communicate significant developments relating to his or her employment.

   Commission's Response: The Commission did not make the suggested change. The requirement of a written fee agreement under certain situations is already address by statute. See, e.g., Bus. & Prof. Code §§ 6147 and 6148. The Commission believes that the remedy provided in those statutes – the fee agreement is voidable at the client's option – is the appropriate remedy for not having a written agreement. The suggestion that a fee agreement should be required in all circumstances would undermine these section. Nevertheless, the Commission has added Comment [5], which directs lawyers' to those statutes.

4. OCTC believes that Comment [1] should be in the rule, not a Comment

   Commission's Response: The Commission has not made the suggested change. The substance of Comment [1], simply explains that the identified fee arrangement does not come within the language of paragraph (c)(1), and therefore, is not an exception that normally should be in the text itself.

5. Comments [2] and [3] seem unnecessary because these Comments are merely duplicative of the rule.

   Commission's Response: The Commission has retained Comments [2] and [3] (now renumbered [3] and [4]) because they provide cross-references to rules imposing related duties on lawyers, thus enhancing compliance with the Rules.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
  (In response to 45-day public comment circulation):

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fifteen public comments were received. One comment agreed with the proposed Rule, six comments disagreed, and eight comments

agreed only if modified. During the 45-day public comment period, four public comments were received. Two comments agreed with the proposed Rule, one comment disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

California's statutory mandatory fee arbitration program. Although case law has generally found, as a policy matter, that issues concerning the amount of fees charged for legal services are not matters that ordinarily should give rise to a disciplinary proceeding, the State Bar does regulate fee issues through the administration of a robust fee arbitration program mandated by statute (Article 13 of the State Bar Act, Business and Professions Code §§ 6200 et. seq.). This program makes arbitration of fee disputes mandatory for attorneys if requested by a client. Clients and attorneys can agree to make the arbitration binding. An attorney who fails to comply with a final binding fee arbitration award is subject to being enrolled as an inactive member. All "unconscionable fees" are unreasonable but the reverse is not true. The combination of current rule 4-200 as a disciplinary standard and the mandatory fee arbitration program works as a two-pronged system for managing client protection in the area of fee disputes. When an attorney charges a fee that is unconscionable, discipline is appropriate. If a fee is not unconscionable but may be unreasonable, then there is an effective mandatory fee arbitration system that protects clients. If the California rule were changed to an "unreasonable fee" standard, then that might have a destabilizing impact of funneling fee arbitration matters into the discipline system. The discipline system is not well-equipped to render fee arbitration services and should not be the forum for resolving common fee disputes.

Authorities that identify illegal fees. Rule 4-200 prohibits illegal fees and both case law and statutes in California identify illegal fees. Examples of case law include: *In re Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403 (fee collected in excess of MICRA limitations); *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896 (fee collected while engaged in the unauthorized practice of law); and *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 (fee collected without court approval where approval is required). Examples of statutory law include: Business and Professions Code § 6106.3 (prohibition against advanced fees for loan modification services); and Business and Professions Code § 6242 (prohibition against advanced fees for immigration reform services prior to the enactment of an immigration reform act).

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.5, which is the counterpart to current rule 4-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf [last checked 2/8/2017]

- Four jurisdictions have adopted Model Rule 1.5 verbatim.[5] Eighteen jurisdictions have adopted a slightly modified version of Model Rule 1.5.[6] Twenty-nine states have adopted a version of the rule that is substantially different to Model Rule 1.5."[7]

- However, as discussed in Section IX.A.1, below, only four jurisdictions besides California have rejected the Model Rule's "unreasonable" standard.

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

A. Concepts Accepted (Pros and Cons):

1. Retain the standard in current rule 4-200, i.e., unconscionability as opposed to Model Rule 1.5's "unreasonable" standard.

    - Pros: First, retaining the unconscionability standard will carry forward the public policy rationale stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403 [49 P.2d 832]:

      "In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.

      Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. *It*

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[5] The four jurisdictions are: New Mexico, Rhode Island, South Dakota, and Utah.

[6] The eighteen jurisdictions are: Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, Oklahoma, Tennessee, Vermont, West Virginia, and Wyoming.

[7] The twenty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.

is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present." (Emphasis added) (Citations omitted).

Second, the public is provided sufficient protection against avaricious lawyers who charge "unreasonable" fees through the civil court system and California's unique system of mandatory fee arbitration. (See Bus. & Prof. Code § 6200 et seq. Put another way, rather than bog down the discipline system with ordinary fee disputes, the law provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee. In any event, in extreme cases such as those described above, the public is further protected through imposing discipline on lawyers who charge, contract for or collect an unconscionable fee.

Third, this is a disciplinary rule and lawyers should not be disciplined for charging what can be determined in hindsight to have been an "unreasonable" fee. The unconscionable standard provides a clearer disciplinary standard, consistent with the Commission's charge to draft articulable standards of discipline.

- Cons: The reasonableness standard has been adopted in nearly every jurisdiction.[8] Rejecting an unreasonable standard, which has been adopted in every jurisdiction except California, Massachusetts and Texas, and retaining an unconscionability standard falls short of the Commission's charge to protect the public and promote confidence in the legal profession and administration. It sends a message that the profession tolerates its members charging an unreasonable fee. This is an area where the Commission should reassess the continued viability of *Herrscher*. The concerns the Supreme Court expressed 75 years ago about the efficacy of inquiring into the reasonableness of fees should not control the debate for a self-regulating profession in this sensitive area of lawyer-client relations.

2. In paragraph (b), retain the 11 factors that are found in current rule 4-200(B) and include two other factors, derived from case law, for determining unconscionability and include in the introduction of paragraph (c) an express statement that the factors are to be considered without limitation. There are 13 factors in the current rule draft and there is a statement that they are to be considered without limitation.

   - Pros: There is no evidence that the factors, which have been included in the rule since 1975, have created a problem or confusion in determining the

[8] Only California, Massachusetts, New York, North Carolina and Texas have not adopted the Model Rules' standard, the latter four having adopted (or more accurately continued from the ABA Code of Professional Responsibility) an "excessive" or "clearly excessive" standard. Michigan, Ohio and Oregon have also carried forward the "excessive" standard but define "excessive" as in excess of reasonable, so they effectively have adopted a reasonable standard.

unconscionability of a fee. The statement that the factors to be considered are without limitation conforms to an OCTC comment received earlier in the Commission's deliberative process. With respect to the similarity of the factors to those used in the Model Rule for determining the reasonableness of a fee, the additional three factors unique to the California rule all relate to unconscionability, (see "Cons"). Further, the consideration of the two additional factors will further distinguish the provision from the Model Rule.

- Cons: There is some confusion whether the factors can be used to determine unconscionability as they are nearly identical to those stated in Model Rule 1.5 for determining the reasonableness of the fee. The only different factors are: (1) the amount of the fee in proportion to the value of the services performed; (2) the relative sophistication of the client; and (3) the informed consent of the client to the fee.

3. Add new paragraph (c), derived from Model Rule 1.5(d), which identifies two types of contingent fee arrangements that are prohibited: certain family law matters and criminal matters. Drafting team consensus.

   - Pros: Although there are other kinds of contingent fee cases that might be prohibited, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g.

     In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy.

     In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.

     Focusing on these two types of cases where public policy strongly opposes contingent fees should not lead to an inference that any other kind of contingent fee matter is permitted.

   - Cons: Limiting the prohibition on contingent fees to two kinds of legal matters implies that contingent fees are permitted in any other kind of legal matter, which may not be true.

4. Add new paragraph (d), which prohibits denominating a fee as "earned on receipt" or "nonrefundable" except in the case of a true retainer, i.e., where the fee is paid to assure the availability of the lawyer. Drafting team consensus.

    - Pros: Paragraph (d) is an attempt to balance a number of competing interests: a lawyer's interest, on the on hand, of being assured of payment when relinquishing an opportunity for other employment and a client's interest in not forfeiting a flat fee in the event the client changes his or her mind and wants to discharge the lawyer. At bottom, paragraph (e) recognizes that except under specific circumstances, a flat fee is not earned until services have been provided. Paragraph (e) states the nonrefundable/ earned on receipt fee arrangement that traditionally has been recognized in the profession and is already found in current rule 3-700(D)(2). Paragraph (e) also includes a description of what constitutes a "true retainer" that is more accurate than the language used in current rule 3-700(D)(2), which simply states that a true retainer is a "fee paid solely for the purpose of ensuring the availability of the member for the matter."

    - Cons: The proposed new description of "true retainer" differs from the longstanding language used in rule 3-700(D)(2). There does not appear to be any disciplinary data indicating that this language should be changed.

5. Add new paragraph (e) that expressly provides that a flat fee is permissible only if the lawyer provides the agreed upon services. Drafting team consensus.

    - Pros: Expressly states a basic concept in contract law: except for true retainers, an advance fee is not earned unless the lawyer provides the services for which he or she was retained.

    - Cons: Many lawyers, e.g., those in criminal law practice, typically have fee arrangements with clients that are denominated as non-refundable or earned-on-receipt. Their view is that the fee can be placed in the lawyer's operating account and be protected from forfeiture proceedings. This issue is addressed in proposed Rule 1.15(b).

6. Add new Comment [1], derived from Model Rule 1.5, Cmt. [6], which explains that some contingent fee arrangements related to family law are permitted.

    - Pros: Recognizes certain post-judgment contingent fee arrangements in family law that permitted because they do not implicate the policies underlying the prohibition. The first Commission made a similar recommendation.

    - Cons: None.

7. Add new Comment [2] which provides a cross-reference to the rule governing a lawyer's duties with respect to handling client funds and property, particularly with respect to advance fees.

    - Pros: The cross-references provides important information on the rule that would govern in the event there are unearned fees upon termination or there is a fee dispute, common occurrences in practice.

    - Cons: None identified.

8. Add new Comment [3] which provides a cross-reference to the rule governing a lawyer's duties concerning fees upon termination of the lawyer-client relationship.

    - Pros: The cross-reference provides important information on the rule that would govern in the event there are unearned fees upon termination, a common occurrence in practice.

    - Cons: None identified.

9. Add new Comment [4] which provides a cross-reference to the fee splitting rule. Drafting team consensus.

    - Pros: In nearly every other jurisdiction, the provision that governs fee divisions among lawyers is in the jurisdiction's counterpart to Model Rule 1.5. In California, the fee division provision is a separate rule. Providing a cross-reference to California's separate rule is appropriate.

    - Cons: None identified.

10. Add new Comment [5], which cross-references Bus. & Prof. Code §§ 6147 and 6148. Drafting team consensus. This concept has been incorporated in Comment [5].

    - Pros: In Model Rule 1.5, paragraphs (b) and (c) set forth the requirements for written fee arrangements in general and contingent fee arrangements, respectively. In California, those requirements are addressed in §§ 6148 and 6147, respectively. Under those statutes, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. See §§ 6147(b) and 6148(c). The drafting team has placed the reference in a Comment; it does not believe that a violation of either section should subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute. The first Commission made a similar recommendation.

    - Cons: See discussion below in Section IX.B of a concept rejected relating to OCTC's September 2, 2015 memorandum in which OCTC states: "OCTC is not in favor of cross-referencing Business and Professions Code §§ 6147 and 6148. Instead, rule 4-200 should state that a lawyer may be disciplined for failing to have a written fee agreement with the client. Written fee agreements

protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment."

B. Concepts Rejected (Pros and Cons):

1. Include a prohibition on charging an unconscionable "internal expense".

   - Pros: The amount of expenses charged a client can constitute a large part of the client's total monetary obligations to a lawyer. A prohibition on charging an unconscionable expense adds language that clarifies the lawyer's obligation. It should both educate lawyers as to their duties and facilitate the imposition of discipline, where applicable. The first Commission recommended adding a similar prohibition.

     The concept of expenses was added to the Model Rules as part of the Ethics 2000 revisions. Only Kansas and Texas do not include an express prohibition on charging unreasonable or excessive expenses.

   - Cons: The concept of an unconscionable internal expense would be new and potentially confusing. Conceptually, if a lawyer's internal expense effectively functions as a hidden profit center, then that conduct would fit the existing rubric of an unconscionable fee charged without the client's consent. Compare the existing State Bar Court approach in *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, at pp. 851-852 [finding that a lawyer's practice of charging a flat periodic fee or lump sum to cover disbursements is not a violation of rule 4-200 or an act of moral turpitude provided the client consents and the amount at issue is not unconscionable].

2. Include an express definition of "unconscionable fee" in the rule.

   - Pros: Presumably, such a definition would provide a succinct explanation of what is meant by the term "unconscionable fee." The language of the definition would be taken from California decisional law, including two Supreme Court cases. See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]. The definition could be used in conjunction with the factors set forth in paragraph (b) as an analytical framework for determining whether a fee is unconscionable.

   - A definition of "unconscionable fee" is unnecessary and, in any event, a precise definition of the term is not possible. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. Further, the non-exclusive factors set forth in paragraph (b) provide a sufficient framework for determining the unconscionability of a fee in the discipline context.

3. Include a provision that addresses modification of fee agreements.

   - Pros: A rule that governs fee arrangements is the logical place for such a provision. In fact, the first Commission drafted such a provision at the request of the Board and included it in its proposed Rule 1.5.[9] In addition, in OCTC's

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[9] The first Commission's proposed rule paragraph provided:

(g) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

The rule paragraph was accompanied by several comments:

[3] Paragraph (g) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (g). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (g). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (g). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. Setzer v. Robinson (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest

September 2, 2015 memorandum providing comments on rule 4-200, OCTC states: "Modification of fee agreements should require compliance with rule 3-300 regarding adverse interests. A lawyer holds a position of trust and has a fiduciary duty vis-a-vis his or her client. Compliance with rule 3-300 will help prevent lawyers from abusing their position and overreaching when renegotiating a fee agreement."

- Cons: The negotiations by which a lawyer and client enter a fee agreement is an arms-length transaction. Current rule 3-300, Discussion ¶. 1, provides that rule 3-300 "is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client." Only under the latter described circumstances should special conditions be imposed on a fee modification. Those conditions are already provided in rule 3-300, which is the appropriate place to address the issue.

4. Include in the rule the general analytical framework for determining the unconscionability of a contract, an inquiry into the procedural and substantive unconscionability of a contract. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745]; Cotchett, Pitre & McCarthy v. Universal Paragon Corp. (2010) 187 Cal.App.4th 1405, 114 Cal.Rptr.3d 781.)

   - Pros: Would bring the unconscionability inquiry in lawyer fee contracts in line with general contract law.

   - Cons: Including such a framework is unnecessary as there is no indication that the current analytical framework involving the consideration of a number of non-exclusive factors, does not provide an effective means for determining unconscionability of a fee.

5. Include a provision in the rule that would subject a lawyer to discipline for failure to comply with the writing and other requirements in Bus. & Prof. Code §§ 6147 and 6148.

   - Pros: Written fee agreements protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment. A lawyer should be subject to discipline for failing to comply with those duties.

   - Cons: There is no reason to add a discipline element to the sanctions for noncompliance provided under §§ 6147 and 6148. Voiding the agreement and limiting the lawyer to recovery of the reasonable value of his or her services is a sufficient disincentive to a lawyer's noncompliance with the statutes' written and other requirements, so the public should be protected.

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adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

6. Include a Comment that would recognize that a lawyer may not be able to comply with paragraph (e)'s writing requirement in an emergency. Drafting team consensus.

    - Pros: This is an important qualification on the writing requirement for flat fee arrangements. These arrangements are often used in a criminal law practice, where lawyers are often retained on short notice, making the execution of a written agreement impracticable initially.

    - Cons: This Comment arguably authorizes an oral contract that would create a lawyer-client relationship, at least until such time that a subsequent written agreement is entered into by the parties. Technically, the State Bar Act's requirement for a written fee agreement (for services where the total expense to a client will exceed $1,000) has no comparable exception. Can a Rule of Professional Conduct establish an exception to a public protection statutory scheme governing contracts for legal services?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. Adding an express prohibition in paragraph (d) of certain types of contingent fee agreements.

2. In paragraph (d), expressly permitting a lawyer to denominate a fee as "earned-on-receipt" or "nonrefundable" only if it is a true retainer.

3. In paragraph (e), expressly permitting a lawyer to contract for, charge or collect a flat fee, which is paid in advance, only so long as the lawyer provides the agreed upon services.

D. Non-Substantive Changes to the Current Rule:

1. Change the rule number to correspond to the ABA Model Rules numbering and formatting. (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the

California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

1. Instead of recommending proposed paragraphs (e) and (f) concerning true retainers and flat fees, respectively, take the same approach recommended by the first Commission (but which was ultimately rejected by the Board).[10]

[10] The first Commission addressed true retainers and flat fees in two separate paragraphs, which provided:

> (e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.
>
> (f) A lawyer is permitted to denominate a fee as "earned on receipt" or "nonrefundable" only in making an agreement for the following types of fee arrangements:
>
> (1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.
>
> (2) a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.

The provisions were accompanied by several comments:

[6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; *In re Matter of Lais* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudge the outcome of fee arbitration proceedings as this Rule, like any law, must be applied to the facts of a particular matter.

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[7] Every fee agreed to, charged, or collected, including a fee under paragraph (f)(1) or (f)(2), is subject to paragraph (a) and may not be unconscionable.

[8] Paragraph (f)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (f)(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer's availability and that the client will be separately charged for any services provided. Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

[9] Paragraph (f)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

RECOMMENDATION:

The Commission recommends adoption of proposed Rule 1.5 [4-200] in the form attached to this Report and Recommendation.

PROPOSED RESOLUTION:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.5 [4-200] in the form attached to this Report and Recommendation.

Proposed Rule 1.5 [4-200] Fees for Legal Services
Synopsis of Public Comments

TOTAL = 4	*A = 2*
	D = 1
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25a	Bar Association of San Francisco (Banola) (01-13-17)	Y	A	(b)(1)	We appreciate the consideration given to our comment relating to the use of the term "overreaching" in subsection 1.5(b)(1). However, the synopsis of the Committee's comment, as stated in the Executive Summary released by the Commission for the Revision of the Rules of Professional Conduct ("Commission") did not reflect why we find this term ambiguous. Although we understand that this term has been used in case law, we are concerned about the meaning of "overreaching" in regard to the negotiation of an initial fee agreement. The negotiation of an initial fee agreement is generally considered an arms-length transaction, and "absent issues of duress, unconscionability and the like, [a client] has no cause to complain that the terms [the lawyer] negotiated were favorable to [the lawyer]." *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913. Accordingly, the use of "overreaching" in subsection (b)(1) appears to undermine this general principle. We are, therefore, clarifying this point in	Supreme Court precedent recognizes "fraud and overreaching" as a basis for discipline involving the negotiation of an initial fee agreement. See Bushman v. State Bar (1974) 11 Cal.3d 558, 563 ["[M]ost cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds. [Citation omitted.]"].) These principles are not inconsistent with *Ramirez* which excluded "issues of duress, unconscionability and the like."

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					case the Commission misunderstood it. (e) We appreciate the Commission's consideration of our comment relating to the clause "as long as the lawyer performs the agreed upon services" in subsection (a) and support the revision made to incorporate this comment.	
Y-2016-10a	Miller, Merwyn J. (01-04-17)	N	M	1.5(e)	My recommendation is to include minimum flat fees in the definition of flat fees under 1.5(e) and make clear that an attorney will not violate the rules for charging more if the client requires the attorney to deposit the fee in their client trust account.	The Commission did not make the suggested change. The Commission believes that the term “minimum flat fee” as used by the commenter is simply another way of characterizing a “non-refundable” fee or “earned upon receipt” fee arrangement. Because the fee arrangement the commenter describes is not a “true retainer” under paragraph (d), to include the term within the scope of paragraph (e) would create a conflict with paragraph (d).
Y-2016-21d	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	D			First, the Commission thanks the commenter for its endorsement of paragraphs (c), (d) and (e). The Commission notes, however, that it previously responded to the remainder of the commenter’s points during the initial 90-day public comment

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						period. It continues to maintain those positions. Nevertheless, it repeats them as follows:
					1. OCTC finds the term "unconscionable fee" vague, difficult to understand, confusing, and very difficult to enforce.	1. As set forth in the Commission's Report and Recommendation, retaining the unconscionability standard will carry forward the public policy rationale stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403.). Using a reasonableness standard would bog down the discipline system with ordinary fee disputes. California law, unlike other states, provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee.
					2. OCTC also urges the Commission to consider adding an additional factor to the list set forth in subsection (b): whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate.	2. The Commission did not make the suggested change, which it believes is unnecessary in a rule that regulates "fees for legal services." The Rule cannot exhaustively address all possible factors that might make a fee unconscionable.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					3. OCTC recommends that the rule be amended to make the failure to have a written fee agreement disciplinable. Written fee agreements protect the public and are an integral part of an attorney's duty to communicate significant developments relating to his or her employment.	3. The Commission did not make the suggested change. The requirement of a written fee agreement under certain situations is already address by statute. See, e.g., Bus. & Prof. Code §§ 6147 and 6148. The Commission believes that the remedy provided in those statutes – the fee agreement is voidable at the client's option – is the appropriate remedy for not having a written agreement. The suggestion that a fee agreement should be required in all circumstances would undermine these section. Nevertheless, the Commission has added Comment [5], which directs lawyers' to those statutes.
					4. OCTC believes that Comment 1 should be in the rule, not a Comment.	4. The Commission has not made the suggested change. The substance of Comment [1], simply explains that the identified fee arrangement does not come within the language of paragraph (c)(1), and therefore, is not an exception that normally should be in the text itself.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					5. Comments 2 and 3 seem unnecessary because these Comments are merely duplicative of the rule.	5. The Commission has retained Comments [2] and [3] (now renumbered [3] and [4]) because they provide cross-references to rules imposing related duties on lawyers, thus enhancing compliance with the Rules.
Y-2016-7b	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	A		COPRAC supports the adoption of proposed Rule 1.5 as revised.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5.1
(Current Rule 2-200)
Fee Divisions Among Lawyers

EXECUTIVE SUMMARY

The Commission evaluated current rule 2-200 (Financial Arrangements Among Lawyers) in accordance with the Commission Charter, including the national standard of the ABA counterpart, Model Rule 1.5(e) (concerning fee divisions among lawyers) and the Restatement of Law Governing Lawyers counterpart, Restatement § 47 (Fee Splitting Between Lawyers Not In The Same Firm). The result of the Commission's evaluation is proposed Rule 1.5.1 (Fee Divisions Among Lawyers).

Rule As Issued For 90-day Public Comment

A key topic addressed by this proposed rule is the regulation of fee sharing by lawyers who are not in the same law firm, including typical referral fees. Most states follow Model Rule 1.5(e) that permits lawyers to divide a fee only to the extent that the referring lawyer is compensated for work actually done on the matter or if the referring lawyer assumes joint responsibility for the matter. The California rule is one of a minority of states that permits a "pure referral fee," i.e., California permits lawyers to be compensated for referring a matter to another lawyer without requiring the referring lawyer's continued involvement in the matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the California Court of Appeal held that the payment of referral fees is not contrary to public policy. The court stated, "If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields." (Id. at 921-922.) The Commission's study found that no case since *Moran* had questioned the policy of permitting pure referral fees. In fact, the ABA's Ethics 2000 Commission itself had recommended that the Model Rules permit pure referral fees, but that position was rejected by the ABA House of Delegates.

That is not to say that the proposed rule remains the same as the current rule. Rather, proposed rule 1.5.1 implements two material changes intended to increase protection for clients. First, the agreement between the lawyers to divide a fee must now be in writing and second, the client must consent to the division after full disclosure at or near the time that the lawyers enter into the agreement to divide the fee. Under current rule 2-200, there is no express requirement that the agreement between the lawyers be in writing and case law has held that client consent to the fee division need not be obtained until the fee is actually divided, which might not occur until years after the lawyers have entered into their agreement. These changes were made because an underlying reason for the rule is to assure that the client's representation is not adversely affected as a result of an agreement to divide a fee. Deferring disclosure and client consent to the time the fee is divided denies the client a meaningful opportunity to consider the concerns the rule is intended to address. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835.)

In addition, proposed rule 1.5.1 tentatively includes the provision in current rule 2-200 permitting a gift or gratuity for a client referral (rule 2-200(B)). This is tentative because the

Commission's work on the lawyer advertising and solicitation rule is pending and the provision on gifts or gratuities will be considered for inclusion in that rule.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made a non-substantive change to clarify that compliance with paragraphs (a)(1) and (a)(2) may be satisfied in either a single document, or through separate documents. The Commission also made other non-substantive stylistic changes.

With these changes, the Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.5.1 [2-200]

Commission Drafting Team Information

Lead Drafter: James Ham
Co-Drafters: Daniel Eaton, Robert Kehr

I. CURRENT CALIFORNIA RULE

Rule 2-200 Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.5.1 [2-200]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.5.1 [2-200]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.5.1 [2-200] Fee Divisions Among Lawyers

(a) Lawyers who are not in the same law firm* shall not divide a fee for legal services unless:

(1) the lawyers enter into a written* agreement to divide the fee;

(2) the client has consented in writing,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of the division; and

(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) This Rule does not apply to a division of fees pursuant to court order.

Comment

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-200)

Rule 1.5.1 [2-200] ~~Financial Arrangements~~ Fee Divisions Among Lawyers

(~~A~~a) ~~A member~~Lawyers who are not in the same law firm* shall not divide a fee for legal services ~~with a lawyer who is not a partner of, associate of, or shareholder with the member~~ unless:

(1) the lawyers enter into a written* agreement to divide the fee;

(~~1~~2) ~~The~~the client has consented in writing ~~thereto~~,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure ~~has been made in writing~~to the client of: (i) the fact that a division of fees will be made ~~and~~, (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of ~~such~~the division; and

(~~2~~3) ~~The~~the total fee charged by all lawyers is not increased solely by reason of the ~~provision for division of fees and is not unconscionable as that term is defined in rule 4-200~~agreement to divide fees.

(b) This Rule does not apply to a division of fees pursuant to court order.

~~(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

Comment

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

V. RULE HISTORY

Prior to 1972, no rule of professional conduct prohibited lawyers not in a firm from dividing fees, even if the referring lawyer performed no work or assumed no responsibility. See *Moran v. Harris* (1982) 131 Cal.App.3d 913, 920 [182 Cal.Rptr. 519] ("*Moran*"). On September 20, 1972, the Supreme Court adopted rule 22, which was derived nearly verbatim from the 1969 ABA Model Code of Professional Responsibility ("ABA Code"), DR 2-107. Rule 22 provided:

> Rule 22. (a) A member of the State Bar shall not divide a fee for legal services with another attorney who is not a partner in or associate of his law firm or law office, unless:
>
> (1) the client consents to employment of another attorney after a disclosure that a division of fees will be made; and
>
> *(2) the division is made in proportion to the services performed or responsibility assumed by each*; [emphasis added] and
>
> (3) the total fee of the attorneys does not clearly exceed reasonable compensation for all legal services they render to the client.
>
> (b) This rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Thus, rule 22 permitted a division of fees only if the referring lawyer continued to participate in the representation *or* assumed responsibility. In this respect, rule 22 diverged from the ABA DR 2-107, which required that the referring lawyer both continue to participate in the representation *and* assume responsibility for the matter.

In 1975, as part of a comprehensive revision of the California Rules of Professional Conduct, rule 22 was renumbered 2-108. Two substantive changes were made. First, rule 22(a)(3) [renumbered rule 2-108(a)(3)] was modified to require that the total fee charged "is not increased solely by reason of the division of fees" in place of "the total fee of the attorneys does not clearly exceed reasonable compensation for all legal services they render to the client." Second, the concept in rule 22(b) was revised, deleted, and moved to then-new rule 2-109 (Agreements Restricting the Practice of a Member of the State Bar).[1]

In 1979, rule 2-108 was revised to permit "pure" fee referral arrangements, i.e., a fee division arrangement between lawyers that does not require the referring lawyer to continue to provide legal services or to assume responsibility for the matter. In addition, a new paragraph (B) was added to the rule. The following redline version of the 1979 rule shows the changes to the 1975 rule:

Rule 2-108 ~~Division of Fees~~Financial Arrangements Among Lawyers

(A) A member of the State Bar shall not divide a fee for legal services with another person licensed to practice law who is not a partner ~~in~~or associate ~~of his~~in the member's law firm or law office, unless:

(1) The client consents in writing to employment of the other person licensed to practice law after a full disclosure has been made in writing that a division of fees will be made~~;~~ and the terms of such division; and

~~(2) The division is made in proportion to the services performed or responsibility assumed by each; and~~

(~~3~~2) The total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees and does not exceed reasonable compensation for all services they render to the client.

(B) Except as permitted in subdivision (A), a member of the State Bar shall not compensate, give or promise anything of value to any person licensed to practice law for the purpose of recommending or securing employment of the member or the member's firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's firm by a client. A member's offering of or giving a gift or gratuity to any person licensed to practice law, who has made a recommendation resulting in the employment of the member or the member's firm, shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement or understanding that such a gift

[1] Rule 2-109 generally prohibited lawyers from entering into restrictive covenants but did not prohibit an employment or partnership agreement that involved payments to an attorney upon retirement from the practice of law. The substance of rule 2-109 is now in current rule 1-500.

or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

A memorandum to the Board from the Chair of the Board Committee on Professional Responsibility provided a three-part rationale for eliminating the requirement that the division be proportional to the services provided or responsibility assumed by each lawyer. The first factor was promoting the public interest in enhanced lawyer competence and specialization. The memorandum provided the following observation of legal ethics scholars:

> The lawyer practicing alone or in a small firm has no self-sufficient competence. He must go outside if his clients are to be adequately represented. In the public interest, it is not enough for the organized bar to take the negative position of forbidding a lawyer to accept a case in a field in which he is not competent. There is a need for standards and methods which will encourage and make feasible the association of generalists and specialists . . . . So far, however, this duty has not been met. The present standards against fee-splitting may actually discourage the use of needed specialists . . . ."

(Patterson and Cheatham, *The Profession of Law* (Foundation Press, 1970), Ch. XV, Section 1 "Competence and Care," p. 250.)

Second, the difference between rule 2-108 and the ABA DR counterpart was causing confusion. The memorandum cited *Altschul v. Sayble* (1978) 83 Cal.App.3d 153 [147 Cal.Rptr. 716] and stated:

> In the recent Altschul case, the court of appeal interpreted subdivision (2) of rule 2-108 to be identical to similar provisions in DR 2-107 of the ABA Code of Professional Responsibility, but it is not. In the ABA version, DR 2-107(A)(2) provides for allocation according to "services performed and responsibilities assumed." On the other hand, rule 2-108(2) approves a division made in proportion to the "services performed or responsibilities assumed" by each attorney. The change in the conjunctive is significant. It was intended to weigh "responsibility" assumed by the referring lawyer (e.g. for a wise referral to the right lawyer, for monitoring or for quality of the work) equally with the legal services performed – even if performed entirely by the other attorney.

Third, the memorandum described the protection afforded through the continuing requirements of obtaining the client consent after a full disclosure and assuring that a fee is not inflated due to the fee division.

In 1989, as part of the comprehensive revisions of the Rules of Professional Conduct, rule 2-108 was renumbered 2-200 and paragraph (A) was modified as indicated below:

> (A) A member ~~of the State Bar~~ shall not divide a fee for legal services with ~~another person licensed to practice law~~ a lawyer who is not a partner of, or associate of, ~~in the member's law firm or law office,~~ or shareholder with the member unless:

(1) The client ~~consents~~ has consented in writing ~~to employment of the other person licensed to practice law~~ thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all ~~persons licensed to practice law~~ lawyers is not increased solely by reason of the provision for division of fees and ~~does not exceed reasonable compensation for all services they render to the client~~ is not unconscionable as that term is defined in rule 4-200.

The request filed with the Court noted: "No substantive changes are proposed to current rule 2-108. The amendments that are proposed are intended to foster brevity and clarity."[2]

Since 1989, there have been no further changes to rule 2-200.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Five comments agreed with the proposed Rule, six comments disagreed, and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

[2] See, page 27 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987. In effect, the revisions to the rule implemented global revisions to the Rules, e.g., substitution of "member" for "member of the State Bar" and "lawyer" for "person licensed to practice law," both of which were defined in rule 1-100(B).

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- Insurance Code § 750 and § 750.5(a) (statutory prohibition against compensation for referral of insurance claims)
- *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (a failure to comply with the requirements of the fee sharing rule may preclude enforcement of the lawyers' fee sharing agreement)
- *Mink v. Maccabee* (2006) 121 Cal.App.4th 835 [17 Cal.Rptr.3d 486] (required disclosure and client consent must be obtained prior to the actual division of fees by the involved lawyers)
- *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453 [9 Cal.Rptr.3d 693] (equitable remedy may be appropriate where fee sharing agreement is unforeceable for failure to comply with the rule)
- *Olsen v. Harbison* (2010) 191 Cal.App.4th 325 [119 Cal.Rptr.3d 460] (attorney could not recover from co-counsel under theory of quantum meruit where client initially had consented to a division of fees but later fired one of the lawyers and entered into a new agreement with the other lawyer)
- State Bar Formal Op. No. 1994-138 (client disclosure requirement when a firm shares fees with an outside lawyer, such as a contract attorney for a particular case or matter
- L.A. County Bar Ethics Op. 516 (3/20/2006, revised 7/21/14) (ethical considerations where an attorney who is in an of counsel relationship with a firm also maintains a separate solo practice)
- L.A. County Bar Ethics Op. 511 (12/15/2003) (sharing in fees as a partner or an employee of two separate firms)
- L.A. County Bar Ethics Op. 503 (1/24/2000) (prepaid referral fees on workers compensation cases)

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.5(e), which is the counterpart to current rule 2-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf [Last visited 2/7/17]

- As noted, ABA Model Rule 1.5(e) does not permit pure referral fees. Twelve jurisdictions have adopted Model Rule 1.5(e) verbatim.[3] Fourteen jurisdictions have

[3] The twelve jurisdictions are: Idaho, Indiana, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, and Vermont.

adopted a slightly modified version of Model Rule 1.5(e).[4] Twenty-six jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.5(e).[5]

- In addition, it should be noted that thirty-six jurisdictions require that the fee division be proportional to the services performed by each lawyer or that each lawyer assume joint responsibility, i.e., these jurisdictions have adopted the ABA policy against pure referral fees. However, fifteen jurisdictions permit pure referral fees, at least to some extent. Besides California, the following 12 jurisdictions permit pure referral fees without expressly limiting the kind of matter involved or the lawyer to whom the matter is referred: Connecticut, Delaware, Kansas, Maine, Massachusetts, Michigan, Nevada, New Hampshire, Oregon, Pennsylvania, Virginia and West Virginia. One jurisdiction, Alabama, permits pure referral fees only in contingent fee cases. Finally, New Jersey permits, through a separate Rule of Court, pure referrals only when the lawyer to whom the matter is referred is certified in a designated area of practice.[6]

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

A. Concepts Accepted (Pros and Cons):

1. Changing the title of the current rule.

   - Pros: The change results in a rule title that more precisely describes the subject matter addressed by the rule.

   - Cons: None identified.

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[4] The fourteen jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Illinois, Kentucky, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, Washington, and West Virginia.

[5] The twenty-five jurisdictions are: Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

[6] New Jersey Rule of Court, Rule 1:39-6(d) provides:

> (d) **Division of Fees**. A certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein. The provisions of this paragraph shall not apply to matrimonial law matters that are referred to certified attorneys.

2. In proposed paragraph (a), substitute the phrase "Lawyers who are not in the same law firm" for "a lawyer who is not a partner of, associate of, or shareholder with the member."

    - Pros: These changes simplify the language of current rule 2-200(A). No substantive changes are intended. The term "lawyers not in the same firm" replaces "a lawyer who it not a partner of, associate of, or shareholder with the member" to delimit when the rule applies at a time when the titles and terms used to describe lawyers in law firms and other organizations that practice law are not limited to those terms.

    - Cons: This change might be viewed as a substantive change by excluding "of counsel" lawyers from the ambit of paragraph (a). Is it clear whether this rule's requirements are intended to address the obligations of an "of counsel" lawyer?

3. Including proposed paragraph (a)(1) which requires the lawyers who are dividing the fee to enter into a written agreement for the division between themselves.

    - Pros: Adding this requirement will aid in the enforcement of the rule. Requiring the agreement to be in writing makes the existence of the agreement verifiable in disciplinary proceedings and assures that compliance will occur when the agreement is made.

    - Cons: May be viewed as an unnecessary regulation of an agreement between attorneys, as opposed to an agreement between the lawyer and the client. No such requirement currently exists in rule 2-200 and an inability to enforce the current rule has not been identified as a result of an absence of such requirement.

4. Requiring that disclosure to the client should be as soon as reasonably practical.

    - Pros: If one of the purposes of the Rule is to give the client greater control over who provides legal services and on what basis, the disclosure should be made as soon as is practical.

    - Cons: The precise division of the fee to be shared might await the conclusion of work on the matter (e.g. where agreement is to divide the fee based on a loadstar approach which looks to the amount of time each lawyer invests in the case, as well as the value the lawyer delivered to the client's cause).

5. Adding the requirement "(ii) the identity of the lawyers who are parties to the division" in proposed paragraph (a)(2).

    - Pros: This requirement will provide better client protection than the current rule by adding that the written disclosure must provide the identity of the lawyers who are parties to the fee division agreement. This facilitates a client's informed choice of counsel.

- Cons: It may not be known which lawyers may be working on a matter at the outset when a division of fee agreement is executed between law firms (e.g. when a law firm is retained for expert services in discreet task, or limited scope, capacities).

6. Retaining the phrase "full written disclosure" under proposed paragraph (a)(2).

   - Pros: Current rule 2-200 contains the same language. The specific disclosure requirements are described in paragraphs (a)(2)(i) through (a)(2)(iii) of the rule.

   - Cons: The term "full written disclosure," standing by itself, is vague and does not give lawyers sufficient guidance as to what should be disclosed.

7. Deleting the phrase "the provision for a division of fees and is not unconscionable as that term is defined in rule 4-200," and replacing it with "agreement to divide fees."

   - Pros: The recommend change is intended to simplify the current rule. No substantive changes are intended.

   - Cons: None identified.

8. Adding subparagraph (b) which states: "This Rule does not apply to a division of fees pursuant to court order."

   - Pros: The paragraph would make it clear that a lawyer should not be disciplined when a division of fees is reviewed and approved by a bench officer.

   - Cons: Lawyers might mistakenly believe that they need not advise the client of the writing of an agreement to divide the fee, and the terms of that agreement, in cases where statutory law provides for an award of attorneys' fees.

9. Adding a Comment that clarifies the written agreements (i) between lawyers and (ii) among lawyers and client may be a single writing.

   - Pros: Added in response to public comment, this Comment clarifies that the process of obtaining and documenting the client's consent and the lawyers' agreement among themselves can be simplified by including all in a single document.

   - Cons: There is nothing in the rule that prohibits a single writing; the Comment is superfluous.

B. Concepts Rejected (Pros and Cons):

1. Adopting the approach of ABA Model Rule 1.5(e) that restricts fee divisions to situation where the lawyers are sharing responsibility or work.

   - Pros: Permitting a pure referral fee is the current policy in California (see *Moran v. Harris* (1982) 131 Cal.App.3d 913) and encourages lawyers to refer cases to competent counsel by retaining an economic incentive for the referring lawyer to seek experienced representation on behalf of the client.

   - Cons: A lawyer should not be compensated for doing nothing more than passing a client onto another lawyer without having to share any responsibility or work.

2. Retaining current rule 2-200(B) concerning giving or promising things of value for the purpose of recommending or securing employment, or as a reward for having made a recommendation resulting in employment.

   - Pros: This paragraph was referred to the Commission members charged with reviewing the advertising rule for inclusion in the advertising rules. It is more economical to state a prohibition on promising or giving something of value to either a lawyer, or non-lawyer, for the purpose of recommending or securing the lawyer's services in one rule. This is the approach taken in ABA Model Rule 7.2(b) and is the approach that this Commission has taken. See Rule 7.2 Report.

   - Cons: Retaining the rule about giving an occasional gift or gratuity as a thank you for providing a referral does not belong in an advertising rule because lawyers in California are familiar with the current organization of the California rules. Further, the effect of 2-200(B) is to prevent evasion of the disclosure requirement by financial arrangements that don't amount to the sharing of a fee.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The Rule adds three new requirements: (i) that the fee division agreement between the lawyers is in writing; (ii) that the client's consent to the fee division arrangement be obtained as soon as practicable; and (iii) the identity of the lawyers who are parties to the fee division be disclosed to the client.

2. The phrase "Lawyers who are not in the same law firm" in paragraph may alter the scope of who is covered under the rule. Existing rule 2-200 prohibits dividing a fee for legal services with a "lawyer who is not a partner of, associate of, or

shareholder with the member…." Lawyers today operate "in the same firm" under various different titles that are not limited to partner, associate or shareholder.

3. The Rule would expressly exclude division of fees pursuant to court order.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. The changes to paragraph (a) primarily simplify the language of current rule 2-200(A). Proposed paragraph (a) retains the policy of the current rule allowing lawyers to divide fees and pay a referral fee, and rejects the approach in ABA

Model Rule 1.5(e) that restricts fee divisions to situations where the lawyers are sharing responsibility or work. Other states have also rejected the narrow ABA Model Rule formulation.

4. The phrase "and is not unconscionable as that term is defined in rule 4-200" which exists in existing rule 2-200 has been removed because it is unnecessary and duplicative. Under California law a lawyer cannot charge an unconscionable fee. This disciplinary standard is set forth in a separate rule. There is no need to repeat it here.

E. Alternatives Considered:

1. The Subcommittee considered ABA Model Rule 1.5(e) and reviewed other States' versions of Model Rule 1.5(e) and concluded that California's policy is appropriate because it encourages public protection and the efficient and competent practice of law.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.5.1 [2-200] in the form attached to this Report and Recommendation

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.5.1 [2-200] in the form attached to this Report and Recommendation.

Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers
Synopsis of Public Comments

TOTAL = 14 *A = 5* *D = 6* *M = 3* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-11	Kreis, John (07-20-16)	No	D	1.5.1	There is no client prejudice by maintaining the current rule as is. Fees are fees; they are proper or they are not. Why should a client be asked to agree in writing to a referral fee arrangement? The stated purpose appears to be "to improve client protection." However, clients will doubtless exploit this requirement to extract concessions from attorneys as to fees and the like.	The Rules of Professional Conduct have long required the client to consent in writing to a division of a fee. Requiring informed written consent to the division of a fee protects the public by allowing the client to decide whether a referral fee should be paid, to determine whether the client is paying a reasonable attorneys' fee, and to insure that the lawyer working on the matter retains a sufficient economic interest in the matter to properly handle the client's case. Nothing in the rule will allow clients to improperly exploit attorneys or force financial concessions with which the attorney does not agree.
X-2016-17	Ward, James (08-01-16)	No	D	1.5.1	Current California rule should not be changed.	The proposed rule provides greater clarity, should reduce disputes about divisions of attorneys' fees, and will provide to clients information earlier and give them greater control over the handling of their matters.
X-2016-20	Reynolds, Pamela (08-01-16)	No	D	1.5.1	Many lawyers make referrals either because they are too busy or because the potential client is	The proposed Rule continues the existing California policy of allowing attorneys to pay a

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					looking for services in an area that the lawyer doesn't practice in. If the current rule is changed to require a lawyer to stay involved in the matter, it will discourage referrals and, instead, clients will be required to go out on their own to find a lawyer when they could have had a really good referral.	"pure" referral fee Unlike ABA Model Rule 1.5(e), the proposed Rule does not include a requirement that the lawyer receiving the referral fee remain involved in the case. This reflects a long-standing policy decision to increase the incentive for lawyers to refer matters to other lawyers who might be better able to handle the matters. See Anthony comment (X-2016-38) and the Commission's response.
X-2016-22	Cisneros, Mariano (08-01-16)	No	D	1.5.1	The bar should not add additional regulations in the fee area because lawyers are becoming inundated with unfunded liabilities already. Commenter has been "involuntarily made into a collection agency for the state when it comes to Medi-Cal liens. In addition, there are the requirements for a Minor's Compromise of a Settlement. This is another layer of bureaucracy.	Existing Rule 2-200 requires client consent in writing to a fee division. The proposed rule continues that requirement, and also requires that the fee splitting agreement between the lawyers be in writing. This requirement protects the public by requiring a written agreement that sets forth the terms of the fee division. See also Response to Kreis. The Commission is unable to see how this Rule would create an "unfunded liability" for any lawyer.
X-2016-38	Anthony, Caleb J. (08-11-16)	No	D	1.5.1	There is great benefit to both the client and lawyers by keeping the "pure" referral fee system intact. Under our current rules, a lawyer is much more likely to refer a case	The Commission agrees. The proposed Rule continues the existing California policy that permits pure referral fees. Please see response to

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					to another lawyer who is better suited for a particular arena of law if he knows he'll get a "pure" referral fee. The client gets more competent representation, the initial lawyer gets his referral fee, and the latter lawyer is happy to have a case that is suited for him - everybody wins!	Reynolds (X-2016-20).
X-2016-41	Kavcioglu, Aren (08-15-16)	No	A	1.5.1	I strongly support the proposed changes to Rule 2-200. There is not a valid reason why a client's agreement to a fee division must be in writing, but the attorneys' division itself does not need to be. In Mink v. Maccabee (2004) 121 Cal.App.4th 835, the court held that the division of fees between attorneys need not be in writing. That "written agreements are preferable to oral ones, and that written consents obtained early in the process are preferable to those obtained after-the-fact." The decision was based upon a strict interpretation of the statute as written, not based upon what is preferable or what makes good sense. It is time to change the language of the statute.	No response required.
X-2016-43j	COPRAC (Baldwin) (08-18-16)	Yes	M	1.5.1	We are in accord with most of the proposed revisions. There is one issue of concern, however, that we wish to highlight for the Commission's further	The proposed rule does not prohibit the creation of a single agreement signed by the attorneys and the client, so long as the single document satisfies all elements of the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					consideration. That issue relates to the language requiring *lawyers* dividing a fee to enter into a *written* agreement regarding the fee division. Because written disclosure and consent must be made to and obtained from the *client* in order to comply with the rule, requiring a separate written agreement as between the lawyers themselves seems redundant and unnecessary to further the goal of public protection. We therefore recommend that section (a)(1) of the proposed rule be removed.	rule. However, separate agreements are permissible. Attorneys may prefer to document their fee division agreement separately, in one writing, and submit a second writing to the client satisfying the disclosure and consent requirements of the rule.
X-2016-50	Gonzalez, Timothy (08-23-16)	No	A	1.5.1	I strongly support the proposed changes to Rule 2-200. The current rule, where the client's agreement to the fee division must be in writing, but the agreement between the attorneys does not need to be in writing, makes no sense and invites abuse.	No response required.
X-2016-66e	San Diego County Bar Association (SDCBA) (Rilely) (09-21-16)	Yes	A	1.5.1	We support this proposed rule as an improvement over current Rule 2-200 in that it requires the client's written consent when the lawyers enter into the agreement or as soon afterward as reasonably practicable.	No response required.
X-2016-77	Kreiss, John (09-26-16)	No	D	1.5.1	The fee to be charged by the attorney to whom the matter would be referred must be fully disclosed. The client can try to	As the Commission noted in response to the commenter's July 20, 2016 submission, under the existing rule, the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					negotiate the fee or seek other counsel. The proposal will insure clients will demand the benefit of the referral fee, which defeats the purpose of the referral from the referring attorney. In a highly competitive market, growing more competitive by the day, the proponents aim at wiping out a marketing tool for lawyers, especially sole practitioners	client's written consent is required before a lawyer can share a fee with another lawyer. Therefore, disclosure and client consent is already required under the existing rule. The proposed rule protects the public by allowing the client to give informed consent to the proposed fee division promptly after the lawyers agree to a division of a fee, and requires that the terms of the lawyers' agreement be in writing, which will tend to reduce disputes concerning the terms or method to be employed in dividing the fee. (See also response to Kreis, X-2016-11, above.)
X-2016-81	Melchior, Kurt (09-26-16)	No	M	1.5.1	Proposed Rule 1.6 [1.5], as well as comments 2 and 3 to Proposed Rule.1.15, draw a line between a "true retainer" and a flat fee, and an advance deposit against future fees although the latter is only implied, not spelled out. I appreciate that State Bar Court precedent supports this distinction, but I think that it does not reflect reality -- specifically, in that there are fee agreements – I have made some myself and seen a substantial number of others –	[Although filed under Rule 1.5.1, the commenter's submission appears to be directed at proposed Rule 1.5, where a response can be found.]

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					where the client agrees to pay what is both a flat fee and a prepayment of fees for certain designated work on the lawyer's part.	
X-2016-104k	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.5.1	OCTC supports this rule.	No response required.
X-2016-120a	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.5.1	LGBT supports this rule.	No response required.
X-2016-130	Malamud, Brad (10-04-16)	No	M	1.5.1	1. Section (b) should be expanded to define when it applies. Thus, "This Rule does not apply to a division of fees pursuant to court order" should include, "if the court order specifically allocates or shares fees among/between the attorneys and the attorneys provided the court notice that they would be dividing the fees based on the court's order." 2. The case law assumes the parties will agree who is the “primary attorney” and who is the "outside lawyer" as the terms are used. Both terms are in need of a definition to clarify.	The Commission declines to make the suggested change. The proposed rule is a disciplinary rule governing the conduct of lawyers. It is not a procedural rule that regulates the conduct of proceedings in court. The language would infringe on a court’s inherent authority to supervise the proceedings before it. 2. The Commission declines to make the suggested change. The terms “primary” and “secondary” when used to describe a lawyer are not used in the rule and are unnecessary to its application.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.6
(Current Rule 3-100)
Confidential Information of a Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-100 (Confidential Information of a Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.6 (Confidentiality of Information). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.6 (Confidential Information of a Client).

Rule As Issued For 90-day Public Comment

Proposed rule 1.6 is nearly identical to current rule 3-100 but has been renumbered to correspond to the ABA Model Rules. California's treatment of lawyer-client confidentiality is unique. Unlike every other jurisdiction in the country, whose statement of a lawyer's duty of confidentiality is contained in a rule of professional conduct that has been adopted by the jurisdiction's highest court, California's duty of confidentiality is contained in a statutory provision passed by the California legislature and enacted in 1871. The history of current rule 3-100 provides insight into proposed rule 1.6. First, because current rule 3-100 is an outgrowth of a legislative amendment to Business and Professions Code § 6068(e), the rule was never intended to function solely as a disciplinary rule, but was instead drafted with the intent of providing guidance to California lawyers on how to proceed when confronted with circumstances addressed in the sole exception to the rule. Understanding this intent helps explain the relatively large number of lengthy comments that this proposed rule contains. Second, the history further suggests that any substantive amendment, including concepts contained in the ABA Model Rules, would require amendment of Business and Professions Code § 6068(e). This is especially true of any express exceptions to the duty of confidentiality and is one of the principal reasons why proposed rule 1.6 contains no major deviations from current rule 3-100.

Paragraph (a)(1) carries forward the language of current rule 3-100 and provides a duty to protect client confidential information to the extent mandated by Business and Professions Code § 6068(e)(1) unless the client gives informed consent or as provided by paragraph (b).

Paragraph (b) carries forward the language of current rule 3-100 and provides that a lawyer may reveal confidential information to the extent necessary to prevent a criminal act resulting in serious bodily injury or death.

Paragraph (c) carries forward the language of current rule 3-100 and provides the steps that a lawyer must take, if reasonable, before disclosing client confidential information.

Paragraph (d) carries forward the language of current rule 3-100 and provides that a lawyer may not disclose any more confidential information than is necessary to prevent a criminal act resulting in serious bodily injury or death

Paragraph (e) carries forward the language of current rule 3-100 and provides that a lawyer does not violate the rule by declining to reveal confidential information permitted by paragraph (b).

Comment [1] provides context for the rule and explains the policy underlying the duty of confidentiality. The term "detrimental subjects" has been substituted for the phrase "legally damaging subject matter" in current rule 3-100. The language is derived from California ethics opinions that have traditionally understood the term "secrets" in Business and Professions Code § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or detrimental to the client.

Comment [2] provides the scope of the information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of confidentiality is broader than the lawyer-client privilege and also includes information acquired by virtue of the representation, regardless of the source, and information protected under the work product doctrine.

Comment [3] explains that the rule provides a narrow exception to the duty of confidentiality derived from Business and Professions Code § 6068(e)(2). Moreover, by distinguishing between "past, completed" and "future or ongoing" criminal acts, the comment provides important guidance to lawyers regarding the scope of the exception.

Comment [4] is a counterpoint to paragraph (e) and provides that a lawyer is not subject to discipline if the lawyer discloses confidential information in compliance with the provisions provided in paragraph (c). The comment also provides the rationale for the provision, i.e., the balance between protecting client confidential information and the prevention of a criminal act resulting in serious bodily injury or death.

Comment [5] provides that there is no duty to disclose confidential information and that the decision to disclose rests solely with the lawyer.

Comment [6] provides critical guidance to lawyers in the form of a list of non-exclusive factors a lawyer should balance in deciding whether to disclose confidential information in order to prevent a criminal act resulting in serious bodily injury or death. The comment further clarifies that the threatened harm need not be imminent for the exception to apply.

Comment [7] provides critical guidance to a lawyer deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act resulting in serious bodily injury or death as required under paragraph (c)(1).

Comment [8] clarifies what is meant by the limiting clause in paragraph (a), "to the extent that the lawyer reasonably believes the disclosure is necessary." Because of the numerous ways in which a lawyer may disclose confidential information, the comment provides guidance, including examples of relevant circumstances that a lawyer might consider in determining the extent of the permitted disclosure under the circumstances.

Comment [9] requires a lawyer, if reasonable under the circumstances, to inform the client of the lawyer's ability or decision to disclose confidential information to prevent a criminal act resulting in serious bodily injury or death. The comment provides critical guidance by setting forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made.

Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing a client of the ability or decision to disclose. The comment explains that there is no specific time when the disclosure must be made and provides a range of possibilities.

Comment [11] provides that disclosure of confidential information permitted by paragraph (b) will likely result in a deterioration of the lawyer-client relationship such that withdrawal may be necessary.

Comment [12] provides that other consequences may arise from disclosure permitted by paragraph (b) and identifies other rules a lawyer should consult in determining the lawyer's course of action.

Comment [13] addresses the fact that the rule does not comprehensively address a lawyer's duty of confidentiality and puts the lawyer on notice that there may be other obligations or exceptions not addressed in the rule, none of which the rule is designed to supersede.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added "informed" consent in Comment [2] for consistency to paragraph (a) and deleted the term "employment or" in Comment [9] as redundant to the concept of "representation." The Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.6 [3-100]

Commission Drafting Team Information

Lead Drafter: Dean Zipser
Co-Drafters: Lee Harris, Tobi Inlender, Dean Stout, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 3-100 Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion

[1] Duty of confidentiality. Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance

and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393].)

[2] Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] Narrow exception to duty of confidentiality under this Rule. Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068, subdivision (e)(1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] Member not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes

is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] No duty to reveal confidential information. Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] Deciding to reveal confidential information as permitted under paragraph (B). Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

(1) the amount of time that the member has to make a decision about disclosure;

(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm. Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to

continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act. Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2). A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that

the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the member's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (B);

(6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] Avoiding a chilling effect on the lawyer-client relationship. The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] Informing client that disclosure has been made; termination of the lawyer-client relationship. When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] Other consequences of the member's disclosure. Depending upon the circumstances of a member's disclosure of confidential information, there may be other

important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] Other exceptions to confidentiality under California law. Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.6 [3-100]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.6 [3-100]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.6 [3-100] Confidential Information of a Client

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this Rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code § 6068(e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this Rule.

Comment

Duty of confidentiality.

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code § 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,* a lawyer must not reveal information protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not

reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these Rules, or other law.

Narrow exception to duty of confidentiality under this Rule.

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code § 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by § 6068(e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule.

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code § 6068(e)(1).

[5] Neither Business and Professions Code § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by § 6068(e)(1) as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this Rule.

Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by § 6068(e)(1) are the following:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the lawyer believes* the lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*.

[7] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable* under the circumstances, first advise the

client of the lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably necessary to prevent the criminal act*.

[8] Paragraph (d) requires that disclosure of information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons* who the lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. Rule 1.4; Business and Professions Code § 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b);

(6) the lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and

(7) the lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship.

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship.

[11] When a lawyer has revealed information protected by Business and Professions Code § 6068(e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person* from the risk of death or substantial* bodily harm, the lawyer must withdraw from the representation. (See Rule 1.16.)

Other consequences of the lawyer's disclosure.

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with Rule

3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See Rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law.

[13] This Rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code § 6068(e)(1) recognized under California law.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-100)

Rule 1.6 [3-100] Confidential Information of a Client

(~~A~~a) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(1) ~~without~~unless the client gives informed consent ~~of the client~~,* or ~~as provided in~~the disclosure is permitted by paragraph (~~B~~b) of this ~~rule~~Rule.

(~~B~~b) A ~~member~~lawyer may, but is not required to, reveal ~~confidential~~ information ~~relating to the representation of a client to the~~protected by Business and Professions Code § 6068(e)(1) to the extent that the ~~member~~lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the ~~member~~lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(~~C~~c) Before revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (~~B~~b), a ~~member~~lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the ~~member's~~lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (~~B~~b).

(~~D~~d) In revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (~~B~~b), the ~~member's~~lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the ~~member~~lawyer at the time of the disclosure.

(~~E~~e) A ~~member~~lawyer who does not reveal information permitted by paragraph (~~B~~b) does not violate this ~~rule~~Rule.

~~Discussion~~ Comment

Duty of confidentiality.

[1] ~~Duty of confidentiality.~~ Paragraph (~~A~~a) relates to a ~~member's~~lawyer's obligations under Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(1), which provides it is a duty of a ~~member~~lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A ~~member's~~lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client-lawyer~~lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter~~detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (~~A~~a) thus recognizes a fundamental principle in the ~~client-lawyer~~lawyer-client relationship, that, in the absence of the ~~client's~~client's informed consent,* a ~~member~~lawyer must not reveal information ~~relating to the representation~~protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

~~[2] Client-lawyer~~*Lawyer-client confidentiality encompasses the ~~attorney-client~~lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality*.

[2] The principle of ~~client-lawyer~~lawyer-client confidentiality applies to information ~~relating to~~a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the ~~attorney-client~~lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The ~~attorney-client~~lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a ~~member~~lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A ~~member's~~lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the ~~client-lawyer~~lawyer-client relationship of trust and prevents a ~~member~~lawyer from revealing the ~~client's confidential~~client's information even when not ~~confronted with~~subjected to such compulsion. Thus, a ~~member~~lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these ~~rules~~Rules, or other law.

~~[3]~~ *Narrow exception to duty of confidentiality under this Rule*.

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited ~~under~~by Business ~~&~~and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(1). Paragraph (~~B), which restates~~b) is based on Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(2), ~~identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual~~which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code ~~section~~§ 956.5, which relates to the evidentiary ~~attorney-client~~lawyer-client privilege, sets forth a similar express exception. Although a ~~member~~lawyer is not permitted to reveal ~~confidential~~ information protected by § 6068(e)(1) concerning a ~~client's~~client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

~~[4]~~ ~~Member~~*Lawyer not subject to discipline for revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule*. ~~Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2),~~

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a ~~member~~lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A ~~member~~lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this ~~rule~~Rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code § 6068(e)(1).

[5] ~~No duty to reveal confidential information.~~ Neither Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(2) nor ~~this rule~~paragraph (b) imposes an affirmative obligation on a ~~member~~lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. ~~(See rule 1-100(~~A~~).) A member~~ lawyer may decide not to reveal ~~confidential~~such information. Whether a ~~member~~lawyer chooses to reveal ~~confidential~~ information protected by § 6068(e)(1) as permitted under this ~~rule~~Rule is a matter for the individual ~~member~~lawyer to decide, based on all the facts and circumstances, such as those discussed in ~~paragraph~~Comment [6] of this ~~discussion~~Rule.

Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).

[6] ~~Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph (~~B~~b) is ordinarily a last resort, when no other

available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted ~~under~~by paragraph (~~B~~b), the ~~member~~lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~ information protected by § 6068(e)(1) are the following:

(1) the amount of time that the ~~member~~lawyer has to make a decision about disclosure;

(2) whether the client or a ~~third party~~third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the ~~member~~lawyer believes* the ~~member's~~lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the ~~client's~~client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article ~~1~~I of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the ~~member~~lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A ~~member~~lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the ~~confidential~~ information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a ~~member~~lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

~~[7] Counseling~~*Whether to counsel client or third person* not to commit a criminal act reasonably* likely to result in death ~~of~~or substantial* bodily harm*.*

[7] Subparagraph (~~C~~c)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information~~, the member~~ protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, ~~or if~~including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling ~~is the client's interest~~are the client's interests in limiting disclosure of ~~confidential~~ information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the ~~member's~~lawyer's

counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the ~~member~~lawyer would cease ~~as~~because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~lawyer who contemplates making adverse disclosure of ~~confidential~~protected information may reasonably* conclude that the compelling interests of the ~~member~~lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the ~~member~~lawyer should, if reasonable* under the circumstances, first advise the client of the ~~member's~~lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the ~~member~~lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the ~~member~~lawyer has concluded that paragraph (~~B~~b) does not permit the ~~member~~lawyer to reveal ~~confidential~~ information~~, the member~~ protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the ~~client's~~client's best interest to consent to the ~~attorney's~~attorney's disclosure of that information.

~~[8]~~ *Disclosure of ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably* necessary to prevent the criminal act*. ~~Under paragraph(D),~~

[8] Paragraph (d) requires that disclosure of ~~confidential~~ information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than ~~the member reasonably believes~~is necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential~~ information to only those persons* who the ~~member~~lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a ~~member~~lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the ~~member~~lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the ~~member's~~lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the ~~member~~lawyer.

Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).

[9] ~~Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).~~ A ~~member~~lawyer is required to keep a client reasonably* informed about significant developments regarding the ~~employment or~~ representation. Rule ~~3-500~~1.4; Business and Professions Code~~, section~~ § 6068~~, subdivision~~ (m). Paragraph (~~C~~c)(2), however, recognizes that under certain circumstances, informing a client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~under~~protected by § 6068(e)(1) as permitted in paragraph (~~B~~b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the

criminal act, but also to the client or members of the ~~client's~~client's family, or to the ~~member~~lawyer or the ~~member's~~lawyer's family or associates. Therefore, paragraph (~~C~~c)(2) requires a ~~member~~lawyer to inform the client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~as provided~~protected by § 6068(e)(1) as permitted in paragraph (~~B~~b) only if it is reasonable* to do so under the circumstances. Paragraph (~~C~~c)(2) further recognizes that the appropriate time for the ~~member~~lawyer to inform the client may vary depending upon the circumstances. (See ~~paragraph~~Comment [10] of this ~~discussion~~Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the ~~member's~~lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the ~~member~~lawyer and client have discussed the ~~member's~~lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the ~~client's~~client's matter will involve information within paragraph (~~B~~b);

(6) the ~~member's~~lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and

(7) the ~~member's~~lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship.

[10] ~~Avoiding a chilling effect on the lawyer-client relationship.~~ The foregoing flexible approach to the ~~member's~~lawyer's informing a client of his or her ability or decision to reveal ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See ~~Discussion paragraph~~Comment [1].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member's~~lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another ~~member~~lawyer may choose to inform a client only at a point when that client has imparted information that ~~may fall under~~comes within paragraph (~~B~~b), or even choose not to inform a client until such time as the ~~member~~lawyer attempts to counsel the client as contemplated in ~~Discussion paragraph~~Comment [7]. In each situation, the ~~member will have discharged properly the requirement under subparagraph (C~~lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

~~[11]~~ ~~*Informing client that disclosure has been made; termination of the lawyer-client relationship*~~.

[11] When a ~~member~~lawyer has revealed ~~confidential~~ information ~~under~~protected by Business and Professions Code § 6068(e) as permitted in paragraph (~~B~~b), in all but extraordinary cases the relationship between ~~member~~lawyer and client that is based on trust and confidence will have deteriorated so as to make the ~~member's~~lawyer's representation of the client impossible. Therefore, when the ~~member~~relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation ~~(see rule 3-700(B))~~, unless the ~~member is able to obtain the client's~~client has given informed consent* to the ~~member's~~lawyer's continued representation. The ~~member~~lawyer normally must inform the client of the fact of the ~~member's~~lawyer's disclosure ~~unless~~. If the ~~member~~lawyer has a compelling interest in not informing the client, such as to protect the ~~member~~lawyer, the ~~member's~~lawyer's family or a third person* from the risk of death or substantial* bodily harm~~.~~, the lawyer must withdraw from the representation. (See Rule 1.16.)

Other consequences of the lawyer's disclosure.

[12] ~~Other consequences of the member's disclosure.~~ Depending upon the circumstances of a ~~member's~~lawyer's disclosure of ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a ~~member~~lawyer must address. For example, ~~if~~ a ~~member will be called~~lawyer who is likely to testify as a witness in ~~the client's matter, then rule 5-210 should be considered~~a matter involving a client must comply with Rule 3.7. Similarly, the ~~member should~~lawyer must also consider his or her duties of loyalty and ~~competency (rule 3-110~~competence. (See Rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law.

[13] ~~Other exceptions to confidentiality under California law.~~This Rule ~~3-100~~ is not intended to augment, diminish, or preclude ~~reliance upon,~~ any other exceptions to the duty to preserve ~~the confidentiality of client~~ information protected by Business and Professions Code § 6068(e)(1) recognized under California law.

V. RULE HISTORY

Introduction. There are three factors that should be considered in considering current rule 3-100. First, it is important to recognize that California's treatment of confidentiality is unique. In every other jurisdiction in the country, the statement of a lawyer's duty of confidentiality resides in a rule of professional conduct that has been adopted by the jurisdiction's highest court. In California, on the other hand, the confidentiality duty is found in a statutory provision passed by the California legislature and enacted in 1872.

Second, the confidentiality rules adopted in the various jurisdictions reflect the greatest variation of any rule based on the Model Rules, ranging from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, to

jurisdictions that *permit* such disclosures, to jurisdictions that prohibit such disclosures, e.g., California. In fact, California law has the strictest confidentiality duty in the United States, with only a single exception expressly recognized in both the statutory provision and the rule.

Third, it is helpful to consider the history behind current rule 3-100 and recognize that the rule was not intended solely as a disciplinary rule. As this history recounts, the rule is an outgrowth of a legislative amendment to the California statute that encompasses a California lawyer's duty of confidentiality, Business and Professions Code § 6068(e). The rule was drafted with the express intent of providing guidance to lawyers practicing in California on the application of the first express exception to confidentiality in California. Understanding this intent helps explain the large number of lengthy comments that the rule contains. The history will further suggest that any amendment to the confidentiality duty in California requires an amendment of § 6068(e).

The History of Rule 3-100. Prior to 2004, the duty of confidentiality in California resided solely in Business and Professions Code § 6068(e).[1] Moreover, unlike ABA Model Rule 1.6 which, from its inception in 1983, recognized several exceptions to a lawyer's duty of confidentiality, § 6068(e) had no exceptions. The California statutory provision had remained substantively unchanged since its adoption by the California Legislature in 1871.[2]

The State Bar had made three attempts to propose a rule of professional conduct with a narrow exception that would permit a lawyer to disclose confidential information in order to prevent a crime reasonably likely to result in death or substantial bodily harm of a person. However, each of the three attempts failed. The reason for the Supreme Court rejecting the proposals appears to have been the Court's belief that a court could not amend a statutory provision, specifically § 6068(e). It was only when the legislature amended § 6068(e) in 2004 to recognize an exception to confidentiality to prevent life-threatening criminal activity and authorized the State Bar to draft a rule of professional conduct to clarify and provide guidance to lawyers concerning the application of this first express exception to confidentiality in California, that the way was opened for a confidentiality rule that included an exception.

A. The State Bar's Three Attempts at Proposing a Rule Concerning Confidentiality Prior To 2004

First, in 1987, the State Bar submitted a proposed rule with four exceptions to the duty, including an exception for life-threatening criminal activity.[3] The California Supreme

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[1] The 2004 amendment to section 6068(e), which added an exception to the duty of confidentiality for life-threatening criminal activity, carried forward the substance of 6068(e) verbatim, only changing the subdivision's designation from "(e)" to "(e)(1)." Section 6068(e)(1) provides that it is the duty of an attorney: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

[2] The language of the original statute has been made gender neutral.

[3] The proposal, if approved, also would have permitted disclosures: (i) with the client's consent; (ii) when ordered by a tribunal when certain conditions have been satisfied; and (iii) to

Court rejected that proposal. In a letter to the State Bar President, dated June 9, 1988, the Court questioned its authority to approve a rule that contravenes the language of a statute. The letter stated in relevant part:

> 4. Regarding proposed Rule 3-100(C)(3) (Duty to maintain Client Confidence and Secrets Inviolate), in what context does it allow for disclosure of otherwise privileged attorney-client information. To the extent it permits disclosure in a judicial proceeding *where no statutory exception to the privilege exists*, it may be inconsistent with, or contravene the Legislature's intent underlying *Evidence Code section 950 et seq.* (Cf. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 539-540.) Where the Legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?

(Letter from Laurence P. Gill, Clerk of the Supreme Court to Terry Anderlini, President of the State Bar of California (June 9, 1988) re Bar Misc. 5626 – Proposed Amendments to the Rules of Professional Conduct of the State Bar of California (on file with the State Bar of California).) (Emphasis added.)

Because the Supreme Court's inquiry raised uncertainty as to whether the Court could modify a statutory provision by approving a rule of professional conduct, the State Bar withdrew the rule from consideration.

Second, in 1992 the State Bar proposed a rule that was limited to two exceptions to the confidentiality duty: (i) when the client consents, or (ii) when life-threatening criminal activity by the client is present. Rather than carving out an exception to the statutory duty as the 1987 proposal had, the 1992 proposal was drafted to provide a safe harbor from discipline for the disclosing lawyer. The rule stated that a lawyer "is not subject to discipline who reveals a confidence or secret" to prevent a criminal act "that the member believes is imminently likely to result in death or substantial bodily harm." Rather than contravening statutory language, the rule identified narrow circumstances (consent, imminent life-threatening injury) under which disclosure would not subject a lawyer to discipline. Notwithstanding this different approach, the Supreme Court rejected the proposed rule without comment.

Third, in 1998, the State Bar abandoned the foregoing "safe harbor" approach and proposed a rule with an exception to confidentiality that would have permitted disclosure of confidential information to the extent that the lawyer reasonably believed it would be necessary "to prevent the client from committing a criminal act that the [lawyer] believes is likely to result in death or substantial bodily harm. The Supreme Court again rejected the proposed rule without comment.

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establish a claim or defense in a controversy with the client or in a disciplinary or other proceeding against the lawyer which is based upon conduct in which the client was involved.

The State Bar did not submit any further proposals until June 2004 when, as an outgrowth of the legislature's amendment of § 6068(e), it submitted a proposed rule that eventually would lead to the Supreme Court's approval of current rule 3-100.

B. The Process By Which Current Rule 3-100 Became Part Of The Rules Of Professional Conduct

In 2003, then-Assemblyperson Darrell Steinberg introduced Assembly Bill 1101 ("AB 1101"),[4] which eventually was enacted by the Legislature and signed into law by Governor Davis (Stats. 2003, ch. 765). The enactment of the bill resulted in the process by which rule 3-100 became part of the Rules of Professional Conduct.

AB 1101 was comprised of four sections, two of which substantively amended statutory provisions in the Business & Professions Code (relating to the duty of confidentiality) and Evidence Code (relating to the lawyer-client privilege), respectively.

Section (1) of AB1101 amended Bus. & Prof. Code § 6068(e) to add an exception, subdivision (e)(2), as indicated by the following legislative black-line version:

It is the duty of an attorney to do all of the following:

* * *

> (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
>
> (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.[5]

Section (2) of AB1101 amended Evidence Code § 956.5, an existing express exception to the lawyer-client privilege, as reflected in the following legislative black-line version of the section:

> 956.5 There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent ~~the client from committing~~ a criminal act that the

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[4] The full text of AB 1101 as introduced is available at: http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-1150/ab_1101_bill_20030220_introduced.pdf. (Last accessed on June 30, 2015.)

[5] See section (1) of AB 1101. The full text of AB 1101 as chaptered is available at: http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-150/ab_1101_bill_20031011_chaptered.pdf. (Last accessed on June 30, 2015.)

lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

The phrase "confidential information relating to the representation of a client" in § 6068(e)(2) was apparently intended to conform to the phrase "confidential communication relating to the representation of a client" that already existed in Evidence Code § 956.5. The use of that latter phrase in § 6068(e)(2), which has no predicate in § 6068(e)(1), creates a disjunction between the two subdivisions that was also carried forward into current rule 3-100. This disjunction is a possible defect in the current rule that the first Commission attempted to remedy.

Section (3) of AB 1101 stated the Legislature's intent that the State Bar, in consultation with the Supreme Court, appoint a task force to study and make recommendations for a rule of professional conduct that would clarify the new statutory exception to the duty of confidentiality.[6] Section (3) provided:

(a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.[7]

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[6] Section (4) of AB 1101 provided that the amendments "shall become operative on July 1, 2004" to provide sufficient time for the task force to complete its work.

[7] Paragraph (c) of section (3) specifies the composition of the task force which includes, but is not limited to: (1) Civil and criminal law practitioners; (2) judicial, executive, and legislative representatives; (3) State Bar committee representatives; and (4) public members. A copy of the task force roster is on file with the State Bar. The current Commission consultant, Professor Kevin

Pursuant to section (3) of AB 1101, a State Bar Advisory Task Force ("Task Force") was appointed. (See, page 4 of the "Request That The Supreme Court Of California Approve Proposed Rule 3-100 Of The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," June 2004 ("2004 Request").) The Task Force was charged with developing a rule of professional conduct related to the issues posed in section (3) of AB 1101 concerning the single confidentiality exception added as § 6068(e)(2). The Task Force used the State Bar's procedures for adopting and submitting a rule to this Court for approval. (See, 2004 Request, at page 4.)

The Task Force sought to draft a rule that would effectuate the public policies favoring the preservation of life and protection of the public and also provide guidance to lawyers about how to achieve those goals within the confines of the attorney-client relationship.[8] The Task Force met several times to discuss the issues identified in section (3) of AB 1101 and consider several preliminary rule drafts to address the issues, and then prepared a proposed rule to submit to the Board for public comment authorization. (See, 2004 Request, at pp. 18-20.) In response to public comment, a number of revisions were made. (See, 2004 Request, at pp. 15-17.) A revised proposed rule was then submitted to the Board, which was adopted unanimously for transmission to this Court. This Court modified Discussion paragraphs [6] and [7] to bring the comment closer to the language of the proposed rule and then approved current rule 3-100, operative on July 1, 2004, Supreme Court case number S125414.

The changes the Supreme Court effectuated appear to reflect its concern that the comments, intended to clarify the rule, conform more closely to that purpose and the black letter language in the rule. In Discussion paragraph [6], the proposed last sentence was deleted: "Thus, a member who knows that a client is discharging or intends to discharge toxic waste into a town's water supply in violation of the criminal law may reveal this information to the authorities if there is a substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims."

In Discussion paragraph [7], two sentences were modified as shown below.

> If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – ~~or by expressing a genuine commitment not to proceed with a threatened criminal act, then~~ the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present.

Mohr, was the chair of the Task Force. Also, current Commission member Mark Tuft was a member of the Task Force.

[8] The Task Force's rule development process included consideration of the prior State Bar proposals of rule 3-100; American Bar Association Model Rule of Professional Conduct 1.6; and section 66 of the American Law Institute's *Restatement of the Law Governing Lawyers*. (See, 2004 Request, at page 4.)

* * * * *

If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent ~~the criminal act~~ harm.

VI. OFFICE OF CHIEFT TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule, but has concerns about many of the Comments.

   Commission Response: No response required.

2. Comments [1], [2], [3], [4], [5], [7], [9], and [10] appear unnecessary and just a reiteration of the rule and a philosophical discussion of the reasons for the rule.

   Commission Response: The Commission declines to make the requested change. In 2003, as part of the legislative enactment that effectuated the exception to § 6068(e) to permit disclosure of confidential information to prevent a life-threatening criminal act, the State Bar, in consultation with the Supreme Court, was directed to promulgate a rule of professional conduct "regarding professional responsibility issues related to the implementation of this act."[9] The bill also identified several issues that the rule drafters should consider in drafting

[9] Section (3) provided of AB 1101, the bill that amended § 6068(e) provided:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

the rule.[10] The Comments for Rule 1.6 identified by the commenter as "superfluous and unnecessary" are essential to the State Bar's reasoned and balanced response to the legislative directive to provide guidance to California lawyers regarding the application of the first express exception to the duty of California since § 6068(e) was first adopted in 1872.

3. OCTC supports Comment [6], [8], [11], [12], and [13].

   Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. All six comments agreed with the proposed Rule only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

As noted in rule 3-100, Discussion paragraph [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

1. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. (See Evidence Code §§ 951-962.) It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

2. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business and Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and

[10] See footnote 9, section 3(b).

lawyer for the purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.) Even information in the public record that is not easily discoverable is protected by the duty. (*In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

a. *Duty of Confidentiality and Lawyer-Client Privilege Compared*. The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily-defined concept of a "confidential communication." (See Evid. Code § 952 for the definition of a "confidential communication" between a "lawyer"; Evid. Code § 950 for the definition of "lawyer"; Evid. Code § 951 for the definition of "client.") For example, the duty encompasses information acquired by virtue of the lawyer–client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is preparing advertising material may not use information protected by the duty without the client's consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see Evid. Code § 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

b. *Other Points About the Duty*. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code § 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

3. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (§ 2018.030(a).) Any other work product of an attorney "is not discoverable unless the court determines that denial of

discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (§ 2018.030(b).)

a. *Duty of Confidentiality and Work-Product Compared*. There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Code of Civ. Proc. § 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. § 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code § 6068(e)(2).)

B. ABA Model Rule Adoptions

Included here are examples of the rule text from three jurisdictions that demonstrate the variation that exists in the confidentiality rule throughout the country: Delaware Rule 1.6, which is identical to Model Rule 1.6, and Alabama Rule 1.6 and New York Rule 1.6, both of which substantially diverge from the Model Rule in different ways.

- **Delaware Rule 1.6** is identical to Model Rule 1.6:

Delaware Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or

civil claim against the lawyer based upon conduct in which the client was involve d, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed in formation would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- **Alabama Rule 1.6** diverges markedly from Model Rule 1.6 in not adopting most of the exceptions in the Model Rule's paragraph (b), nor adopting paragraph (c):[11]

  Alabama Confidentiality of Information.

  (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

  (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

  (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

  (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

- **New York Rule 1.6** also diverges markedly from Model Rule 1.6 in its structure and terminology, and in including a definition of "confidential information":

[11] It should be noted that Alabama engaged in a piecemeal revision of its Rules of Professional Conduct after the ABA Ethics 2000 Commission issued its revised Model Rules by the end of 2002. Most of its rules remain based on the original Model Rules, which the ABA adopted in 1983.

New York Rule 1.6: Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information," revised December 9, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf [Last visited 2/7/2017]

- Model Rule 1.6 has been subject to more variation among the jurisdictions that have adopted or adapted it than any other ABA model rule. These variations range from states that prohibit disclosures of any information except to prevent death or substantial bodily harm, to those that *permit* disclosure to prevent financial injury, and even to some states that *mandate* disclosure to prevent death or substantial bodily harm or to prevent a criminal act likely to result in substantial financial injury. Two jurisdictions have adopted Model Rule 1.6 verbatim.[12] Thirty-nine jurisdictions have adopted a slightly modified version of Model Rule 1.6.[13] Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.6.[14]

- Exception to Prevent Life-threatening Act. Concerning paragraph (b) of the proposed rule, all states provide an exception for revealing confidential information to prevent reasonably certain death or substantial bodily injury. In most jurisdictions, like California, it is permissive, but 13 jurisdictions require such disclosures (Arizona, Connecticut, Florida, Illinois, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin). A number of jurisdictions, like California, limit disclosures to preventing a life-threatening *criminal act* (e.g., Alabama, District of Columbia, Michigan, Rhode Island, South Dakota and West Virginia). Some jurisdictions, unlike California, require that the criminal act be likely to cause *imminent* death or bodily harm (e.g., Alabama, Rhode Island, and South Dakota). Other jurisdictions simply provide an exception that would permit a lawyer to prevent a crime, which would include a life-threatening crime (e.g., Kansas, Virginia). Given the range of permitted or mandated disclosures, California's variation does not stray from a national standard.

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[12] The two jurisdictions are: Delaware and West Virginia.

[13] The thirty-nine jurisdictions are: Alaska, Arkansas, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Kansas, Kentucky, Maine, Maryland, Missouri, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

[14] The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Texas.

- **Other Model Rule exceptions to confidentiality that are recognized in California case law or statutes.**[15]

    1. Exception to seek legal advice about compliance with professional obligations. Nearly every jurisdiction permits a lawyer to seek advice about compliance with the rules of professional conduct or other law, or both. Several jurisdictions provide a Comment to recognize that such disclosures are permitted (e.g., Kansas, Massachusetts, Michigan, and Virginia). Only New Jersey, Texas and West Virginia do not provide for such disclosures either in the Rule or a Comment. Texas permits a lawyer to reveal unprivileged information, i.e., information relating to the representation that is not subject to the lawyer-client privilege, to "carry out the representation effectively . . . ." (Texas Rule 1.05(d)(2)(i)), and New Jersey and West Virginia provide that the duty is qualified by "disclosures that are impliedly authorized in order to carry out the representation.") (N.J. Rule 1.6(a); W.V. Rule 1.6(a).) (See Section IX.C.6.a & note 26, below.)

    2. Self-defense exception. Every other jurisdiction's provision is as broad as Model Rule 1.6(b)(5) in permitting disclosures even against third-party claims. If California were to include a self-defense exception, it would have to be coextensive with Evidence Code § 958, i.e., available only to assert a claim against, or defend a claim brought by, a client. (See Section IX.C.6.b & note 27, below.)

    3. Exception to comply with court order or other law. Nearly every jurisdiction permits disclosures to comply with a court order or other law, or both. Besides California, only Alabama does not have an express exception for such disclosures, and an unnumbered Alabama Comment titled "Disclosures Otherwise Authorized or Required," provides: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." (See, Alabama Rule 1.6, Comment.) Florida, Georgia, and Washington do not permit disclosures to "comply with other law." (See Section IX.C.6.c & note 28, below.)

- **Other Model Rule exceptions that have no counterparts in California law.** Some jurisdictions have adopted a version of ABA Model Rule 1.6(b)(2) and (3) (revealing confidential information in cases of financial harm). The ABA Comparison Chart, entitled "Comparison of State Confidentiality Rules, ABA Model Rule 1.6(b)(2) and (3): Revealing Confidential Information in Cases of Financial Harm," revised May 13, 2015, is available at:

    - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6b2_3.pdf [last visited 2/7/17].

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[15] Although the first Commission recommended adoption of these exceptions, the Commission does not recommend their addition to current rule 3-100. (See Section IX.C.6 (Concepts Rejected), below.)

- Forty-one jurisdictions permit disclosure to prevent crime, including criminal fraud.[16] Five jurisdictions required disclosure to prevent crime, including criminal fraud.[17] Six jurisdictions do not permit or require disclosure to prevent crime (including criminal fraud).[18]

    - Of the jurisdictions that permit or require disclosure, thirty jurisdictions require the amount of loss to be "substantial" in order to disclose. Sixteen jurisdictions do not have a requirement in the amount of loss in order to disclose.

- Twenty-seven jurisdictions permit disclosure to prevent non-criminal fraud likely to result in substantial loss.[19] Three jurisdictions require disclosure to prevent non-criminal fraud likely to result in substantial loss.[20] Twenty-one jurisdictions do not allow disclosure to prevent non-criminal fraud likely to result in substantial loss.[21]

- In nineteen jurisdictions disclosure is limited to situations where the lawyer's services were used perpetrate a crime or fraud. Thirteen jurisdictions do not limit it to situations where the lawyer's services were used. Seventeen jurisdictions include no provision. Two states limit it to situations where the lawyer's services were used to perpetrate a fraud but not a crime.

- Thirty-three jurisdictions permit disclosure to prevent or rectify substantial financial loss resulting from crime or fraud. Seventeen jurisdictions do not require disclosure to rectify substantial financial loss resulting from crime or fraud. One jurisdictions permits disclosure to rectify financial loss unless the loss is substantial, in which case disclosure is required.

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[16] The jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

[17] The jurisdictions are: Florida, New Jersey, Vermont, Virginia and Wisconsin.

[18] The jurisdictions are: California, Kentucky, Missouri, Montana, Rhode Island and South Dakota.

[19] The jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia,.

[20] The jurisdictions are: New Jersey, Vermont and Wisconsin.

[21] The jurisdictions are: Alabama, California, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Washington, and Wyoming.

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

A. Introduction

The same three factors identified in the Introduction to the History Section should be considered in reviewing the Commission's recommendations concerning current rule 3-100: (i) the uniqueness of California's duty of confidentiality residing in a statute rather than a rule; (ii) the broad variation in rules adopted in jurisdictions throughout the country; and (iii) the lengthy gestation of current rule 3-100 and how it was eventually adopted.

B. Concepts Accepted (Pros and Cons):

1. Paragraph (a): Change syntax to more closely approximate the syntax of Model Rule 1.6 and most jurisdictions.

    - Pros: The changed syntax includes the preferred active voice ("the client gives informed consent"). No substantive change is intended.

    - Cons: None identified.

2. Paragraph (a): Substitute "the disclosure is permitted" for "as provided".

    - Pros: The use of the word "permitted" emphasizes that Rule 1.6 does not impose a disclosure duty on the lawyer. Whether the lawyer discloses information protected by § 6068(e)(1) is discretionary.

    - Cons: None identified.

3. Paragraph (b), substitute the clause "information protected by Business and Professions Code § 6068(e)(1)" for the clause "confidential information relating to the representation of a client."

    - Pros: The substitution will remedy the current disjunction that exists between paragraphs (a) and (b) in current rule 3-100 (which also exists between Business and Professions Code §§ 6068(e)(1) and (e)(2).)

      The disjunction arises because under current rule 3-100(B) (and subdivision (e)(2)), a member/attorney may reveal "confidential information relating to the representation of a client" to prevent a life-threatening criminal act. However, there is no predicate for the phrase "confidential information relating to the representation of a client" in subdivision (e)(1), which is incorporated by reference in paragraph (A). Moreover, there is nothing in the legislative history to explain the disjunction. It would appear there are two possibilities: First, the Legislature might have simply attempted to conform the language in 6068(e)(2) to the language in the parallel exception to the lawyer-client privilege, Evidence Code § 956.5 ("There is no privilege under this article if

the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.") However, even with that attempt to conform the language, the language in § 6068(e)(2) is different from that in § 956.5, the former referring to "confidential *information*" and the latter referring to "confidential *communication*," which are different concepts. Only communications between lawyer and client are protected by the privilege while any information the lawyer acquires by virtue of the representation, regardless of its source, is protected under the duty of confidentiality. Second, the language used might represent a borrowing of the term used in Model Rule 1.6 to denote the information protected in subdivision (1) of § 6068(e), i.e., "information relating to the representation of a client."

However, regardless of why the clause "confidential information relating to the representation of a client" was used in subdivision (2) of § 6068(e), the disjunction remains. Substituting the more accurate "information protected by Business and Professions Code § 6068(e)(1)" removes it.

The first Commission recommended a similar substitution, but more generally referred to "§ 6068(e)" rather than "§ 6068(e)(1)." The latter term is more precise because the confidentiality duty is stated in subdivision (e)(1), and the exception for life-threatening criminal conduct in subdivision (e)(2).

- Cons: There is no evidence that the "disjunction" has created confusion or diminished compliance with the statute or the rule. Moreover, it might be questioned whether the Supreme Court should change the language in paragraph (b), which is a verbatim recitation of a legislative enactment.

4. Paragraph (b): Add phrase, "as provided in paragraph (c)" at the end of the paragraph.

   - Pros: This phrase is an important clarification. It emphasizes that the disclosure as permitted by paragraph (b) is limited not only "to the extent . . . necessary to prevent" the criminal act, but also by the provisions of paragraph (c). The first Commission also added this clause.

   - Cons: None identified.

5. Paragraph (c): Retain paragraph (c), the only changes being substitution of the terms "lawyer" and "information protected by Business and Professions Code § 6068(e)(1)" and the formatting changes as described above.

   - Pros: There is no evidence that paragraph (c), which was drafted in response to specific inquiries from the Legislature, (see above), has caused confusion or other problems.

- Cons: None identified.

6. Paragraph (d): Retain paragraph (d), the only changes being substitution of the terms "lawyer" and "information protected by Business and Professions Code § 6068(e)(1)" and the formatting changes as described above.

   - Pros: Paragraph (d) is an important limitation on the extent to which a lawyer is permitted to disclose information protected by § 6068(e)(1) to prevent a life-threatening criminal act. In effect, the provision provides that in attempting to prevent such an act, a lawyer must take care to pursue the path that will result in the lawyer disclosing the least amount of protected information, thus avoiding concomitant injury to the lawyer-client relationship. (See Comments [10] and [11].) Moreover, aside from the fact that the Supreme Court has already approved this provision, there is no evidence that paragraph (d) has caused confusion or other problems of compliance or enforcement.

   - Cons: None identified.

7. Paragraph (e): Retain paragraph (e), the only changes being substitution of the term "lawyer" and the formatting changes as described above.

   - Pros: Paragraph (b)'s use of permissive language and the disjunctive ("may, but is not required to") emphasizes that disclosure is discretionary with the lawyer and no duty is imposed. Paragraph (e) fosters a lawyer's careful consideration of the circumstances in making a decision to disclose protected information by providing that a lawyer's exercise of that discretion and decision not to disclose will not subject the lawyer to discipline. Given the subject matter of the paragraph (b) exception and the overriding value that is placed on life, a lawyer's carefully-reasoned decision not to disclose information as permitted could be condemned in retrospect should a fatality or serious injury occur that a disclosure might have been prevented. This provision provides an important balance to those considerations.

   - Cons: None identified.

COMMENTS

Note on Comments To Proposed Rule 1.6: Principle 2 of the Commission's Charter provides the Commission "should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards." Principle 5 provides that Comments "should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves." Despite these principles, each of the recommended Comments are justified. As discussed, (see paragraph A., above), proposed Rule 1.6 was not intended solely as a disciplinary rule. The primary objective of current rule 3-100 is to provide guidance to California lawyers concerning how to comply with the rule's permissive exception for disclosing protected information to prevent a life-threatening criminal act. Further, the rule was drafted at the direction of the Legislature

when it amended § 6068(e) to permit the first exception to the California duty of confidentiality since the section was adopted in 1871. In addition, no substantive changes to the Comments are intended, the only changes being substituted terms and formatting changes. Finally, the Supreme Court has already approved all of the Comments. In summary, the Comments are an attempt to clarify how the rule should be applied, do not conflict with Principle 5, and conform with Principle 4 by facilitating "compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties."

8. Retain current rule 3-100 Comment headings with minor revisions.

   - Pros: The Rule 3-100 Task Force inserted headings into each Discussion paragraph to provide lawyers with a quick reference point for the subject matter of the paragraph. Notwithstanding the current Commission's Charter regarding Comments, given that rule 3-100 was intended as, and is, a rule of guidance, retaining the Comment headings should be favored. When a lawyer is confronted with a life-threatening situation the harm is often imminent. Providing headings helps a lawyer to quickly find a Comment that will explain how the lawyer might disclose protected information as permitted by the Rule. In addition, there was consensus among the Commission members to move each heading out of the Comment itself and place it above each Comment to make it more prominent.

   - Cons: None identified.

9. Retain current rule 3-100, Discussion ¶. 1 as Comment [1].

   - Pros: Comment [1] provides context for the Rule, explaining the policy underlying the duty of confidentiality, i.e., to promote "the trust that is the hallmark of the lawyer-client relationship," which in turn promotes candor by the client and enhances the lawyer's ability to represent the client effectively.

     The term "detrimental subjects" has been substituted for the phrase, "legally damaging subject matter." No change of meaning is intended. The latter phrase comes from Model Rule 1.6, Cmt. [2], and has no historical meaning in California law. The substituted term, "detrimental subjects" is derived from State Bar and local California bar association ethics opinions that have traditionally understood the term "secrets" in § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or *detrimental* to the client.

   - Cons: The Comment, while accurate, does not explain or clarify the rule.

10. Retain current rule 3-100, Discussion ¶. 2 as Comment [2], with non-substantive several revisions, including adding the term "informed" to modify "consent" in the last sentence, to conform the Comment to paragraph (a).

    - Pros: Comment [2] describes the scope of information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of

confidentiality is much broader than the lawyer-client privilege and also includes information acquired by virtue of the representation, regardless of source, and information protected under the work-product doctrine.

- Cons: None identified.

11. Retain current rule 3-100, Discussion ¶. 3 as Comment [3].

    - Pros: Comment [3] clarifies that the rule provides for a narrow exception to the duty of confidentiality. The Commission recommends replacing a nearly verbatim recitation of § 6068(e)(2) with a shorter description of that provision. The first Commission made a similar recommendation. By distinguishing in the last two sentences "past, completed criminal acts" of a client and "future or ongoing criminal acts," the Comment provides important guidance to lawyers regarding the extent to which they are authorized under § 6068(e)(2) to disclose information protected by their duty of confidentiality.

    - Cons: None identified.

12. Retain current rule 3-100, Discussion ¶. 4 as Comment [4].

    - Pros: Comment [4] is a counterpoint to paragraph (e), which provides a lawyer is not subject to discipline for not disclosing information. Comment [4], on the other hand, provides that a lawyer is not subject to discipline if the lawyer *does disclose* protected information as permitted by the rule, i.e., complies with the various provisions limiting the disclosure, e.g., paragraph (c). It provides assurance to a lawyer contemplating disclosure that if the lawyer complies with the rules provisions, he or she will not be subject to discipline. Comment [4] also provides the rationale for the provision, i.e., whether a lawyer should disclose protected information requires a careful balancing between the interests in preserving confidentiality (and the trust relationship between lawyer and client) and preventing a life-threatening criminal act.

    - Cons: Comment [4], which provides immunity from discipline similar to paragraph (e), should also be in the black letter of the rule.

13. Retain current rule 3-100, Discussion ¶. 5 as Comment [5].

    - Pros: Comment [5] is included to emphasize that there is no duty to disclose and that the decision whether to disclose or not rests with the lawyer. To further emphasize the lawyer's discretion, the Commission recommends deleting the reference to rule 1-100(A) [proposed Rule 1.0(a) and (b)], which notes that the rules are "binding" on lawyers, as unnecessary given that (i) the binding confidentiality duty resides in § 6068(e)(1); and (ii) paragraph (b) is permissive. The first Commission also deleted the reference for the same reason.

- Cons: The use of permissive language and the disjunction in paragraph (b) ("may but is not required") sufficiently makes the intended point of Comment [5].

14. Retain current rule 3-100, Discussion ¶. 6 as Comment [6] and change the heading so it provides "Whether to reveal information …".

    - Pros: Comment [6] is one of the critical guidance provisions in the rule. It provides a list of non-exclusive factors a lawyer should balance in deciding whether to disclose protected information to prevent a life-threatening criminal act.

      Further, the Comment clarifies that the threatened harm need not be imminent for the paragraph (b) exception to apply. This is important because most jurisdictions formerly had required that the harm be imminent before a lawyer could rely on the exception and all three previous proposals by the State Bar had included an "imminence" limitation.

      The heading has also been changed to emphasize that disclosure is a choice, not a foregone conclusion.

    - Cons: None identified.

15. Retain current rule 3-100, Discussion ¶. 7 as Comment [7] and change the heading so it provides "Whether to counsel client …".

    - Pros: Comment [7] is another provision that provides critical guidance to a lawyer in deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act, as required under paragraph (c)(1) "if reasonable under the circumstances." The Comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.7.

      Similar to Comment [6], the heading has been revised to emphasize that under appropriate circumstances as describe in the Comment, counseling the client or third person is within the lawyer's discretion.

    - Cons: None identified.

16. Retain current rule 3-100, Discussion ¶. 8 as Comment [8].

    - Pros: Comment [8] clarifies what is meant by the limited clause, "to the extent that the lawyer reasonably believes the disclosure is necessary." Because of the numerous ways in which a lawyer might disclose protected information (anonymous message, to authorities, to a family member of the criminal actor, etc.), the Comment provides guidance, including examples of relevant circumstances that a lawyer might consider in determining the extent of the permitted disclosure under the circumstances.

- Cons: None identified.

17. Retain current rule 3-100, Discussion ¶. 9 as Comment [9].

    - Pros: Paragraph (c)(2) requires that a lawyer, if reasonable under the circumstances, inform the client of the lawyer's ability or decision to disclose protected information to prevent a life-threatening criminal act. Comment [9] sets forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made. (See also paragraph 17, below, concerning related Comment [10].

      The Comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.9.

    - Cons: None identified.

18. Retain current rule 3-100, Discussion ¶. 10 as Comment [10].

    - Pros: Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing the client of the ability or decision to disclose. It explains that there is no specific time when the disclosure must be made and provides a range of possibilities, at the outset of the representation to shortly before the contemplated disclosure is made.

      The Comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.10.

    - Cons: None identified.

19. Retain current rule 3-100, Discussion ¶. 11 as Comment [11].

    - Pros: Comments [9] and [10] provide guidance as to *when* a lawyer should inform the client of the lawyer's ability or decision to disclose. Comments [11] and [12] provide guidance on what a lawyer should expect will likely result when the lawyer has so informed the client, particularly when the lawyer has already made the disclosure.

      Comment [11] focuses on the potential breakdown of the trust relationship between and lawyer and client and the real possibility that the lawyer will be obligated to withdraw from the representation as a result of the lawyer informing the client.

      Comment [12] focuses on other consequences that might result from the lawyer making a disclosure and identifies other rules the lawyer should consult in determining the lawyer's course of action.

These Comments were originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to either of the current Discussion paragraphs.

- Cons: None identified.

20. Retain current rule 3-100, Discussion ¶. 12 as Comment [12].

    - Pros: See paragraph 19.

    - Cons: See paragraph 19.

21. Retain current rule 3-100, Discussion ¶. 13 as Comment [13] and delete the phrase "reliance upon."

    - Pros: Because current rule 3-100 is not a rule that comprehensively addresses the duty of confidentiality, the Task Force that drafted rule 3-100 included Discussion ¶. 13 to put lawyers on notice that the rule is not an exhaustive treatment of confidentiality in California and that there may be other obligations or exceptions recognized in the law, none of which the rule is intended to supersede.

      The Commission recommends deleting the phrase "reliance upon" as surplusage. No change in meaning is intended.

    - Cons: None identified.

C. Concepts Rejected (Pros and Cons):

1. Title: Change the title of the rule to "Confidentiality of Information."

    - Pros: First, that title is used in nearly every jurisdiction's confidentiality rule. Second, and more important, continued use of the current title, "Confidential Information of a Client," could be confusing because the Commission has recommended that all references to "confidential information" in current rule 3-100 be replaced by either "information protected by Business and Professions Code § 6068(e)(1)" or "information protected by § 6068(e)(1)". As discussed above, (see paragraph 3), the Commission is recommending these substitutions to remedy a disjunction between paragraph (a) and paragraph (b) of the current rule.

    - Cons: The Rule concerns only confidential client information, not information that a lawyer is obligated to keep confidential pursuant to a contract with non-clients or under a court order. Moreover, the Commission has recommended that the current term, "confidential information relating to the representation," be replaced with "information protected by Business and Professions Code § 6068(e)(1)." Retaining the current reference to "client" in the title will help to explain what follows, which does not include consideration of any other duty of

confidentiality a lawyer might owe.

2. Include in the blackletter rule a definition of "information protected by Business and Professions Code § 6068(e)(1)". There was consensus among Commission members not to recommend including a definition in the rule. The definition the Commission considered provided:

> (f) "Information protected by Business and Professions Code § 6068(b)(1)" or "protected information" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Protected information does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

The first sentence is drawn from California ethics opinions that in turn adopted the definition of "confidence" and "secrets" in ABA Code of Professional Responsibility, DR 4-101(A). The second sentence of the definition is taken from New York Rule 1.6(a). It is significant that the term used in the New York definition is "generally known," not "public record" information. A State Bar Court case has held that "public record" information that is "not easily discoverable" is protected by 6068(e)(1). (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

- Pros: The proposed provision would delimit the scope of a lawyer's duty of confidentiality. Because of California's strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Business and Professions Code § 6068(e) (and paragraphs (a) and (b)), (see paragraph B.3, above), expanding current rule 3-100, Discussion ¶. 2, would be critical in providing guidance to lawyers in this important area and advancing protection to clients. Few jurisdictions define in their rules what information comes within the scope of the duty of confidentiality, and that is a deficiency.

- Cons: First, it is not practicable to define confidentiality in a black letter profession without including several clarifying Comments. For example, the first Commission attempted to do so in four Comments in its proposed Rule 1.6.[22] Second, it is questionable whether the Supreme Court should attempt

[22] The first Commission's description of confidentiality provided:

> [3] As used in these Rules, "information protected by Business and Professions Code § 6068(e)(1)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and

to define in a Rule of Professional Conduct a statutory term. In fact, in a 2014 Supreme Court letter to the Bar concerning proposed Rule 1.0, the Supreme Court directed that a cross-reference to the definition of "information protected by Business and Professions Code § 6068(e)" in Comments [3] to [6] of proposed Rule 1.6 should be deleted.[23] There is some uncertainty about the

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Professions Code § 6068(e)(1) is broader than the lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)

Scope of the Lawyer-Client Privilege

[4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

Scope of the Duty of Confidentiality

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

[6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[23] The letter provided:

The court has asked that I refer the Proposed Revision to the Rules of Professional Conduct, rule 1.0.1(e-2), submitted August 21, 2013, with its request that the State Bar redraft this provision without reference to any proposed Comments. The language of the redrafted submission should be consistent with the terms of Business and Professions

reason for the Court's direction. Among other things, it could mean: (i) rules of professional conduct, which are promulgated by the court, should not attempt to define a statutory term; (ii) if there is such a definition, the definition should be in the black letter of the rule and not in its Comments; (iii) there should not be a cross-reference from the black letter of a rule to a Comment in another rule.

3. Require that the client's "informed consent" as described in paragraph (a) must be in writing. There was consensus among Commission members not to recommend that requirement.

   - Pros: Given California's strong policy of protecting client confidentiality, any informed consent that is obtained from a client to disclose protected information should be "informed *written* consent" as is required in the conflict of interest rules. Such a writing requirement would better alert the client to the significance of the consent being sought.

   - Cons: Requiring written consent would be impracticable in many practice scenarios, e.g., negotiations and mediations, which often require prompt responses to proposals and counter-proposals. In addition, the consequences from other kinds of disclosures that would be detrimental or embarrassing to a client would be obvious and should not require the kind of detailed written disclosures that are required in conflict situations where the adverse consequences might not be so apparent.

4. Include in paragraph (a), similar to the Model Rule, language that recognizes that in addition to informed client consent and the paragraph (b) exception, disclosures may also be "impliedly authorized in order to carry out the representation."[24] There was consensus among Commission members not to recommend including such a provision.

   - Pros: Including the exception will bring California in line with every other jurisdiction in the country, which recognize that in order to advance the client's interests in the representation, a lawyer must have implied authority, for example, during negotiations on behalf of the client when the client is not available to provide consent.

Code section 6068, subdivision (e), as well as the compliance and disciplinary purpose and function of the California Rules of Professional Conduct.

(See April 15, 2015 Letter from Frank McGuire, Court Administrator, to Starr Babcock and Mary Yen, State Bar General Counsel's Office, concerning 8206125 -Proposed Rule 1.0.1 (Terminology).)

[24] The Commission also considered "implied authority" language from other jurisdictions, including New York's more detailed language, which provides: "the disclosure is impliedly authorized in order to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community."

- Cons: Such a provision has the potential to swallow the rule. The first Commission similarly rejected the provision.

5. In paragraph (b), remove the "criminal act" limitation as suggested in a public comment received. There was consensus among Commission members not to recommend the change.

   - Pros: The change is necessary because a lawyer who learns that a client or another person has put the public in danger – as through a dangerous consumer product – could not ethically warn anyone unless the manufacturer's failure to recall the product or warn the public was also a crime.

   - Cons: The "criminal act" limitation is included to emphasize that the conduct that would release a lawyer from the lawyer's duty of confidentiality must at least rise to the level of being "criminal." It should remain. In any event, because the language is part of § 6068(e)(1), it cannot be changed without legislative action.[25]

6. Add other exceptions to paragraph (b) that correspond to Model Rule exceptions and are recognized in California case law or other statutory sections. The exceptions would have included provisions corresponding to:

   a. Model Rule 1.6(b)(4). Exception to seek legal advice about the lawyer's compliance with the Rules.[26]

   b. Model Rule 1.6(b)(5). A "self-defense" exception, i.e., would permit a lawyer to disclose protected information to establish a claim or defense.[27]

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[25] The public commenter, Prof. Stephen Gillers, is aware that such a change requires legislative action and urges the Commission through the State Bar to seek such legislative action.

[26] The specific exception considered by this Commission, which had been proposed by the first Commission, provided that a lawyer may reveal confidential information to the extent necessary:

> (2) to secure legal advice about the lawyer's compliance with the *lawyer's professional obligations*. (Emphasis added).

The provision considered would have broadened the topics for consultation to include all of a lawyer's "professional obligations" in recognition that lawyer conduct is regulated in California not only by the RPC's but also by the State Bar Act, other statutes (e.g., Evidence Code), and case law. (See, e.g., *Fox Seachlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-309 [106 Cal.Rptr.2d 906], which is in accord with MR 1.6(b)(4).)

[27] The specific exception considered, proposed by the first Commission, would have permitted disclosures:

> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

c. Model Rule 1.6(b)(6). An exception to comply with a court order or other law.[28]

- Pros: The three exceptions described above are already recognized in current California case law or other statutory sections, (e.g., Evid. Code § 958), and should be included in the confidentiality rule to alert lawyers to

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That a lawyer can reveal protected information to establish a claim or defense appears to be well-settled in California law. (See Evid. Code § 958; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164.) Nevertheless, the first Commission used language from the more narrowly-constructed exception in § 958, viewing the Model Rule exception as being too broad in permitted a lawyer to disclose protected information in third party actions and thus contrary to California law. (Compare *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456] [action dismissed where law firm could not defend itself against malpractice claim filed by lawyer it had advised with respect to plaintiff lawyer's client, and client had refused to waive privilege as to communications necessary to law firm's defense]; *McDermott Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 [99 Cal.Rptr.2d 622] [action dismissed in shareholder derivative action against corporation's outside counsel where only corporation, not shareholders, could waive the privilege, corporation had not waived the privilege, and corporation's privileged communications were necessary to the law firm's defense].)

Still, a Commission dissent argued that such an exception would permit disclosure without a court determination, as would be the case with Evidence Code § 958.

[28] The specific exception, proposed by the first Commission, permitted disclosure:

(4) to comply with a court order.

Model Rule 1.6(b)(6) provides a lawyer may reveal information relating to the representation:

(6) to comply with other law or a court order;

Comply With Court Order Exception. This exception is similar to the second half of Model Rule 1.6(b)(6). (Compare *People v. Kor* (1954) 129 Cal.App.2d 436.) Note that a first Commission dissent took issue with this provision, arguing that it contradicted settled California law, i.e., *People v. Kor*, which the dissent argued prohibited a lawyer from disclosing confidential information to comply with a court order. *Kor*, however, should probably be limited to its facts. There, where the lawyer had testified against his client under threat of punishment for contempt, the Court stated the lawyer ""should have chosen to go to jail and take his chances of release by a higher court." (*Id*. at 447 [concurring opinion of J. Shinn, joined by J. Vallee].) However, the factual situation in *Kor* was extraordinary. Rarely will a lawyer be ordered, as was the case in *Kor*, to take the stand and testify as to the substance of a client's communication, when the lawyer's testimony would directly contradict the client's testimony, which in *Kor* was the basis for the client's defense to the charges against him. In such a case, the lawyer's testimony would be highly prejudicial or injurious to the client, which would be a critical factor in a lawyer's calculus in deciding whether risking contempt is an appropriate course to take. In addition, there are steps a lawyer can take to protect against such a situation. (See *Mohawk Indus., Inc. v. Carpenter* (2009) 558 U.S. 100 [130 S.Ct. 599].)

"Other Law" Exception. The first Commission declined to include the reference to "other law" in part out of concern that the exception might be used to import provisions of the Sarbanes-Oxley Act into rule 3-100, thus circumventing the first Commission's rejection of Model Rules 1.6(b)(2) and (b)(3).

their existence and their duties to utilize the exceptions only to the extent necessary to achieve the objective permitted by the exception.

- Cons: All of the foregoing exceptions would likely still require a legislative enactment.

7. Add other exceptions to paragraph (b) that correspond to Model Rule exceptions but are *not* recognized in California case law or other statutory sections. There was consensus among Commission members not to recommend including these exceptions. The exceptions include:

   a. Crime or Fraud Resulting in Substantial Financial or Property Injury. Model Rule 1.6(b)(2), which permits disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

   b. Prevent, Mitigate or Rectify Substantial Financial Injury. Model Rule 1.6(b)(3), which permits disclosure "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

      Both paragraph (b)(2) and (b)(3) were adopted by the ABA in 2003 in response to the financial debacles earlier in the Millennium, e.g., Enron.

   c. Conduct Conflicts Check. Model Rule 1.6(b)(7), which permits disclosure "to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." This provision was adopted by the ABA in 2012, after the first Commission's deliberations.

   - Pros: Including the exception will bring California in line with a majority of jurisdictions, at least as to paragraphs (b)(2) and (b)(3). Adding the conflicts check exception would recognize the modern reality of law firm mergers and the increased lateral movement of lawyers between law firms.

   - Cons: All of the foregoing exceptions would require a legislative enactment.

8. Add a provision similar to Model Rule 1.6(c) that would impose a duty on lawyers to prevent inadvertent or unauthorized disclosure or unauthorized access to protected information. There was consensus among Commission members not to recommend including the duty.

   - Pros: Including the duty would recognize today's reality, particularly in light of the expanded use of technology in modern law practice, of the risk of inadvertent or unauthorized disclosure of protected information, or

unauthorized access to it. The provision would put lawyers on alert that they have a duty to implement policies and procedures to prevent such eventualities.

- Cons: A lawyer's duty to maintain inviolate the confidence and to protect the secrets of clients already encompasses the more specific duty contained in Model Rule 1.6(c).

9. OCTC's suggestion that Rule 3-100 should prohibit an attorney from threatening to disclose confidential information.

   - Pros: Such a prohibition would clarify that a lawyer must not take advantage of the lawyer's knowledge of the client's secrets, confided to the lawyer in confidence, to gain an advantage or achieve a result that the lawyer wants. Such secrets can be and often are embarrassing or detrimental to the client. Even a threat of disclosure can undermine the lawyer-client relationship.

   - Cons: First, current rule 3-100 is not a general rule of confidentiality and, in fact, does not state any prohibitions on disclosing confidential information but simply references the statutory provision, § 6068(e)(1), which contains the statement of the lawyer's duty. The provisions in paragraphs (c) through (e) were drafted in direct response to a legislative inquiry. (See Section IX.A, above.)

     Second, a duty not to threaten disclosure of confidential information can be inferred from § 6068(e)(1)'s statement of the lawyer's duty to "maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client." Threatening disclosure of information that is embarrassing or detrimental to the client cannot be viewed as compatible with maintaining the confidence or trust of a client, or preserving that information.

     Third, an express prohibition on threatening disclosure could place a lawyer in an untenable position under a Rule that is directed to a specific situation: a life-threatening criminal act that a lawyer is permitted to prevent through disclosure of confidential information. In addition, the paragraph (c) of the Rule requires that the lawyer, when reasonable under the circumstances, (i) inform the client of the lawyer's ability or decision to disclose confidential information to prevent such an act and (ii) attempt to persuade the client not to commit the act. In many if not most instances the client could feel threatened by these disclosures. That possibility might act to prevent a lawyer from exercising discretion under the rule for fear of violating the Rule.

     Finally, paragraph (b) of the Rule (as well as § 6068(e)(2)) permit disclosures only "to the extent that the lawyer reasonably believes the disclosure is necessary to prevent" the criminal act.

10. OCTC's suggestion to include reference to Bus. & Prof. Code § 6068(e)(2) in the rule itself.

    - Pros: Including the reference would clarify that the Rule is to be interpreted and enforced consistently with the code.

    - Cons: There is no need for such clarification. First, paragraph (b) is a nearly verbatim recitation of § 6068(e)(2). Second, given that there are already references to paragraph (b) in paragraphs (c), (d) and (e), that the Rule is to be interpreted and enforced consistently with § 6068(e)(2) is apparent. Further, current Discussion ¶. 3, carried forward as Comment [3], expressly states that paragraph (b) "is based on" § 6068(e)(2).

11. OCTC's suggestion that the rule should also discuss an exception to section (A) where a member is ordered by a court to disclose client information.

    - Pros: Members must obey court orders unless a stay is obtained. (Bus. & Prof. Code, § 6103.)

    - Cons: Assuming that OCTC is suggesting that the Rule should include an exception to the duty of confidentiality that would permit a lawyer to disclose a client's confidential information to comply with a court order, the Commission believes that such an exception would require legislative action similar to that action which resulted in the enactment of § 6068(e)(2). (See paragraph IX.C.6 & footnote 286, above.) Although § 6103 provides that a "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession . . . are causes for disbarment,"[29] the provision does not address whether compliance with a court order preempts the lawyer's duty under § 6068(e)(1).

12. Add exception that would permit government lawyer whistle blowing. There was consensus among Commission members not to recommend the exception. The concept was raised by a public comment submitted by lawyer Glenn Alex.

    - Pros: Government lawyers should be permitted to blow the whistle even if it requires them to disclose protected information acquired by virtue of the representation because such lawyers should be viewed as owing duties not only to the government entity they represent but also to the public. Where actions by government officials will injure the public interest, a government lawyer should not be restrained by his or her duty of confidentiality and should be permitted to take action to prevent the harm.

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[29] Section 6103 provides in full:

A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

- Cons: Government lawyers cannot function effectively in representing their client government entities if there were an exception that permitted them to blow the whistle. They would be unable to establish the trust relationship required for effective counseling and advocacy of their government clients. Moreover, an attempt to carve out an exception to confidentiality for government lawyers has failed three times in the last 15 years.[30]

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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[30] First, an attempt was made to create an exception to rule 3-600 (Organization As Client). The Supreme Court rejected the State Bar's proposed rule:

> "The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e)."

Second, the legislature passed a bill, AB363, that would have permitted government lawyers to whistle blow. Then Governor Davis vetoed the bill with the following message:

> "I am returning Assembly Bill 363 without my signature.
>
> While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel.
>
> The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients. For these reasons, I must return this bill without my signature."

Third, the legislature subsequently passed a similar bill, AB2713. Then Governor Schwarzenegger vetoed that bill as well. His veto message stated:

> "I am returning Assembly Bill 2713 without my signature.
>
> This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.
>
> Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.
>
> For the reasons stated I am unable to support this measure."

D. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. None of the proposed changes to current rule 3-100, including the substitution of the clause "information protected by Business and Professions Code § 6068(e)(1)," are intended as substantive changes.

E. Non-Substantive Changes to the Current Rule:

1. All of the proposed changes to current rule 3-100, including the substitution of the clause "information protected by Business and Professions Code § 6068(e)(1)," are intended as non-substantive changes.

F. Alternatives Considered:

1. Use of a Current Client's Information. Current rule 3-100 appears to address only the duty not to *reveal* or *disclose* confidential information given that the exception in paragraph (B) only permits a lawyer to "reveal confidential information . . . ." The Model Rules have a specific rule that prohibits a lawyer's *use* of confidential information "to the disadvantage of the client." (Model Rule 1.8(b).) The Commission concluded that California should have a rule that similarly prohibits the "use" of a client's confidential information to the client's disadvantage?

   The Commission's consideration of a rule similar to Model Rule 1.8(b) is the subject of a separate Report & Recommendation. (Proposed Rule 1.8.2).

2. Disclosure to Protect Client With Diminished Capacity. There is no provision in rule 3-100 that would permit a lawyer to disclose confidential information or take other "reasonably necessary protective action" to protect a client with diminished capacity when "the lawyer reasonably believes the client is at risk of substantial physical, financial or other harm unless action is taken." (Compare Model Rule 1.14.) The first Commission recommended, and the Board adopted a more narrowly drawn rule that would have permitted a lawyer to take such action.

   The Commission's consideration of a rule similar to Model Rule 1.14 is the subject of a separate Report & Recommendation.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.6 [3-100] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed amended Rule 1.6 [3-100] in the form attached to this Report and Recommendation.

Proposed Rule 1.6 [3-100] Confidential Information of a Client
Synopsis of Public Comments

TOTAL = 6 *A = 0* *D = 0* *M = 6* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43k	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	Cmt. 11	Comment [11] is unclear because it states that attorney may continue employment with client's consent despite the situation contemplated requiring mandatory withdrawal.	The Commission agrees that Comment [11] can cause confusion by designating the described situation as one requiring withdrawal when in fact the circumstances would require a more nuanced response, e.g., the lawyer remonstrating with the client on an appropriate course of conduct that would not result in a rule violation. Accordingly, the Commission has deleted the reference in the comment to Rule 1.16(a)(2). The remainder of the comment is consistent with the lawyer's duties.
X-2016-66f	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(d), cmt. 11	1. Sub. (d) should state that the lawyer's disclosure must be no more than the lawyer reasonably believes is necessary.	1. The Commission declines to make the suggested change as unnecessary. A lawyer is obligated to maintain in violate the secrets of the client "at his or her peril." There is no reason for a different standard here than there is in other situations where a lawyer is authorized or permitted to reveal confidential client information. In any event, paragraph (d) arguably has an objective standard by its reference to paragraph (b),

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						which contains a reasonable belief standard.
					2. A comment should be added discussing the limitations regarding disclosure of confidential information relating to disputes between attorney and client.	2. The Commission declines to make the suggested change. Rule 1.6 is limited to clarifying the single express exception in Bus. & Prof. Code § 6068(e) that permits disclosure of confidential information to prevent a life-threatening criminal act. Disputes between client and lawyer, except as they might relate to a life-threatening criminal act, are beyond the scope of the rule.
					3. Comment 11 should be clarified to reflect the fact that disclosure of confidential information creates a presumption that the relationship has deteriorated, requiring withdrawal absent client's consent.	3. The Commission declines to make the suggested change. Please refer to response to COPRAC, X-2016-43k, above.
X-2016-76e	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	Cmts. 5, 7, 11	Correct typographical errors in comments 5, 7, and 11.	The Commission thanks the commenter for pointing out these oversights and has made the requested changes.
X-2016-96f	Bar Association of San Franscisco (BASF) (Banola) (9-27-16)	Y	M	MR 1.6(b)(5)	Requests that the rule include an attorney self-defense exception to the duty of confidentiality similar to Model Rule 1.6, but which would be applicable only to	The Commission declines to make the suggested changes. As noted in the response to SDCBA, X-2016-66c, Rule 1.6 is limited to clarifying the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					a former client. The provision would provide: A lawyer may reveal information relating to the representation of a former client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the former client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the former client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the former client. The foregoing provision is consistent with California law.	single express exception in Bus. & Prof. Code § 6068(e)(2) that permits disclosure of confidential information to prevent a life-threatening criminal act. Disputes between client and lawyer, and a lawyer's ability to use confidential information to defend himself or herself, except as the disputes might relate to a life-threatening criminal act, are beyond the scope of the rule. Absent a legislative amendment to section 6068(e) that would parallel the commenter's suggested change, it cannot be made to proposed Rule 1.6 (current rule 3-100). In summary, changing the Rule to include exceptions under the Evidence Code, such as §958, would significantly expand the rule's scope. The intersection of the exceptions to the privilege and the duty of confidentiality in §6068(e) has and continues to be a matter of case law.
X-2016-104I	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	Cmts.1, 2, 3, 4, 5, 7, 9, and 10	Comments 1, 2, 3, 4, 5, 7, 9, and 10 are superfluous and unnecessary.	The Commission declines to make the requested change. In 2003, as part of the legislative enactment that effectuated the exception to

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						§ 6068(e) to permit disclosure of confidential information to prevent a life-threatening criminal act, the State Bar, in consultation with the Supreme Court, was directed to promulgate a rule of professional conduct "regarding professional responsibility issues related to the implementation of this act."[2] The bill also identified several issues that the rule drafters should consider in drafting the rule.[3] The Rule 1.6 comments identified by the commenter as "superfluous

[2] Section (3) provided of AB 1101, the bill that amended § 6068(e) provided:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

[3] See note 2, section 3(b).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						and unnecessary" are essential to the State Bar's reasoned and balanced response to the legislative directive to provide guidance to California lawyers regarding the application of the first express exception to the duty of California since § 6068(e) was first adopted in 1872.
	San Diego County Bar Association (SDCBA) (McIntyre) (10-3-16)	Y	M	Cmt. [2]	Requests the following modification to proposed Comment [2]: [2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, including information obtained from third-parties, or which might be found in the public record, if learned during the course of the representation and the revelation of which would be detrimental or embarrassing to the client; it necessarily encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege. matters protected by the work product doctrine, and matters protected under ethical standards of	The Commission declines to make most of the requested changes. It does not consider the added statement to be accurate, e.g., the duty of confidentiality is not temporally defined by what a lawyer might have learned *during* the representation. Including that language would be misleading. The "public record" clarification is duplicative of Comment [2]. The Commission also disagrees with the citation to additional authority, particularly to the State Bar ethics opinion which are not cited in the Rules. However, the Commission agrees that the word "consent" in the last sentence should be modified by the word "informed" and has made that change.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cai.Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614. 621 (1 20 Cal.Rptr. 253]; *Dietz v. Meisenheimer* (2009) 177 Cal.App.41 771, 786 [99 Cal.Rptr.3d 614]; Cal. State Bar Formal Opn. No. 2016-195.) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality, however, is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client 's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent of the client or as authorized or required by the State Bar Act, these Rules, or other law.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.7
(Current Rule 3-310(B), (C))
Conflict of Interest: Current Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having separate rules that regulate different conflicts interest situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

(2) proposed Rule 1.7 (conflicts of interest: current clients), which regulates conflicts situations that are currently regulated under rule 3-310(B) and (C). Proposed rule 1.7 represents an approach that is a "hybrid" of the California and ABA approaches to current client conflicts.

Proposed rule 1.7 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.[1]

[1] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is currently studying those rules.

2. ***Recommendation of the "hybrid" approach of proposed Rule 1.7***. The recommended "hybrid" approach involves merging the "checklist approach"[2] of regulating conflicts involving current clients in current rule 3-310(B) and (C) with the ABA Model Rule's approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's personal interests. (MR 1.7(a)(2)).

There are a number of reasons for the Commission's recommendation. *First*, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see paragraph (a) and introductory clause to paragraph (b)), while providing specific examples ("checklist items") within the latter category that carry forward the current California Rule requirements. These listed requirements in turn clarify how situations that violate those principles might be recognized in practice. *Second*, the hybrid approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule's application to several discrete situations as in current rule 3-310(B) and (C). *Third*, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest. *Fourth*, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the black letter rather than relegate it to two separate Discussion paragraphs in the current rule (see rule 3-310, Discussion paragraphs 2 and 10).

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.7 incorporates the concept of direct adversity of interests of two current clients. This carries forward the concept in current rule 3-310(C)(2) and (3), and Model Rule 1.7(a)(1).

Paragraph (b) incorporates the concept of material limitations on a lawyer's representation of a client because of duties owed another current or former client, or because a relationship with a client or other person. The paragraph borrows the language of Model Rule 1.7(a)(2) in carrying forward the concepts found in current rule 3-310(B) and (C)(1). Subparagraphs (b)(1) through (b)(5) are the provisions that warrant the characterization of the proposed rule as a "hybrid" as these are derived from current rule 3-310 "checklist" of specified conflicts that trigger the current rule. In the proposed rule, these are nonexclusive examples of interests and relationships that result in a material limitation and require that the lawyer obtain informed written consent.

[2] The "checklist" approach in current rule 3-310(B) and (C) involves the identification of discrete categories of current conflict situations. Unless an alleged conflict fits within one of these discrete categories, the lawyers involved will not be subject to discipline.

Paragraph (c) carries forward the concept in current rule 3-320. Similar to paragraph (b), this paragraph is concerned with limitations on the lawyer's ability to represent a client because of the lawyer's relationships with an opposing party's lawyer. The situation is not included in paragraph (b) because the Commission believes that the standard in current rule 3-320 – the lawyer must only "inform" the client of the relationship – should be carried forward, rather than applying paragraph (b)'s "informed written consent" standard.

Paragraph (d) incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts. The concept is currently found in two separate Discussion paragraphs of current rule 3-310 (paragraphs 2 and 10).

Unlike the Model Rule with 35 comments, there are only 10 comments to proposed Rule 1.7, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] explains "direct adversity" of legal interests and importantly distinguishes clients with economically adverse interests. Comment [2] explains when adverse positions clients have taken on a legal issue may require a lawyer to obtain the clients' informed written consent. Comment [2] carries forward the concept in current rule 3-310, Discussion ¶.7, and explains the rule's application to joint client representations. Comment [4] carries forward current Discussion ¶.9, which the Supreme Court approved in 2002 after extensive debate among various stakeholders in the insurance industry. Comment [5] explains how paragraph (b) should be applied by providing several discrete examples. Comment [6] crucially explains that a lawyer's duty of confidentiality may preclude the lawyer from providing a disclosure sufficient to ensure the client's consent is informed. Comment [7] carries forward the substance of current Discussion ¶¶.2 and 10 concerning unconsentable conflicts and provides citations to several cases that have addressed the issue. Comment [8] is new and provides interpretative guidance regarding paragraphs (a) and (b) regarding the extent to which they might apply to advance consents to future conflicts of interest. Comment [9] notes that a second consent may be required should the circumstances under which a consent was originally obtained change. Comment [10] provides cross-references to proposed Rules 6.3 and 6.5, both of which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to both the text and comment of proposed Rule 1.7.

Text. In paragraphs (a) and (b), the Commission added the phrase "in compliance with paragraph (d)" to clarify that a lawyer must not only obtain the client's informed written consent but must also comply with the requirements in paragraph (d).

In paragraph (b), deleted all of the examples that had been provided in the public comment draft except for former subparagraph (b)(1), which has been moved to paragraph (c) as subparagraph (c)(1).

The Commission added new paragraph (c), with a new introductory clause. Paragraph (c) carries forward subparagraph (b)(1) of the public comment draft as subparagraph (c)(1) and paragraph (c) of the public comment draft as subparagraph (c)(1). Similar to paragraphs (a) and (b), paragraph (c) provides that not only must the lawyer give written disclosure to the

client of the relationships in paragraphs (c)(1) and (2), but must also comply with the requirements in paragraph (d).

Comment. In Comment [2], which addresses the issue of positional conflicts, the first sentence has been deleted and the second sentence has been moved to new Comment [7], which contains a fuller discussion of positional conflicts.

The Commission has added new Comment [2], which explains what is meant by the term "matter." This comment is also cross-referenced in the Comment to both Rule 1.9 (Duties to Former Clients) and Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officials and Employees).

In Comment [4], the Commission added a reference to paragraph (b), which also corresponds to current rule 3-310(C)(3).

In Comment [5], the Commission added the clause "or relationships, whether legal, business, financial, professional, or personal" to clarify the scope of paragraph (b). The last sentence of Comment [5] was also added for the same reason.

New Comment [6] has been added to clarify the scope and application of new paragraph (c). Public comment suggested that the public comment version of paragraphs (b) and (c) as drafted created confusion because their coverage might overlap in some situations.

New Comment [7] contains a fuller discussion of positional conflicts. See Comment [2], above.

In Comment [10] (Comment [8] in public comment draft), the Commission added a new third sentence ("The experience and sophistication … consent.") to identify factors in determining the feasibility of obtaining an advance consent.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Post Public Comment Revisions

After consideration of comments received in response to the additional 45-day public comment period, the Commission made several changes to the proposed rule, both the text and the comments, including some substantive changes.

Paragraph (d): Paragraphs (a), (b), and (c) identify when a conflict of interest may arise and state that a lawyer must obtain a client's informed consent or make written disclosure to a client, depending on the type of conflict. Paragraph (d) identifies circumstances when a conflict of interest cannot be cured by client consent or disclosure. The Commission has revised paragraph (d) to emphasize the interrelationship among these paragraphs. The Office of the Chief Trial Counsel submitted a comment stating that this was not clear and might lead to confusion about whether consent or disclosure, standing alone, can cure a conflict.

Comment [1]: This comment explains how to apply the concept of "direct adversity" by providing non-exclusive examples. The Commission revised the comment to expressly state that the identified situations are non-exclusive examples of direct adversity conflicts, and

added an additional example that describes the directly adverse conflict that arises when a lawyer is retained to sue a person who is a current client of the lawyer or the lawyer's firm.

Comment [2]: This comment clarifies that a "matter" giving rise to a conflict of interest is not limited to litigation but might involve a variety of client representations. The Commission has revised the comment to recognize that a matter might also be a "transaction," "investigation," "charge," "accusation" or an "arrest." The Commission agreed with the United States Department of Justice, which submitted a comment recommending broader language. The State Bar Standing Committee on Professional Responsibility and Conduct also submitted a comment recommending broader language.

Comment [4]: This comment carries forward Discussion paragraph 9 in current rule 3-310, which the Supreme Court of California approved in 2002 after extensive study with participants of various stakeholders in the insurance industry. Discussion paragraph 9 clarifies the extent to which rule 3-310(C)(3) might apply to a lawyer's duties in an insurance defense tripartite relationship. The Commission has revised the comment to refer only to paragraph (a) of the proposed rule which carries forward current rule 3-310(C)(3). Attorney Stanley Lamport submitted a comment recommending this revision.

Comment [7]: In part, this comment carries forward Discussion paragraph 1 in current rule 3-310 which explains that representing inconsistent legal positions in different matters ordinarily does not trigger a conflict of interest. The Commission has revised the second sentence of Comment [7] by using a simpler sentence structure and the phrase "sufficient, standing alone" to avoid the comment from being potentially overbroad. The State Bar Standing Committee on Professional Responsibility and Conduct submitted a comment recommending clarifying changes to this sentence.

With these changes, the Board's Committee on Regulation and Discipline authorized an additional 30-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

The additional 45-day public comment period ends on March 6, 2017 and the Commission is scheduled to meet on March 7, 2017 to review the public comments received. Final modifications to proposed rule 1.7, if any, will be considered at that Commission meeting and reported to the Board at the Board's meeting on March 9, 2017.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.7 [3-310]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893

[142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: March 7, 2017
Action: Recommend Board Adoption of Proposed Rule 1.7 [3-310]
Vote: XX (yes) – X (no) – X (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.7 [3-310]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.7 [3-310] Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is

a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a

husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required,

however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the

representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT RULE 3-310(B), (C), (D))

Rule 1.7 [3-310] ~~Avoiding the Representation of Adverse Interests~~ Conflict of Interest Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

~~(A) For purposes of this rule:~~

~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~

~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~

~~(3) "Written" means any writing as defined in Evidence Code section 250.~~

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

(1) ~~The member has~~the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

~~(2) The member knows or reasonably should know that:~~

~~(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

~~(b)~~(2) the ~~previous relationship would substantially affect the member's~~ representation is not prohibited by law; ~~or~~and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

~~(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

Comment

~~(2) Accept or continue~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; ~~or (3)~~ (ii) ~~Represent~~a

lawyer, while representing a client, accepts in ~~a~~another matter ~~and at the same time in a separate matter accept as a client~~the representation of a person* or ~~entity whose interest~~organization who, in the first matter, is directly adverse to the ~~client in the first matter.~~lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

~~(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.~~

~~(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:~~

~~(a) such nondisclosure is otherwise authorized by law; or~~

~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

Discussion

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1[3] Paragraphs (a) and (C)(2) are intended tob) apply to all types of legal employmentrepresentations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of an ante-nuptiala pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtainIf a lawyer initially represents multiple clients with the informed written consent of* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member, the lawyer must obtain the further informed written consent* of the clients pursuant to subparagraphunder paragraph (C)(2a).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a memberlawyer,

retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, ~~subparagraph (C)(3) is not intended to~~paragraph (a) does not apply with respect to the relationship between an insurer and a ~~member~~lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would

have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice ~~for non-disciplinary purposes~~to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)~~

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.7)

Rule 1.7 [3-310] Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~

~~(1) the representation of one client will be directly adverse to another client; or~~

(~~2~~c) ~~there is~~Even when a significant risk ~~that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.~~requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

~~(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:~~

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal~~; and~~.

~~(4) each affected client gives informed consent, confirmed in writing.~~

Comment

~~*General Principles*~~

~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).~~

~~[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

~~[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].~~

~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~

~~*Identifying Conflicts of Interest: Directly Adverse*~~

[~~6~~1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. ~~The client as to whom~~*See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse ~~is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current~~to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, ~~a directly adverse conflict may~~direct adversity can arise when a lawyer ~~is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit~~cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in

unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

~~*Identifying Conflicts of Interest: Material Limitation*~~

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[~~8~~5] Even where there is no direct ~~adverseness~~adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities ~~or~~, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a ~~lawyer asked to represent~~lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture ~~is likely to be~~, may materially ~~limited in~~limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the ~~others. The conflict in effect forecloses~~other clients. The

risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the ~~client~~clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of ~~the client.~~each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

~~*Lawyer's Responsibilities to Former Clients and Other Third Persons*~~

~~[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.~~

~~*Personal Interest Conflicts*~~

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

~~[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.~~

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17<u>6</u>] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a

~~mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by~~c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b)~~(1)~~.

~~*Informed Consent*~~

~~[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).~~

~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~

~~*Consent Confirmed in Writing*~~

~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.~~

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[~~24~~7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer ~~may take~~takes inconsistent legal positions in different tribunals at different times on behalf of different clients. ~~The mere fact that advocating~~ Advocating a legal position on behalf of ~~one~~a client might create precedent adverse to the interests of ~~a~~another client represented by ~~the~~a lawyer in an unrelated matter ~~does~~ is not sufficient, standing alone, to create a conflict of interest~~. A conflict of interest exists~~ requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that ~~a~~: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case~~;~~, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients ~~need to be advised of the risk~~' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether ~~the issue~~a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the ~~issue~~legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer. ~~If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.~~

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

~~[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.~~

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

~~*Nonlitigation Conflicts*~~

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].~~

~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~

~~[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility~~

~~of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~

~~*Special Considerations in Common Representation*~~

~~[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.~~

[~~30~~11] A ~~particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

~~[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information~~

will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or

~~might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.~~

VI. RULE HISTORY

A. Summary of 1972 Amendments

The predecessor to current rule 3-310, former rule 5-102, originally approved and made operative on January 1, 1975, was entitled "Avoiding the Representation of Adverse Interests." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 of the 1928 Rules was the rule that governed conflicts. The text of rule 5-102(A) was identical to the text of the previous rule 7.

> **Rule 5-102. Avoiding the Representation of Conflicting Interests**
>
> A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.

B. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.[1] Paragraph (A) continued the disclosure and consent requirements found in former rule 5-102(A) when the attorney has any relationship with the adverse party or any interest in the subject matter of the employment. The proposal expanded the rule to include situations in which the member had a relationship with another party in the past. The amendment was intended to make clear that, should an attorney discover during the course of representing a client that he or she has or had such a relationship or interest, he or she may not continue representation unless the requirements of the rule are met. Former rule 5-102(A) was subject to the interpretation that paragraph (A) was applicable only at the outset of the attorney-client relationship.

Paragraph (B) was derived from former rule 5-102(B), which prohibited an attorney from representing conflicting interests without the written consent of all parties concerned and expanded the rule to clarify that the client's counsel must be informed.

Paragraph (C) was new. Derived from ABA Model Rule 1.8(g), paragraph (G) clarified that an aggregate settlement of the claims of two or more clients is a special conflict situation that required the informed written consent of all the clients.

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[1] See page 34 of Bar Misc. No. 5626, Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,‖ December 1987.

Paragraph (D) carried forward former rule 4-101 as amended, which prohibited an attorney from accepting employment adverse to a client or former client without the client's informed written consent, when the new employment relates to a matter in which the attorney received confidential information from the client client. The amendment to the rule limited its applicability of to those situations in which the confidential information is "material to the employment."

Paragraph (E) was new, derived from ABA Model Rule 1.8(f). It regulates those situations in which an attorney is paid by someone other than the client.

Paragraph (F) was new and intended to define "informed" as the term is used in 3-310.

The rule as originally proposed by the then Commission also included three Discussion paragraphs. The rule, in legislative blackline showing changes to the then current rules, provided:

Rule 3-310. ~~5-102.~~ Avoiding the Re presentation of Adverse Interests

(A) ~~A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.~~ If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.

(B) A member ~~of the State Bar~~ shall not ~~represent conflicting interests~~ concurrently represent clients whose interests conflict, except with ~~the~~ their informed written consent. ~~of all parties concerned.~~

(C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

(D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.

(E) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The client consents after disclosure, provided that no disclosure is required if;

(a) such nondisclosure is otherwise authorized by law, or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

(F) As used in this rule "informed" means full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Paragraph (A) is intended to apply to all types of legal employment, including the representation of multiple parties in litigation or in a single transaction or other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the consent of the clients thereto. Moreover, if the potential adversity should become actual, the member must obtain the further consent of the clients pursuant to paragraph (B).

Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

C. Summary of 1992 Proposed Amendments

Amendments to Blackletter Text

In 1992, in response to an inquiry from the Supreme Court, a substantial number of substantive and non-substantive amendments were made to rule 3-310. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and the remaining sections were re-lettered accordingly.

Instead of defining "informed," new subparagraph (A)(1) defined the term "disclosure." The definition remained substantially the same except that: 1) the new definition applied expressly to former clients; 2) the phrase "effects of those circumstances upon the representation" found in former paragraph (F) was replaced with the phrase "consequences to the client or former client;" and 3) the term "relevant" was added before the word "circumstances" :

> (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

New subparagraph (A)(2) defined the phrase "informed written consent":

> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

New subparagraph (A)(3) defined the term "written" bu reference to the California Evidence Code:

> (3) "Written" means any writing as defined in Evidence Code section 250.

As explained by the then Commission, the definition was intended to provide flexibility in the application of the rule.

New paragraph (B) amended former paragraph (A) in two principal ways. It:(i) required "written disclosure" rather than "informed written consent;" and(ii) expanded variety of relationships and interests that the member would be required to disclose in writing to the client, including relationships with witnesses. It was believed that the client's interests are adequately protected by requiring written disclosure without written consent. Additionally, the written disclosure requirement provided both the attorney and the client with a writing evidencing disclosure to the client. Regarding witness relationships, as a member's relationship with a witness could affect the member's examination of such witness to the detriment of the client, such a relationship must also be disclosed to the client. The introductory clause of paragraph (B) thus provided:

> (~~A~~B) ~~If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.~~ A member shall not accept or continue representation of a client without providing written disclosure to the client where:

Generally, the four subparagraphs in new paragraph (B) expressly identified the relationships and interests that previously had only been implied by the broad language in former paragraph (A). The subparagraphs also generally expanded the scope of paragraph (B)'s coverage to encompass both past and present relationships with witnesses.

New subparagraph (B)(1) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has any of several kinds of *current* relationships with a party or witness in the same matter:

> (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

The enumeration of the relationships was intended to clarify the kinds of relationship that require written disclosure even if *de minimus* in nature.

New subparagraph (B)(2) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has reason to know that: 1) the lawyer previously had any of several kinds of relationship with a party or witness in the same matter; and 2) the previous relationship would substantially affect the representation.

> (2) The member knows or reasonably should know that:
>
> (a) The member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and
>
> (b) The previous relationship would substantially affect the member's representation; or

The phrase "knows or reasonably should know" was included to recognize the difficulties in cataloguing all past relationships and interests, especially where the member could not know that a particular relationship would be relevant to a later representation. Additionally, the proposed new rule recognized that a past relationship may have no substantial effect on the member's representation and therefore need not be disclosed.

New subparagraph (B)(3) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has or had any of the identified relationships with another person or entity that would be affected substantially by resolution of the matter:

> (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

New subparagraph (B)(4) prohibited a lawyer from accepting or continuing representation written disclosure where the member has or had any of the identified interests in the subject matter of the representation.

> (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

As such an interest could affect the member's zealous and impartial representation, the interest should be disclosed .

New subparagraphs (C)(1) and (C)(2) combined and continued the concepts found in then current paragraph (B) and Discussion ¶. 2regarding joint representations, i.e., the representation of multiple clients in a single action or transaction. Subparagraph (C)(1) addressed joint representation situations where the clients' interests *potentially* conflict; subparagraph (C)(2) addressed joint representation situations where the clients' interests *actually* conflict. This rule amendment simply transferred the concept from the Discussion to the black letter text.

New subparagraph (C)(3) addressed the situation where a member represents Client A versus Party B and at the same time wishes to represent Party B versus Party C. Paragraph (C) thus provided:

> (~~B~~C) ~~A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.~~ A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a c lien t a person or entity whose interest in the first matter is adverse to the client in the first matter.

Paragraph (D) was identical to then current paragraph (C) except for a non-substantive clarifying syntax change:

> (~~C~~D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients , ~~except with their~~ without the informed written consent of each client.

Paragraph (E) was identical to then current paragraph (D) except for a non-substantive clarifying syntax change:

> (~~D~~E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to ~~a~~ the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment ~~except with the informed written consent of the client or former client~~.

A proposed amendment to then current subparagraph (E)(3) imposed a stricter standard by requiring the lawyer to obtain informed written consent rather than simply

obtaining the client's consent after disclosure. In effect, the proposed amendment added a writing requirement:

(~~E~~F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of ~~a~~ the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent~~s after disclosure~~, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law~~,~~; or

(b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or ~~members of~~ the public.

Amendments to Discussion section

Then current Discussion ¶.1 was carried forward verbatim.

New discussion ¶. 2 provided notice to lawyers that, in some instances, a client's identity or nature of representation may be a client confidence.

New discussion ¶. 2 clarified that amended paragraph (B) was not intended to apply to the relationship of a member to another party's lawyer and that such relationships are governed by rule 3-320 (Relationship With Other Party's Lawyer).

New discussion ¶¶. 4 and 5 clarified the relationship between amended paragraphs (B) and (E).

New discussion ¶. 6 clarified that rule 3-310(B) was not intended to apply to situations in which a lawyer fails to advise any affected client of a relationship or interest which a partner or associate in the member's firm may have with another party unless the lawyer was aware of such relationship or interest.

New discussion ¶. 7 clarified that rule 3-310(C) was intended to apply to representations of clients in both litigation and transactional matters.

The amendment to then current Discussion ¶. 2 (renumbered 8) simply conformed it to the relettering of the blackletter text paragraphs.

New discussion ¶. 9 provided notice to members that written conflict waivers pursuant to this rule might not suffice for non-disciplinary purposes, such as motions for disqualification. Case authority was provided in support of the stated proposition.

New discussion ¶. 10 clarified that amended paragraph (C) was not intended to apply to class action settlements subject to court approval. In this situation, it was believed that clients' interests are protected by the court.

The amendment to then current discussion ¶. 3 (renumbered 11) simply conformed it to the relettering of the blackletter text paragraphs.

The proposed Discussion paragraph provided in its entirety:

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is preclude d, informed written consent is likewise precluded. (See, e.g., Business and Professions C ode section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraph s are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the m ember knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

~~Paragraph (A)~~ Subparagraphs (C)(1) and (C)(2) ~~is~~ are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or

the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph ~~(B)~~ (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 1 85]; *Klemm v . Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 5 09]; *Ishmael v. Millington* (196 6) 24 1 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (~~E~~F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

D. Summary of 2002 Proposed Amendments

An amendment to rule 3-310, new Discussion ¶. 9, was adopted by the Board on May 4, 2002 and was subsequently approved by the Supreme Court. The amendment was developed in response to Business and Professions Code § 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff's bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the decision of the California Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20].

New Discussion ¶. 9 paragraph clarified that rule 3-310(C)(3) does not apply when the lawyer-client relationship with an insurance company client arises from the handling of a defense matter for a policyholder of the insurance company. This proposed Discussion section was to appear between paragraph eight and nine.

In *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship

between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to action.

The first sentence of Discussion ¶. 9 clarified that the *State Farm* holding occurred in a specific and narrow fact setting.

The second sentence of clarified that the *State Farm* holding does not apply where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.

In effect, new Discussion ¶. 9 also clarified the application of the rule to an insurance defense setting, which previously had been addressed in then Discussion ¶. 11, which provided in relevant part: "Paragraph (F) [regarding fees paid by a person other than the client] is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interests."

No amendments have been made to rule 3-310 since the 2002 amendments.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule.[2] However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, …" OCTC recognizes that Comment 7 explains that, but it should be in the rule, not a Comment.

   Commission Response: The Commission agrees and has revised the rule to capture the concept described in the suggested change. See revised paragraphs (a), (b) and (c).

2. OCTC supports Comments 1, 2, 3, 4, 5, 6, 9, and 10. OCTC has no position on Comment 8 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver.

   Commission Response: No response required.

3. If subsection (d) is revised as indicated above, the Commission might want to reconsider Comment 7.

   Commission Response: No response required.

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[2] OCTC, however, is concerned about the proliferation of conflict rules as discussed in the General Comments section of [its 9/27/16] letter.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Five comments, including the above comment from OCTC, were received. All agreed, only if modified, with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

During the 90-day public comment period, seventeen public comments were received. Five comments agreed with the proposed Rule, ten comments agreed only if modified, and two comments did not indicate a position. During the 45-day public comment period, five public comments were received. All five comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report. During the 30-day public comment period, ____ comments were received. ____ comments agreed with the proposed Rule, ___ comments agreed only if modified, and ____ comments disagreed.

Two speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section VI on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

1. General Overview of Conflicts.

    - *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], review denied (6/23/2010)
    - *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal. Rptr. 3d 771]
    - *People ex rel Dept. of Corp. v. Speedee Oil Change Sys.*, Inc. (1999) 20 Cal.4th 1135, 1151-1152 [86 Cal. Rptr. 2d 816]
    - *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal. Rptr. 2d 537]

2. Conflicts Involving Current Clients (3-310(B), (C)).

- *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal. Rptr. 2d 537] (representation directly adverse to current client). ("The primary value at stake in cases of simultaneous or dual representation is the attorney's duty-and the client's legitimate expectation-of loyalty, rather than confidentiality.")
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action)
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict)
- *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20] (insurance defense)
- *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]
- *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392] (relationship between insurers and lawyers representing insureds)
- State Bar Formal Ethics Op. 2003-163, available at: http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=xVPoTzYq93U%3d&tabid=838

3. Conflicts Involving Corporate Affiliates.

- *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 [81 Cal. Rptr. 2d 425]
- *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248 [70 Cal. Rptr. 2d 419]

4. Unwaivable (Prohibited or Unconsentable) Conflicts of Interest.

- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185];
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509];
- *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592]

5. Advance Consents to Conflicts.

- *In re Shared Memory Graphics LLC* (Fed. Cir. 2011) 659 F.3d 1336 (applying California law) (permitted).
- *UMG Recordings, Inc. v. MySpace, Inc.* (C.D.Cal. 2008) 526 F.Supp.2d 1046 (permitted).
- *Concat LP v. Unilever, PLC* (N.D.Cal.2004) 350 F.Supp.2d 796 (not permitted).
- *Visa U.S.A., Inc. v. First Data Corporation* (N.D.Cal.2003) 241 F.Supp.2d 1100 (permitted).

- *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285 [37 Cal.Rptr.2d 754] (permitted).

6. Substantial Relationship Test.

Given that the standard in rule 3-310(E) is the "materiality" of the information to the current matter, it has been left to the courts to craft a test to determine whether information a lawyer likely acquired from a former client is "material." The courts have accomplished this by creating a substantial relationship test that is applied in civil actions to determine whether a lawyer should be disqualified. See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445 [280 Cal.Rptr. 614] (To establish substantial relationship of matters, inquire re: (1) factual similarity of the cases; (2) their legal similarity; and (3) the extent of the lawyer's involvement in the cases). See also *Adams v. Aerojet-General Corp*. (2001) 86 Cal.App.4th 1324 [104 Cal.Rptr.2d 116]; *City National Bank v. Adams* (2002) 96 Cal.App.4th 315 [117 Cal.Rptr.2d 125]. Conversely, unlike CR 3-310(E), MR 1.9(a) does not explain why the substantial relationship inquiry is made: to determine whether the lawyer acquired confidential information material to the present matter.

In *Jessen v. Hartford General Casualty Co.* (2003) 3 Cal.Rptr.3d 877, 884-885 [111 Cal.App.4th 698], the court stated that the test for determining whether a substantial relationship exists between the current matter and the former matter "turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." See also *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618] (Figure 17); *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594 [21 Cal.Rptr.3d 380] (Figure 18). In effect, *Jessen* conflates the first two factors of the H.F. Ahmanson test (similarity of factual and legal issues) into one. Although *Jessen*, *Farris* and *Brand* provide a test that arguably is broader and more likely to result in disqualification than the test originally set out in *H.F. Ahmanson*, more recent decisions have held that mere conclusory allegations by the moving party of the migrating lawyer's alleged relationship to the former client will not be sufficient to meet the moving party's burden to prove the matters are substantially related. See, e.g., *Faughn v. Perez* (2006) 145 Cal.App.4th 592 [51 Cal.Rptr.3d 692] (moving party's heavy reliance on inferences and failure to submit direct evidence that pointed to specific confidential information to which attorney could have had access required denial of disqualification motion)

B. ABA Model Rule Adoptions

Model Rule 1.7. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.7: Conflicts of Interest: Current Client," revised September 5, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.authcheckdam.pdf [Last visited 2/6/17]

- Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.[3] Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.[4] Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7."[5]

Model Rule 1.7, Comment [34] (Parent/Subsidiary Conflicts Situations). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct Rule 1.7, Comment [34]," revised October 21, 2010, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7_cmt_34.authcheckdam.pdf [Last visited 12/28/15]

- Thirty jurisdictions have adopted Model Rule 1.7, Comment [34] verbatim.[6] Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].[7] Thirteen jurisdictions have not adopted a version of the Comment."[8]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the ABA Model Rules' approach to have separate rules for different conflicts of interest situations, i.e., Rule 1.7 (current client conflicts), Rule 1.9 (former client duties), Rule 1.8.6 (third-party payor), Rule 1.8.7 (aggregate settlements), rather than amalgamating the provisions in a single rule, current rule 3-310.

    - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Separate rules should reduce confusion and

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[3] The nineteen jurisdictions are: Arkansas, Colorado, Delaware, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

[4] The twenty-two jurisdictions are: Alaska, Arizona, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

[5] The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Georgia, Michigan, Mississippi, North Dakota, Ohio, and Texas.

[6] The thirty jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[7] The three jurisdictions are: Alaska, District of Columbia, and New York.

[8] The thirteen jurisdictions are: Alabama, California, Florida, Louisiana, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, and Virginia.

provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.

- Cons: Current rule 3-310 has been applied without any perceived problems for over 25 years. There has been no showing of a compelling need to change the basic structure of the conflicts rules in California.

2. Recommend adoption of the ABA Model Rule approach to current client conflicts in Rule 1.7.

   - Pros: The ABA's explicit conflicts standards set forth in paragraph (a) of Model Rule 1.7 are a clear, succinct and straightforward statement – in two subparagraphs – of the kinds of conflicts that involve a current client. These two kinds of conflict situations are implemented in the proposed rule in two paragraphs: (i) paragraph (a) addresses direct adversity conflicts, a concept found in current rule 3-310(C)(2) and (3); and (ii) paragraph (b) addresses conflicts where there is a significant risk that a lawyer's duties to or relationships with another person, or the lawyer's own personal interests, will materially limit the representation. These latter conflicts situations are currently addressed in rule 3-310(B)(2) through (4) and 3-310(C)(1). Paragraph (b) of Model Rule 1.7 explicitly identifies those conflict situations that are not consentable in three subparagraphs (Model Rule 1.7(b) is found in proposed Rule 1.7(d).) Notwithstanding its succinctness, the Model Rule and proposed rules are more comprehensive in their scope of coverage and would be more protective of a client's interests. Nearly every jurisdiction in the country has adopted the Model Rule either verbatim or a very close approximation. California should similarly adopt the basic framework and language of Model Rule 1.7 and contribute to the establishment of a national standard. Finally, the twelve proposed Comments to the rule, substantially fewer in number than the Model Rule Comments, all provide guidance on how the rule should be interpreted and applied. The number of Comments is the same number of Discussion paragraphs in current rule 3-310, many of which have been carried forward in the proposed rule.

   - Cons: The Model Rule may appear to be straightforward but the devil is in the details, which the Model Rule addresses by including 35 Comments, many of them lengthy. The first Commission also used the Model Rule structure and language, and inserted 41 Comments of explanation. The number of Comments accompanying both versions of the Model Rule approach would appear to belie a claim that the rule is straightforward. Straight adoption of the ABA Model Rule approach would completely forego the current California Rule approach, which has proved workable and useful.

3. Retain the current California Rules' standard for obtaining a client's consent to most conflicted representations, "informed written consent," rather than the Model Rules' less robust standard, "consent, confirmed in writing."

    - Pros: This standard is more client-protective because written disclosure is required, a consent being informed only to the extent that the disclosure is sufficient. Retaining the standard carries forward long-standing California policy. There is no evidence the requirement does not work in practice or is ignored.

    - Cons: None identified.

4. Retain the current California Rules' less stringent standard of requiring only "written disclosure" in some situations based on a lawyer's duties to or relationships with other persons, or the lawyer's personal interests. (See discussion of proposed paragraph (c), below.)

    - Pros: Carries forward long-standing California policy intended to ensure that a client is made aware of a much broader set of lawyer relationship and interests that would not otherwise be disclosed under the Model Rule's "significant risk that a lawyer's representation will be materially limited" standard in Model Rule 1.7(a)(2), thus avoiding the under-regulation of that standard. There is no evidence that California's approach is broken. Moreover, the perceived under-regulation problem of current rule 3-310(B), i.e., that serious relationship or personal interest conflicts do not require informed consent, is obviated by the recommended adoption of paragraph (b).

    - Cons: The justification for requiring only written disclosure, to increase the breadth of relationships and interests that are disclosed, is attractive in theory but it is only when a client is confronted with signing a disclosure document that the client will take the time to consider whether the relationship or interest is sufficiently inconsequential and proceed with the lawyer's representation. There is also a reasonable likelihood that if a consent is not required, lawyers will honor the rule primarily by its breach.

5. Recommend adoption of paragraph (a), which incorporates the general concept of direct adversity found in Model Rule 1.7(a)(1).

    - Pros: A criticism of current rule 3-310(C) has been that it does not capture this broader concept of direct adversity. By substantially adopting the Model Rule 1.7(a)(1) language, the proposed rule will capture the broader concept of direct adversity that was identified in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], and has been absent in current rule 3-310(C). This is clarified in proposed Comment [1].

    - Cons: There is no need to broaden rule 3-310(C)(3) as the broader concept of direct adversity is already recognized in case law, i.e., the *Flatt* case. Further,

the Supreme Court has already interpreted current rule 3-310(C)(3) to encompass the *Flatt* standard when it adopted rule 3-310, Discussion ¶. 9, concerning conflicts in the insurance defense context.

6. Recommend adoption of paragraph (b), which incorporates Model Rule 1.7(a)(2)'s general concept of a lawyer's ability to represent a client being compromised by a relationship with, or responsibilities owed to another client or third person, or by the lawyer's personal interests.

    - Pros: See Pros in Section IX.A.1, above. Of special note is the Commission's recommendation that the heightened requirement of "informed written consent" be applied to these material limitation conflicts rather than the less stringent "written disclosure" requirement in current rule 3-310(B). As to current rule 3-310(C)(1), which addresses a "potential" conflict in a joint client representation, rule 3-310 currently requires informed written consent.

    - Cons: See Cons in paragraph1, above, as to the recommendation to adopt the Model Rule approach.

7. Recommend adoption of paragraph (c), which (i) carries forward current rule 3-310(B)(1) largely intact, and (ii) adds the concept in current rule 3-320 regarding a lawyer's relationship with another party's lawyer.

    - Pros: The situations described in subparagraphs (c)(1) and (2) carry forward current rule 3-310(B)(1) and 3-320, respectively. Regardless of whether informed written consent is required under paragraph (b) because there is a significant risk the representation will be materially limited, the lawyer should have a duty to provide written disclosure of the described relationships or responsibilities so that the client can decide whether to retain the lawyer or seek other counsel. Further, paragraph (c) and Comment [6] recognize that in practice, where the question is close, a prudent lawyer will comply with the informed written consent requirement of paragraph (b) rather than providing only written disclosure under paragraph (c). Finally, incorporating current, standalone rule 3-320 into the proposed rule brings into a single rule all of the relationship and personal interest conflicts, increasing the likelihood that lawyers from other jurisdictions practicing in California as authorized under California's multijurisdictional framework will be able to find them.

    - Cons: Paragraph (c) requires written disclosure of a relationship with or responsibility to a party, a witness or with another party's lawyer, even when a significant risk that would require disclosure and consent under paragraph (b) is not present. It thus requires written disclosure in circumstances that do not present a conflict of interest. It will only cause confusion because it will be difficult to know when there is significant risk that will trigger the application of paragraph (b). Further, the argument that when the question is close, a lawyer will err on the side of caution, would apply equally in the absence of paragraph (c). Finally, incorporating current rule 3-320 risks confusion by

removing a separate California rule that has been in place with no indication that it is not working in this form.

8. Recommend adoption of paragraph (d), which incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts of interest.

    - Pros: Proposed paragraph (d) moves the important concept of unconsentable conflicts into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10). A provision that in effect provides an insurmountable obstacle to obtaining a client's consent to a conflicted representation belongs in the black letter of the Rule. Further, by including a cross-reference to paragraph (d) in each of paragraphs (a), (b) and (c), as well as a cross-reference to the latter paragraphs in paragraph (d), the rule makes clear that not only must informed consent be obtained or written disclosure made, but also each of the conditions in paragraph (d) must be satisfied before a lawyer may represent a client in a conflict situation governed by the proposed rule.

    - Cons: There is no evidence that including the concept only in the Discussion section of rule 3-310 has caused any lack of awareness of the concept. Further, there is a abundant case law that sets forth the principle of unconsentable conflicts of interest.

9. Recommend adoption of Comment [1], which is derived in part from Model Rule 1.7, Cmt. [1].

    - Pros: By identifying undivided loyalty as the primary principle involved in conflicts of interest involving current clients, the rule provides important interpretative guidance on the scope and application of the rule. Further, by providing examples of how directly adverse conflicts can arise, the rule provides useful and important guidance on the scope and application of paragraph (b).

    - Cons: None identified.

10. Recommend adoption of Comment [2], which provides examples of what constitutes a matter" within the scope of the rule. Derived from Model Rule 1.11(e), it is also cross-referenced in proposed Rules 1.9, 1.11, and 1.12.

    - Pros: The Comment provides meaningful and useful guidance by way of non-exclusive examples regarding the wide array of situations under which a conflict of interest between or among clients might arise.

    - Cons: The proposed Comment is a definition and should be in the black letter of the rule.

11. Recommend adoption of Comment [3], which carries forward the concept in current rule 3-310, Discussion ¶. 7, concerning joint client conflicts in a single matter.

    - Pros: Provides meaningful and useful guidance on the application of the rule to particular joint client situations that often arise in practice. It importantly recognizes and alerts lawyers to the fact that a representation that might begin as a material limitation conflict governed by paragraph (b) can transform into a direct adversity conflict, governed by paragraph (a), requiring a separate consent from the affected clients. The current discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

12. Recommend adoption of Comment [4], which carries forward largely unchanged current rule 3-310, Discussion ¶. 9, concerning conflicts that might arise in the insurance defense context.

    - Pros: The Supreme Court approved this Comment in 2002 after extensive debate among various stakeholders in the insurance industry. It provides meaningful and useful guidance regarding a particular situation that often arises in insurance contexts. The current discussion paragraph has been in place for nearly 15 years and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

13. Recommend adoption of Comment [5], which is new and concerns paragraph (b).

    - Pros: Comment [5], which is derived from Model Rule 1.7, Cmt. [8], provides meaningful and useful interpretative guidance regarding paragraph (b). It provides several examples that alert lawyers to how situations requiring a client's informed written consent might arise.

    - Cons: None identified.

14. Recommend adoption of Comment [6], which is new, and explains the rationale for the different disclosure and consent regimes in paragraph (b) ["informed written consent"] and paragraph (c) ["written disclosure"].

    - Pros: By explaining the rationale for the different approaches to relationship and personal interest conflicts in paragraphs (b) and (c), the Comment provides interpretative guidance on when one or the other of the paragraphs might apply in situations not expressly identified in a subparagraph of either paragraph.

    - Cons: None identified.

15. Recommend adoption of Comment [7], derived in part from Model Rule 1.7, Cmt. [7], which carries forward the concept in current rule 3-310, Discussion ¶.1 concerning positional conflicts that might arise in representing different clients in separate matters. (See, e.g., State Bar Formal Ethics Op. 1989-108.) The Comment was substantially expanded following public comment from the State Bar's Committee on Professional Responsibility and Competence (COPRAC).

    - Pros: The Comment provides meaningful and useful guidance on application of the rule to the situations that arise involving positional conflicts. The current discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful in this complex area of the law.

    - Cons: None identified.

16. Recommend adoption of Comment [8], which carries forward the concept in current rule 3-310, Discussion ¶. 2, which explains that when disclosure is precluded by rules protecting the confidentiality of another client's information, representation in situations covered by paragraphs (a) through (c) is prohibited.

    - Pros: Maintains a current Comment that emphasizes the overarching duty to protect confidential client information. Provides meaningful guidance to alert lawyers that an inability to disclose confidential client information may preclude compliance with the disclosure requirements of the conflict rule. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

17. Recommend adoption of Comment [9], which carries forward current rule 3-310, Discussion ¶. 10 concerning unconsentable conflicts, and notes that paragraph (d) is the blackletter manifestation of the concept.

    - Pros: Provides an important explanation of paragraph (d), which in effect describes conflicts where consent cannot be obtained or written disclosure will not suffice, thereby overriding the other provisions of the Rule (paragraphs (a) through (c).)

    - Cons: None identified.

18. Recommend adoption of Comment [10], which provides that the Rule does not prohibit a lawyer from entering into an agreement with a client under which the client provides an "advance consent" to a future conflict of interest.

    - Pros: In modern practice involving large law firms, a client otherwise might be precluded from retaining the lawyer or law firm of the client's choice because the lawyer foresees that a conflict might arise in the future between the client and a current client of the lawyer, and wants assurance that the new client will

not later prevent representation of the current client. This provision provides assurance that a lawyer will not be disciplined simply from entering into such an agreement. It does not, however, sanction enforcement of the agreement or attempt to define specific requirements for such an agreement to be effective. These will be determined on a case-by-case basis by the courts.

- Cons: This is an area of law that should be left to be developed on a case-by-case basis in the civil courts.

19. Recommend adoption of Comment [11], which explains that material changes in the circumstances under which a consent was obtained may require a lawyer to obtain a new consent.

    - Pros: This Comment importantly clarifies that the effectiveness of a consent might become diminished over time and a change in circumstances. It is a general statement of the principle alluded to in the last sentence of Comment [3].

    - Cons: None identified.

20. Recommend adoption of Comment [12], which provides cross-references to two proposed Rules, recommended for adoption by this Commission, which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

    - Pros: Both referenced rules, proposed Rules 6.3 and 6.5, promote lawyer conduct that promotes confidence in the legal profession or the administration of justice, or would increase the access to justice, or both. Lawyers should be made aware that the principles set forth in proposed Rule 1.7 are not intended to prevent such conduct.

    - Cons: None identified.

21. Delete discussion paragraphs 3 through 6, 8, 11, and 12 of current rule 3-310.

    - Pros: As noted in the redline comparison of the proposed Rule to current rule 3-310 in Section IV, above, each of these paragraphs has not been carried forward because the proposed revisions to the 3-310 provisions which they are intended to explain have been deleted, moved to another rule, incorporated in the black letter of this rule, or rendered irrelevant because a cross-referenced rule has been imported into the proposed Rule.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a "hybrid" approach to the current conflicts rule provisions by merging the "checklist approach" to regulating conflicts involving

current clients, (i.e., as is done in current rule 3-310(B) and (C)) with the ABA Model Rule's approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (Model Rule 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's relationships with, or responsibilities to, another client or third person, or by the lawyer's personal interests.

- Pros: ***First***, as explained more fully below, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see introductory clauses to proposed paragraphs (a) and (b)), while providing specific examples ("checklist items") within each category that carry over the current California Rule requirements which clarify how situations that violate those principles might be recognized in practice.

  Second, this hybrid approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule's application to several discrete situations as in the current rule (Compare current rule 3-310(B) and (C)).

  Third, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into the introductory clauses of paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest.

  Fourth, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10).

  Fifth, by retaining a written disclosure requirement that broadly applies to a much broader category of potential personal conflicts of a lawyer, (see current rule 3-310(B) and proposed paragraph (c)), the rule will continue to increase client protection and promote confidence in the legal profession and administration of justice by requiring written disclosure of even those relationships or interests that do not rise to the level of presenting a significant risk they will have a substantial effect on the lawyer's representation of the client.

- Cons: The hybrid approach of the proposed Rule is more complex than either the current rule provisions or Model Rule 1.7. The hybrid approach's complexity might confuse lawyers as to their duties and risks weakening both compliance with and enforcement of basic conflicts principles. A combination of approaches is not found in any other jurisdiction and would maintain California's departure from a national standard that would operate more effectively to regulate national practices across jurisdictions. A current

conflicts rule should adhere to either the current rule's approach or adopt the Model Rule's approach. Perhaps more important, nearly all of the concepts that are listed as favoring the "hybrid" approach are carried forward in proposed Rule 1.7, the only concept not being carried forward being the blackletter "checklist" of specific material limitation conflicts that are now in current rule 3-310(B)(1) through (4). (See next paragraph.)

2. Retain the current "checklist" approach in current California rule 3-310 (B) and (C), without incorporating general principle concepts from Model Rule 1.7.

    - Pros: The rule has been in existence for over 25 years. There is no evidence that lawyers cannot understand their duties as stated in the rule, or that compliance with it, or discipline under it, is impaired. See also Cons in paragraph B.2, above.

    - Cons: See Pros in paragraph B.2, above.

3. Recommend adoption of a definition of "written disclosure" for purposes of this Rule.

    - Pros: Provides a definition that explains the scope of disclosure required under paragraph (c). This is a necessary addition to the Rule because, while informed consent" and "informed written consent" are defined in the global terminology rule (see proposed Rule 1.0.1(e) and (e-1)), neither "disclosure" nor "written disclosure" is. It would be both confusing and redundant to place a definition of "disclosure" in Rule 1.0.1 because the definition of "informed written consent" already describes the disclosure that is required to obtain such consent.

    - Cons: The Commission has moved to the Model Rule approach of defining "informed consent" rather than the approach in current rule 3-310(A) of defining "disclosure" in subparagraph (A)(1) and in subparagraph (A)(2) defining "informed written consent" to mean the client's "written agreement to the representation following disclosure." A separate definition of "written disclosure" is not necessary because implied in the definition of "informed consent" is the requirement of "disclosure."[9]

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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[9] Proposed rule 1.0.1(e) provides:

"Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

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

1. Paragraph (a) is a substantive change in that it incorporates and describes the situations corresponding to current rule 3-310(C)(2) and (C)(3)] as situations involving direct adversity. Paragraph (a) is also a substantive change to the extent that it impliedly incorporates the holding of *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], which is broader than the concept in current rule 3-310(C)(3).

2. Paragraph (d) is a substantive change because it moves the description of unconsentable conflicts into the black letter of the Rule.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member."

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Paragraph (a)'s substitution of "representation" for "accept or continue the representation" in current rule 3-310(C)(2) and (3) is not a substantive change.

4. All other changes to the rule are not intended as substantive changes in lawyers' duties.

E. Alternatives Considered:

1. In addition to the alternatives discussed in "Concepts Rejected" above, the Commission also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310's provisions amended to incorporate the global changes the Commission has agreed to ("lawyer" for "member," etc.) and the separate standalone rules corresponding to the ABA numbering. The Commission abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached.

XI. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr and Mr. Martinez submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XII. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr, on the Recommended Adoption of Proposed Rule 1.7

This message states my dissent from proposed Rule 1.7(b) and (c), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

The Commission's Charter directs us to "…ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Proposed Rule 1.7(b) presents a serious violation of those directions.

Rule 1.7 addresses current-client conflicts. Its analog in our current Rules is rule 3-310. Rules 3-310(A) (definitions), (D) (aggregate settlements), (E) (certain confidentiality issues), and (F) (fee payments on behalf of a client) are located in other proposed Rules and are not pertinent here. Proposed Rue 1.7(b) is intended to embody the conflicts now stated in rules 3-310(B) (conflicts resulting from a lawyer's relationships and personal interests) and (C)(1) and (2) (potential and actual conflicts resulting from a lawyer's representation of multiple clients in a single matter – joint representations).[1]

Here are the exact words of the proposal:

> A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

This statement expresses a non-controversial view – surely no lawyer should represent a client without the client's informed approval when there is a significant risk that the lawyer other duties or relationships, or the lawyer's personal interests, might interfere with the lawyer's full performance of all duties owed to the client. Because a lawyer's duties include loyalty – meaning, among other things, preserving a client's trust in the lawyer because this is essential to the proper functioning of the lawyer–client relationship - disclosure to and approval from the client are indispensable.[2] I should add that the disclosure and consent process also serves to remind the lawyer of where the lawyer's duties lie.

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[1] A lawyer's representation of two or more clients in the same matter properly is called a "joint representation". *See*, *e.g., Roush v. Seagate Technology, LLC*, 150 Cal. App.4th 210, 225 (1970).

[2] As suggested by my earlier reference to the duty of loyalty, the quality of a lawyer's work is a civil standard. A client who later discovers that its lawyer did not reveal, for example, that the lawyer had been cross-examining the lawyer's next door neighbor, cousin or client in another matter, will lose trust in the lawyer and the legal system, and the conflict rules should be designed to avoid that result. See *Hernandez v. Paicius*, 109 Cal. App.4th 452, 463-468 (2003), disapproved on other grounds in *People v. Freeman*, 47 Cal.4th 993, 1006 (2010).

The single proposed paragraph (b) sentence therefore is a correct, even elegant, statement of what each lawyer should do. The problem with this formulation is that it does not identify the relationship conflicts or personal interest conflicts pinpointed in current rule 3-310(B)(1) – (4) and only hints at the joint-representation conflicts now covered by rule 3-310(C)(1) and (2). Proposed paragraph (b) therefore can be criticized as an aspirational standard, and it is, but I think of it more as being an undifferentiated amalgam of a multiple distinct elements.

I know those elements because my many years of activity in the legal ethics field have left me with a mental roadmap of the rule 3-310 checklist. For others who do not carry that checklist, and I mean by this virtually every California lawyer, the meaning of paragraph (b) would require study of the proposed Rule 1.7 Comments. A diligent and able lawyer might be able to locate in those Comments all of the elements of the current rule. I say "might" because I am skeptical that many lawyers would be able to reverse engineer rules 3-310(B) and (C) by reading the proposed Comments and because it is my opinion that these proposed Comments are not complete. What I think much more likely is that many lawyers will not trouble to read the Comments, and instead will understand "significant risk" and "materially limited" as giving them the freedom to judge their own ability to do a good job. Lawyers have any number of reasons to convince themselves there is no conflict of interest: including the financial benefits of a representation, the excitement of a particular project, reputational benefits within a firm as being known as a client developer, and the opportunity to be a client's savior at a time of client stress and risk. As a consequence, many lawyers will prove themselves effective salesmen in convincing themselves to go forward without providing the disclosure that now would be required under rule 3-310.[3]

The material limitation standard, because it will be a temptation to many lawyers, would result in a dilution of client protection. Another result would be that lawyers will be blindsided and will get into disciplinary and civil hot water. Neither result is desirable, nor will be the further injury to the reputation of lawyers and the legal system.

The proposed Rule contains direct proof of my concern that the application of proposed paragraph (b) is indefinite and unpredictable. Proposed paragraph (c) states:

> Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where: (1) [there is a conflict under what amounts to current rule 3-310(B)(4)] …."

[3] One commenter suggested to me that this is like the so-called "good deal" exception to the securities laws. Some securities promoters will think they don't have to comply with the securities laws because the deal is so good that nothing could go wrong.

Here is one example of what this means: Current rule 3-310(B)(1) requires a lawyer to make a "disclosure"[4] to the client when the lawyer has a personal or other relationship with a party or witness in the same matter. There are no exceptions. Disclosure always is required in this situation. Proposed paragraph (b) waters down the current rule by requiring disclosure only when the lawyer's relationship to a party or witness rises to the level of posing a "significant risk" of the lawyer's representation being "materially limited". So in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule.[5]

There appear to be three main arguments in favor of proposed Rule 1.7(b). *First*, it is argued that California's current check-list approach is incomplete while the Model Rule approach borrowed in proposed Rule 1.7 is complete. Assuming there something of potential importance has been omitted from our current check list (although that is hard to imagine), and assuming it could not be added to the check list, there would be a resulting trade-off between logical completeness and, on the other hand, the loss of check-list clarity and the more and more rigid disclosure requirements of rule 3-310(B). *Second*, it is argued that national uniformity is important. Assuming national uniformity were important (and ignoring that no jurisdiction has adopted the Model Rules intact and that Rule 1.7 is one with many local variations),[6] it is my opinion that the Model Rule approach is essentially flawed and that, as California has done with some other Rules, the Model Rule approach should be rejected. *Third*, it is argued that all law students are taught and tested on the Model Rules and understand Model Rule 1.7. It has been my experience, as one who frequently fields inquiries from lawyers, that there is no topic on which lawyers are less prepared or more confused than the correct way to analyze conflicts of interest. This is true without regard to where or when they attended law school, and generally is true even with lawyers the best and most conscientious lawyers. Conflicts analysis often is obscure, and the Rules should not make it more so.

I so far have explained my principal objection to Rule 1.7, but I have these additional comments:

- Current rule 3-310(B) requires disclosure but proposed paragraph (b) would heighten the requirement to one of informed written consent. I do not object strongly to that change but want to point out that the increased requirement easily could be applied to current rule 3-310(B) if the current check-list format were retained.

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[4] This term now is defined in rule 3-310(A)(1) and will become part of the definition of "informed consent" under proposed Rule 1.0.1(e). I have used the current terminology in this Dissent because I think it makes it easier to picture the two steps in which the lawyer provides information and explanation and the client then provides its consent.

[5] And because proposed paragraph (c)(1) would require a "disclosure" when there is no material limitation, it is not apparent what explanation the lawyer would provide of what is not a conflict under paragraph (b).

[6] Compare, for example, Rule 1.7 in Washington D.C., New York, and Texas (the last of these numbered as Rule 1.06).

- I agree with proposed paragraph (a), but its meaning cannot be fully understood with an explanation of "direct adversity".[7] The proposed Comment does not adequately explain the concept and I fear will lead to wide-spread misunderstanding. The directions to remove practice guidance from the Comments led the second Commission to remove important explanation of the meaning of "direct adversity".

- Part of the attempted explanation of "direct adversity" in Comment [1], referring to joint representations, talks of when "a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict". This is conceptually wrong. A lawyer does not have a conflict because the clients have conflicts. A lawyer properly can jointly represent business competitors if the subject of the representation excludes any matter on which the lawyer might be called on to provide advice or representation that favors one client over the other. Even the most vigorous competitors can have common interests, and a lawyer can represent them with a sensible limitation on the scope of the representation. Any discussion of conflicts between clients is misleading when speaking of a lawyer's conflict of interest. A lawyer has a potential conflict of interest if the lawyer might be required to choose between conflicting duties or to reconcile conflicting interests; a lawyer has an actual conflict of interest when required to choose between conflicting duties or to reconcile conflicting interests. "A potential conflict is a reasonable set of circumstances which could impair a lawyer's ability to fulfill his or her professional obligations to each client in the proposed engagement." *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal. App.4th 770, 779 (2013).

- Proposed paragraph (c)(2) is taken from current rule 3-320. The current rule requires "notice" to the client (a standard lower than "disclosure") if the lawyer has one of certain personal relationships with another Party's lawyer. Proposed paragraph (c)(2) would make three material changes in the current provision. The first would be to heighten the notice requirement to one of formal "disclosure". I don't see the need for that change because I don't think it requires any explanation for a client to understand the significance of, for example, an opposing lawyer being the spouse of the first client. However, this not my major concern. The proposal also would expand the scope to include "disclosure" of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer's own personal relationships. And the first lawyer's conduct would be measured by the "reasonably should know" standard, defined in proposed Rule 1.0.1(j) as meaning "…that a lawyer of reasonable prudence and competence would ascertain the matter in question." This would an obligation to investigate on firm lawyers no matter how large and geographically dispersed the firm, and including governmental offices. This likely would conflict with privacy

[7] There is no corollary in our current rules because an oversight in the writing of the 1989 Rules left it out, and a later effort in 1996-97 to correct the oversight was unsuccessful. Proposed paragraph (b) also encompasses current rule 3-310(C)(3).

rights and is unsupportable. There is no evidence of any deficiency in current rule 3-320.

For these reasons, I respectfully dissent from proposed Rule 1.7(b) and (c). I see this proposed Rule as a prime example of the dangers inherent in materially changing California law with its substantial body of case and other authority on the meaning and application of our current rule.

Commission Member Dissent, Submitted by Raul Martinez, on the Recommended Adoption of Proposed Rule 1.7

The Commission's inclusion of Paragraph (c) will dilute the obligations under Paragraph (b) and introduce a subjective test. Paragraph (c) requires written disclosure to the client, but not written consent, with respect to legal, business, financial or personal relationships that the lawyer or another lawyer in the lawyer's firm has with a party or witness in a matter. Thus, under Paragraph (c), the lawyer must make an initial determination as to whether the significant risk of a material limitation on the lawyer's responsibilities mentioned in Paragraph (b) "is not present." Paragraph (c) effectively invites the lawyer to make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer's responsibilities to the client. The Rule provides little guidance to a lawyer seeking to ascertain whether the "conflict" requires informed written consent under Paragraph (b) or written disclosure under Paragraph (c). The end result will be that many lawyers will "default" to Paragraph (c), not Paragraph (b). This problem is compounded by the overarching requirement in Paragraph (d)(1) that the lawyer "reasonably believes" he or she can provide competent representation to each client. Although the "reasonable belief" standard as defined in Rule 1.0.1(i) is intended to import an objective test (i.e., that "the circumstances are such that the belief is reasonable"), in practice, lawyers will see it as a purely subjective one. The Rule would be better written and confusion can be avoided by simply deleting Paragraph (c). Alternatively, Paragraph (c) could be revised and re-drafted as a standalone rule, untethered to the material limitation concept, as is current Rule 3-320.

Paragraph (c) does not set forth a clear and enforceable disciplinary standard. The dividing line between circumstances covered by Paragraphs (b) and (c) is unclear. The disciplinary standard of a "significant risk" of "material limitation" of the lawyer's representation of a client is by itself a difficult concept to grasp and apply. This standard becomes unworkable under Paragraph (c) when a lawyer is called upon to make a current determination that a "significant risk" under Paragraph (b) "is not present."

Paragraph (c)(2) would require implementation of cumbersome, if not impossible, conflict check systems for law firms. Paragraph (c)(2) imposes a "reasonably should know" standard on a lawyer to determine whether another lawyer in the lawyer's law firm has a spousal, parental, sibling, cohabitational, or attorney-client relationship with a lawyer in the matter the lawyer is involved in. The "reasonably should know" standard contained in Paragraph (c)(2) would require the lawyer, and in turn, the lawyer's law

firm, to conduct a reasonable investigation (i.e., a conflicts check) to determine if other lawyers in the firm have one of the requisite relationships. As defined by Rule 1.0.1(j), the phrase “Reasonably should know” means that a lawyer "of reasonable prudence and competence *would ascertain* the matter in question." Rule 5.1 would impose on a law firm a concomitant obligation to undertake reasonable efforts to insure lawyers comply with their ethical obligations--in other words, implement a conflict check system that would reveal these relationships. Law firms are not equipped (nor should they be) to conduct the type of conflict check system that would be required to comply with this Paragraph. Compliance with this aspect of the Rule would be burdensome, confusing and potentially invasive on the privacy rights of lawyers.

Paragraph (c) is overly broad in that it would require disclosure of de minimis relationships that do not impact the lawyer's obligations. Because it reaches relationships that do not present a significant risk of materially limiting the lawyer's responsibilities to a client, Paragraph (c) is not a true conflict of interest rule. Paragraph (c)(1) requires written disclosure to the client of a host of business, financial, professional, or personal relationships with a party or witness in a matter that would not affect the lawyer's representation of the client. Similarly, Paragraph (c)(2) would require disclosure of relationships involving other lawyer's in the firm that would have no impact on the lawyer's obligations to the client. Yet both Paragraphs can provide a basis for discipline even in situations where client loyalty is in no way impaired. (See *People v. Bonin* (1989) 47 Cal.3d 808, 835 [“Conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.”].) Paragraph (c) would result in discipline of lawyers in situations where there is no actual or potential client harm. Worse yet, it would discipline lawyers for making the wrong call in deciding whether Paragraph (c), rather than Paragraph (b), applies to any given circumstances and where it is later determined that written disclosure rather than informed written consent was mandated.

Example (ii) in Comment [1] is overly broad and contradicts the black letter of the Rule since representation of a client's adversary in unrelated litigation is not "direct adversity." Turning to the comments, Comment [1] cites as an example of a "directly adverse conflict under Paragraph (a)" the situation where: "(ii) a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer’s client." This example, which is derived from current Rule 3-310(C)(3), describes a *material limitation* conflict under Paragraph (b), not a directly adverse conflict under Paragraph (a). The representation of a client's adversary in an unrelated matter is not directly adverse to the client in the first matter where the second client is not a party to the first matter. Comment [6] of ABA Model Rule 1.7 more accurately describes direct adversity by explaining that "absent consent, a lawyer may not act as an advocate in one matter *against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated." Example (ii) goes beyond this important principle. Rather than explaining the black letter of the Rule, Example (ii) expands on it.

Commission's Response to Dissents Submitted by Robert Kehr & Raul Martinez, on the Recommended Adoption of Proposed Rule 1.7

Proposed Rule 1.7(a):

Kehr Dissent. The Kehr dissent agrees with proposed paragraph (a), but argues that the proposed Comment does not adequately explain the concept of "direct adversity." As the dissent notes, the Commission's Charter directed it to limit the number and length of its comments. With this directive in mind, the Commission believes that proposed Comment [1] provides sufficient guidance on "direct adversity." The Kehr dissent argues that example (i) in Comment [1] does not describe an instance of direct adversity. The Commission disagrees. Example (i) refers to the situation not where two clients' interests in unrelated matters conflict, but where there is a conflict between the interests of two clients in the same matter in which the lawyer is representing both. Under these circumstances, the lawyer necessarily will be forced to choose between conflicting duties or to reconcile conflicting interests in the matter in which the lawyer is representing both clients. This is a direct adversity conflict, as is recognized in current Rule 3-310(C)(2).

Martinez Dissent. With respect to proposed Comment [1], the Martinez dissent argues that example (ii) does not illustrate direct adversity. The Commission disagrees. Example (ii) is derived from current Rule 3-310(C)(3) and addresses the situation where, for example, Client A, represented by lawyer, sues Defendant B in Matter 1, and Defendant B then retains the same lawyer to defend against Plaintiff C in unrelated Matter 2. This results in direct adversity in Matter 1, where it did not exist before lawyer's retention by B in Matter 2. After B's retention of lawyer, both sides in Matter 1 (A and B) are now clients of the lawyer, albeit in unrelated matters. This is an example of direct adversity, as is recognized in current Rule 3-310(C)(3) and by the California Supreme Court in its 2002 amendment to current Rule 3-310, when it added Discussion paragraph 9 to make clear that, "Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider *and not as a direct party to the action*." (emphasis added). *See also* ABA Model Rule 1.7, Comment [6] (in discussing direct adversity, stating that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.")

Proposed Rule 1.7(b):

The Commission agrees with the Kehr dissent that paragraph (b) of the proposed Rule "expresses a non-controversial view" in precluding a lawyer from representing a client without the client's informed written consent where there is a significant risk that the lawyer's other duties, relationships, or personal interests will materially "interfere with the lawyer's full performance of all duties owed to the client." The Commission also agrees with the dissent that paragraph (b) is a "correct, even elegant, statement of what each lawyer should do" to further this view. Further, the Commission agrees with the dissent that, except for those few lawyers with "many years of activity in the legal ethics

field," virtually every other California lawyer does not have "a mental roadmap of the current Rule 3-310 checklist." As a result, the overwhelming majority of California lawyers are ill-equipped to think about and identify the conflicts enumerated in that checklist on a day-to-day basis. It is for all these reasons that the Commission recommends a shift from the current checklist approach to proposed paragraph (b), which sets forth a straightforward statement of the general rule that is consistent with that applied in virtually every jurisdiction in the country, and in doing so increases public protection by: (a) putting lawyers on notice in plain terms of when they will need to engage in further inquiry to determine if representation may run afoul of the Rule and (b) encouraging lawyers to make the necessary disclosures to obtain the client's informed written consent if there is any uncertainty.

The Kehr dissent argues that paragraph (b) will decrease client protection because lawyers may "understand 'significant risk' and 'materially limited' as giving them the freedom to judge their own ability to do a good job." This is not how the ABA Model Rule has been interpreted or applied. Moreover, paragraph (b) is no different in this regard than current Rules 3-310(B)(2) and (B)(3), both of which apply only upon a determination of a substantial effect on the representation or the relationship that triggers the duty to disclose. Like the "substantial effect" standard of the current Rule, the "significant risk" and "materially limited" standards of proposed paragraph (b) do not require a lawyer's actual knowledge. By not requiring actual knowledge, they appropriately further client protection, and the preservation of client trust, by encouraging lawyers to err on the side of disclosure to obtain the client's informed written consent.

The Kehr dissent also argues that proposed Rule 1.7 "contains direct proof" that "application of proposed paragraph (b) is indefinite and unpredictable," the purported proof being paragraph (c) of the proposed Rule. In characterizing paragraph (c) as proof of paragraph (b)'s unpredictability, however, the dissent misapprehends the relationship between paragraphs (b) and (c) and the way in which they carry forward certain provisions of current Rule 3-310 to maintain heightened client protection. The dissent argues: (1) current Rule 3-310(B)(1) always requires disclosure when a lawyer has a personal or other relationship with a party or witness in the same matter; (2) paragraph (b) "waters down" the current rule by requiring disclosure only when the relationship rises to the level of posing a "significant risk" of representation being "materially limited"; and (3) therefore, "in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule." Paragraphs (b) and (c), however, impose distinct obligations. Paragraph (c), like current Rule 3-310(B)(1), requires *disclosure* of the relationship without regard to whether there is a "substantial risk" that the representation will be "materially limited." Contrary to the dissent's position, paragraph (c) carries forward the same level of client protection provided by the current Rule. Paragraph (b), on the other hand, requires informed written consent when a relationship, responsibilities owed a third person, or the lawyer's own interests pose a "significant risk" that the representation will be "materially limited." The heighted consent requirement provides greater client protection than the current rule, which merely requires "written disclosure,"

even where the relationship, whether prior (current Rule 3-310(B)(2)) or current (current Rules 3-310(B)(1) or (3)) is such that it presents a significant risk of a material limitation on the representation. Accordingly, the Commission believes there is no lack of clarity or decreased level of client protection.

Proposed Rule 1.7(c)

Paragraph (c) articulates a clear and enforceable disciplinary standard. The Martinez dissent argues that paragraph (c) does not set forth a clear and enforceable disciplinary standard because it applies only where the lawyer makes a determination that a "significant risk" of "material limitation" under paragraph (b) is not present. The Commission disagrees. Paragraph (c) imposes disclosure obligations under well-defined circumstances, that is, whenever a relationship of the type listed is present. Paragraph (c) carries forward the situations addressed in current Rules 3-310(B)(1) and 3-320, which have been in place for decades and have not posed the alleged problems cited by the dissent. Paragraph (b) adds a heightened level of protection by requiring not just disclosure of the relationship, but "informed written consent," when a relationship of the type listed is present and the relationship poses a "significant risk" of "material limitation." In the absence of such a risk, paragraph (c) requires disclosure; where such a risk is present, paragraph (b) requires informed written consent. In combination, paragraphs (b) and (c) articulate clear and enforceable disciplinary standards that enhance client protection.

Paragraph (c) does not dilute paragraph (b)'s obligations. The Martinez dissent also argues that paragraph (c) dilutes the obligations under paragraph (b) by encouraging lawyers to "make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer's responsibilities to the client." The Commission disagrees for two reasons.

First, as discussed above, paragraph (b) does not require actual knowledge with respect to the significant risk of material limitation, and so does not apply a subjective test. The Martinez dissent argues that the inclusion of paragraph (d), which provides an overarching bar to representation if the lawyer does not "reasonably believe" that he or she can provide competent and diligent representation, will lead lawyers to believe that this is a "purely subjective" determination. As the Martinez dissent recognizes, however, the "reasonably believe" test in paragraph (d) is explicitly defined by proposed Rule 1.0.1(i) to be an objective standard. Moreover, proposed paragraphs (b), (c), and (d) all make clear that the requirements of paragraph (d) apply *in addition to* (and not as a replacement for) the standards set out in paragraphs (b) and (c). *See also* proposed Comment [9] ("Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing as required by paragraph (c)."

Second, as discussed above, the dissent's "dilution" argument misapprehends the relationship between paragraphs (b) and (c). If a listed relationship is present, paragraph (c) will require at a minimum written disclosure. If the relationship poses a

significant risk of material limitation, paragraph (b) would require compliance with the more rigorous standard that California has employed for decades in its conflicts rules, informed written consent. Because a lawyer would bear the risk of discipline if the lawyer incorrectly assesses whether a particular set of facts creates a significant risk that a representation will be materially limited and chooses (c), an uncertain lawyer will appropriately err on the side of greater client protection, that is, on seeking informed written consent to ensure compliance with paragraph (b). This informed written consent will also satisfy paragraph (c) because obtaining informed written consent necessarily provides written disclosure. *See* proposed Rule 1.0.1(e) and (e-1) (definitions of "informed consent" and "informed written consent," respectively).

Paragraph (c) is not overly broad. The Martinez dissent also argues that paragraph (c) is "overly broad in that it would require disclosure of *de minimis* relationships that do not impact the lawyer's obligations." The relationships covered by paragraph (c), however, are those covered by current Rules 3-310(B)(1) and 3-320, which similarly impose disclosure requirements without regard to the effect on the lawyer's obligations. Paragraph (c) simply carries forward the same policy determination as reflected in the current Rules of Professional Conduct that these relationships are of a type that they should be made known to the client, even if there is not a significant risk they will affect representation. The Commission does not believe there is a valid reason for rejecting this determination to the detriment of client protection.

Paragraph (c)(2) would not require a law firm to implement a cumbersome conflicts check system. The Martinez dissent argues that paragraph (c)(2) would "require implementation of cumbersome, if not impossible, conflict check systems for law firms." The Kehr dissent makes a similar argument, and contends in partial support that paragraph (c)(2) "would expand the scope [of current Rule 3-320] to include disclosure of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer's own personal relationships." These arguments misread paragraph (c)(2), which, with the exception of *client* relationships, limits the relationships that must be disclosed to those of the lawyer herself, just as in current Rule 3-320. Paragraph (c)(2) requires written disclosure of the relationship, where a lawyer knows or reasonably should know that another party's lawyer is (1) a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, or has an intimate personal relationship with the lawyer or (2) a client of the lawyer or another lawyer in the lawyer's firm. Thus, the only extension of paragraph (c)(2) to firm lawyers is with respect to lawyer-client relationships, which should be readily revealed by the most basic of conflicts checks systems. The result is that paragraph (c)(2) should not require the implementation of any additional "cumbersome" conflict check systems because the other listed relationships apply only when personal to the lawyer, just as in current Rule 3-320. The "reasonably should know" standard effectively requires, therefore, only that the lawyer engage in reasonable inquiries to ascertain who the opposing lawyer is, and whether that lawyer has one of the listed relationships with the lawyer herself. The Commission believes this is not unduly burdensome and appropriately furthers client protection.

Proposed Rule 1.7 [3-310] Conflict of Interests: Current Clients
Synopsis of Public Comments

TOTAL = 7	A = 0
	D = 0
	M = 7
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27a	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	M		We would not opposed this rule if (1) the comment section were clarified to remove the word "embarrassment," and (2) the word "knowingly" was added to establish a required mens rea in order to be in violation of the rule.	
Y-2016-8a	Law Professors (Zitrin) (01-03-17)	Y	M	(b)	1. When we submitted our letter in September, our approval and support of Rule 1.7 was predicated on the then-existing draft, which included a list of items under subsection (b) – similar to the list currently in Rule 3-310(B) – that required informed written consent. That draft proposal was subsequently changed to eliminate the list that was approved of in our letter. This list, extremely valuable, has been replaced by vaguer language as to what matter require informed written [consent]. We adhere to our last comment, supporting approval of the prior draft that set forth Rule 1.7(b)(1)-(5) with specificity. (However, we maintain our continued objection to use of the word "resolution" in subsection 1.7(b)(3)).	1. The Commission determined that the list of examples previously included in paragraph (b) should be eliminated because certain of the examples were either over or under-inclusive in setting out situations in which informed written consent should be required because there was a "significant risk" that the lawyer's representation would be "materially limited." The Commission continues to believe this is correct, and that the general statement in Comment [5] making clear that this may occur as a result of the lawyer's other responsibilities, interests, or relationships "whether legal, business, financial, professional, or personal," together with the discussion

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						that follows, provides better guidance.
					2. New subsection (b) is far less protective of the rights of clients than the previous draft. On first glance, the revised language more closely tracks ABA Model Rule 1.7(a)(2). However, upon closer scrutiny this revised language adversely affects client loyalty in two ways. First, the ABA comments make clear that the "material limitation" test is objective. That is no longer true in the California draft. Paragraph (b) now references "compliance with paragraph (d)," and paragraph (d) uses a *subjective* test (representation permitted if "the lawyer *reasonably believes* that the lawyer will be able to provide competent and diligent representation" – emphasis added). That language would vitiate the objective standard requires in ABA MR 1.7(a)(2), and in the former draft we approved.	2. The Commission disagrees with the commenter's assertion that paragraph (b) imports a subjective test by requiring compliance with paragraph (d). First, both paragraph (b) and Comment [5] state the relevant test in objective terms, that is, simply whether there "is a significant risk." Second, paragraph (d), which corresponds to ABA Model Rule 1.7(b), sets forth certain "unwaivable" or "non-consentable" conflicts. The addition of the language requiring compliance with paragraph (d) simply means that even with the clients' consent, the lawyer may not accept or continue the representation if any of the conditions set out in paragraph (d) are not satisfied. Further, to avoid confusion about the requirements that might permit representation despite the presence of a conflict, the Commission has added to the introductory clause of paragraph (a) the clause, "the lawyer complies with

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						paragraphs (a), (b), and (c)." This additional clause should further clarify that not only must the requirements in (d)(1) through (3) be satisfied, but also that either informed written consent under paragraphs (a) and (b) be obtained or written disclosure under paragraph (c) is given. Finally, the Commission disagrees that "reasonable belief" is a purely subjective standard. Proposed Rule 1.0.1(i) defines the term to mean "that the lawyer believes the matter in question and that the circumstances are such that the belief is *reasonable*." (Emphasis added.)
					3. Second, the most important specific language of subsection (b) has now been removed from the rule and relegated to a comment, paragraph 5. This language – "materially limited [by] the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal" – thus again merely requires *disclosure and not consent* under Comment paragraph 5. This vitiates the thrust of the informed consent	3. The Commission disagrees with the commenters' assessment that the current draft of the rule "vitiates the thrust of the informed consent requirement in section (b) and is a serious retrenchment as to client protection." Consistent with ABA Model Rule 1.7, paragraph (b) continues to require informed written consent whenever there is a significant risk of a material limitation. This goes beyond

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					requirement in section (b) and is a serious retrenchment as to client protection. (We also note that it also appears to legislate in a comment, something the Supreme Court has asked not to occur.)	former California Rule 3-310(B)(2) and (3), which required only written disclosure (not informed written consent) in some situations falling within the scope of proposed Rule 1.7(b). The Commission continues to believe that a lawyer's responsibilities to or relationships with another client, a former client or a third person,* or the lawyer's own interests, do not in every instance create a *significant risk* that the lawyer's representation of the client will be *materially* limited. In certain circumstances where they do not, consistent with current California Rules 3-310(B)(1) and (4), paragraph (c) continues to require written disclosure. Moreover, current rule 3-320 requires only that a lawyer "inform" the client. By including the substance of rule 3-320 in paragraph (c), the heightened requirement of "written disclosure," providing greater client protection, applies. Finally, paragraph (c) and Comment [6] recognize that in practice, where the question is close, a prudent

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						lawyer will comply with the informed written consent requirement of paragraph (b) rather than providing only written disclosure under paragraph (c).
Y-2016-18a	Lamport, Stanley	N	M		1. Paragraph (c) should be removed from the rule. Paragraph (c) should not be in a conflicts of interest rule. Proposed Paragraph (c) requires written disclosure of a relationship with or responsibility to a party, a witness or with another party's lawyer, even when a significant risk that would require disclosure and consent under paragraph (b) is not present. In other words, this proposed Rule would require written disclosure in circumstances that do not present a conflict of interest. 2. The last sentence of Comment [4] should be limited to paragraph (a). Comment [4] attempts to carry over the Discussion in current rule 3-310, which makes Rule 3-310(C)(3) inapplicable when a lawyer represents an insurer in connection with	1. The Commission disagrees with the commenter's position. The situations described in subparagraphs (c)(1) and (2) carry forward current rule 3-310(B)(1) and 3-320, respectively. Regardless of whether informed written consent is required under paragraph (b) because there is a significant risk the representation will be materially limited, the lawyer should have a duty to provide written disclosure of such relationships or responsibilities so that the client can decide whether to retain the lawyer or seek other counsel. 2. The Commission recognizes this inadvertent oversight and has made the suggested change.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					defending an insured and accepts a representation that is adverse to another insured defended by the same insurer. Rule 3-310(C)(3) is encompassed by proposed Rule 1.7(a), which applies to representations that are directly adverse to another client in the same or a separate matter.	
Y-2016-28a	Public Defender Los Angeles County (Emling) (01-17-17)	Y	M		We proposed deleting "embarrassment" from the comment section, and including "knowingly" in the rule so that an attorney must actually *know* of the existence of a conflict in order to violate the rule.	
Y-2016-21e	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	(d)	1. OCTC supports this rule. 2. However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, …" OCTC recognizes that Comment 8 explains that, but it should be in the text of the rule, not in a Comment.	1. No response required. 2. The Commission did not make the specific suggested change but did add an additional clause to the introductory clause of paragraph (d) to avoid the confusion that the commenter believes might arise. See Response 2 to Law Professors, Y-2016-8a, above The Commission notes it did not make the commenter's specific change because paragraph (c) also requires compliance with paragraph (d)

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						but does not require the clients' informed written consent.
					3. OCTC supports Comments 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11. OCTC has no position on Comment 10 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver. OCTC is concerned that Comment 12 is unnecessary because proposed rules 6.3 and 6.5 are self-explanatory.	3. The Commission did not include the suggested guidance because it believes the specific requirements for an "adequate" advance waiver will be contextual and should be left to case law. Further, providing such guidance would conflict with the Commission's Charter.
					4. If subsection (d) is revised as indicated above, the Commission might want to reconsider the first sentence of Comment 9.	4. Please see response to comment #2.
Y-2016-7c	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	M		1. As an initial matter, COPRAC repeats its strong support for the Commission's decision to adopt the basic framework set out in ABA Model Rule 1.7 for the analysis of concurrent client conflicts. COPRAC also supports most of the changes to the Rule and the Comments approved by the Commission on October 21-22.	1. No response required.
				Comment	2. COPRAC opposes new	2. The Commission continues

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
				[2]	Comment [2] defining what constitutes a "matter" for purposes of Rule 1.7 (and, by cross-reference, for Rules 1.9 and 1.11). This definition is clearly too narrow in its application to transactional work, limiting such work to single contracts. It is also confusing in its application to many common situations, such as mediation prior to the filing of a lawsuit or administrative or legislative lobbying. The definition also appears to fall into the category of law-making by Comment that the Supreme Court has disapproved. Finally, this definition appears to be a departure from prior law that is not required for national uniformity, since the ABA Model Rules do not contain such a definition. It appears that other jurisdictions (like California) have been content to treat the question of what counts as a matter (like the question of whether an attorney-client relationship exists) as one to be developed in the case law rather than specified by rule. In light of these considerations, COPRAC suggests that the Comment be dropped or substantially modified.	to believe that as a non-exclusive list of examples of what is included within the term matter, Comment [2] is an appropriate comment. However, the Commission has modified Comment [2] so that the list of examples is not only closer to that contained in current ABA Model Rule 1.11(e), but also is appropriate for use with respect to Rules 1.7 and 1.9 as well.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
				Comment [7]	3. COPRAC also proposes a small clarifying stylistic revision to new Comment [7] on positional conflicts. We suggest that the Comment's second sentence, beginning with "That advocating…" be rewritten for clarity as follows: "Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by the lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent."	3. The Commission has made the suggested change.
Y-2016-12	U.S. Department of Justice (Ludwig) (01-09-16)	Y	M		In our September 27, 2016, letter to the Commission, we recommended that the Commission provide lawyers with guidance regarding what constitutes a "matter" for purposes of proposed California Rule 1.9. We understand that the Commission has elected to define the term "matter" in Comment [2] to proposed California Rule 1.7 and to apply that definition to all of the conflict of interest rules. In doing so, it appears that the Commission largely relied upon the definition of "matter" previously found in	The Commission agrees that the definition of matter should be broader and has made the suggested change. See Comment [2].

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					proposed California Rule 1.11(e)(1). We support the Commission's decision, but note that, as drafted, the term "matter" does not include "investigation[s], charge[s], accusation[s], [or] arrest[s]," all of which previously were included in proposed Rule 1.11(e). We understand that the Commission's definition is not and cannot be comprehensive—that it merely "includes" those matters described in the proposed Comment. That said, we think that it is important to define "matter" explicitly to include investigations, charges, accusations, and arrests—which do not readily fall into any of the other types of matters listed—and respectfully request that the Commission include these terms in Comment [2] to proposed Rule 1.7.	

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on January 20, 2017 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) ~~occurs~~can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; ~~or~~ (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a

client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, ~~paragraphs~~paragraph (a) ~~and (b) do~~does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. ~~That advocating~~Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter ~~does~~is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.1
(Current Rule 3-300)
Business Transactions with a Client and Pecuniary Interests Adverse to a Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-300 (Avoiding Interests Adverse to a Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.8.1. The result of the Commission's evaluation is proposed rule 1.8(a) (Conflicts of Interest: Current Clients: Specific Rules).

Rule As Issued For 90-day Public Comment

Proposed rule 1.8.1 states a lawyer's duties when entering into a business transaction with a client or acquiring an adverse pecuniary interest. In general, a transaction between a fiduciary and a beneficiary gives rise to a presumption of self-dealing.[1] Two main issues were considered in drafting proposed rule 1.8.1. The first issue pertains to the current rule's requirement that an attorney advise clients that they may seek independent counsel. The Commission considered whether there should be an exception to this requirement in the limited circumstance where a client is already represented by another lawyer in the specific transaction. The second issue was whether the rule should be clarified as to its applicability to a modification of a lawyer-client fee agreement.[2] In the current rule's Discussion section, there is only limited guidance on the applicability of the rule to fee agreements. That guidance states that: "Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client."

Regarding circumstances where the client is already represented by another lawyer in the transaction, the Commission recommends adding the exception to the requirement that an attorney advise clients that they may seek independent counsel (see proposed paragraph (b)). The Commission reasoned that the client protection intended by this requirement is not furthered by requiring an advisement in such circumstances because the objective of the requirement is already met, namely the client has retained a lawyer to advise the client on the transaction. In addition, the Commission was concerned that the lawyer's act of giving advisement notwithstanding that the client is already represented by another lawyer might be

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[1] See Probate Code § 16004(c) which provides that:

> A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

[2] This ambiguity in the current rule is discussed in an ethics alert article by the Committee on Professional Responsibility and Conduct ("COPRAC") entitled: "Uncertain Ethics Requirements for Attorney Fee Modifications Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement." The article includes a comment from the Office of the Chief Trial Counsel arguing that all modifications should be regarded as transactions because a current client's trust and confidence is implicated. The article is posted at: http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf .

perceived by the client as denigrating the independent lawyer that the client has already chosen and therefore could interfere with the client's confidence in that lawyer's advice.

Regarding the issue of whether the rule should be clarified as to its applicability to a modification of a lawyer-client fee agreement, the Commission recommends amending the existing Discussion guidance to state that the rule "does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client." The Commission viewed this clarification as preferable to the alternative of an amendment stating, as an absolute proposition, that rule applies to any and all modifications of a fee arrangement that arise during the lawyer-client relationship. The Commission was concerned that if the rule were to apply to all fee agreement modifications, it might require compliance each time a lawyer: (i) agrees to represent a current client in a new matter; (ii) agrees to a change in the billing rate (including workouts or changes reducing a client's fee obligations); and (iii) agrees to alter the scope of a current representation (including expanding the scope of services in flat or fixed fee arrangements even if there is no concomitant agreement for an additional fee or fee increase). The Commission also observed that discipline already is available when a lawyer utilizes the lawyer-client relationship to manipulate a client (see *In the Matter of Shalant* (2006) 4 Cal. State Bar Ct. Rptr. 829) and for a situation where a fee arrangement is unconscionable (see rule 4-200).[3]

In addition to these two main issues, other proposed amendments include the following.

- In paragraph (a), adding to the existing client disclosure requirement that the lawyer must disclose "the lawyer's role in the transaction or acquisition."
- In paragraph (c), restating the existing requirement to obtain client consent in writing after disclosure as a requirement to obtain a client's "informed written consent to the terms of the transaction or the terms of the acquisition."
- In Comment [1], providing cross references to related statutory provisions concerning the sale of financial products to an elder (Business and Professions Code § 6175.3) and attorney liens on community real property (Family Code §§ 2033 - 2034).
- In Comment [2], adding new guidance on factors that may be considered for determining whether an attorney is an "independent lawyer" under paragraph (b) of the proposed rule.

<u>Related Model Rule concepts considered in connection with Model Rule 1.8(a).</u>

In studying Model Rule 1.8(a), the Commission also considered Model Rules 1.8(d) and (i). The Commission is not recommending adoption of these rules. Model Rule 1.8(d) provides that: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." Model Rule 1.8(i) provides that: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case."

[3] Under rule 4-200(B)(11), a factor for determining the conscionability of a fee is: "The informed consent of the client to the fee."

The Commission construes both of these rules as imposing absolute prohibitions on lawyer conduct. As absolute prohibitions carrying a penalty of State Bar discipline, they are inconsistent with existing California law or policy. The Commission finds that the essential conduct addressed in these Model Rules properly falls under current rule 3-300 and that the public protection afforded by rule 3-300 is more consistent with existing California law than the absolute prohibitions in the Model Rules. Regarding acquisition of literary or media rights, see: *Maxwell v. Superior Court* (1982) 30 Cal.3d 606; and *People v. Doolin* (2009) 45 Cal. 4th 390, 391. See also: *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 719 at n. 16. Regarding the acquisition of a property interest in the cause of action or subject matter of a client's litigation, see *Mathewson v. Fitch* (1863) 22 Cal. 86 and *Estate of Cohen* (1944) 66 Cal.App.2d 450, 458. As explained in the Model Rule comments, Model Rule 1.8(i) is a regulatory concept based on common law prohibitions on champerty and maintenance, but California has never included the concept of maintenance and champerty in a rule of professional conduct. For both of these Model Rules, the Commission believes that if ultimately adopted proposed rule 1.8.1 should serve as the applicable disciplinary standard.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission implemented a non-substantive revision in paragraph (a) to use the active voice in stating a lawyer's duty of client disclosure. For brevity and clarity, non-substantive revisions also were made in paragraph (c), in part, to remove repeated references to "the terms of" a business transaction or an acquisition of an adverse interest.

Substantive changes were made to the comments regarding the applicability of the rule to: a modification of a fee agreement; and dealings with a former client.

In Comment [1] of the public comment version of the proposed rule, the Commission attempted to clarify to what extent, if any, the proposed rule applied to a modification of a fee agreement but public comments received questioned the clarity and policy of this change. In response to the public comments, the Commission determined to delete the language in Comment [1] concerning modification of fee agreements. Rather than attempting to clarify this issue, the Commission decided to maintain the status quo and restored the language of the current rule's Discussion section. That language has been added at the start of Comment [5].

Regarding a lawyer's dealings with a former client, the Commission added a new Comment [4] in response to a public comment from the State Bar's Office of the Chief Trial Counsel. The new comment cites to case law holding that the current rule may in some circumstances apply to a transaction entered into with a former client. This new comment promotes compliance by putting lawyers on notice that the rule may apply even in dealings with a person who technically is not a current client of the lawyer at the time of the business transaction or the acquisition of an adverse interest.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.1 [3-300]

Commission Drafting Team Information

Lead Drafter: Robert Kehr
Co-Drafters: Jeffrey Bleich, Lee Harris

I. CURRENT CALIFORNIA RULE

Rule 3-300 Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction “with” B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.8.1 [3-300]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.8.1 [3-300]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client

A lawyer shall not enter into a business transaction with a client, or knowingly* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) the transaction or acquisition and its terms are fair and reasonable* to the client and the lawyer fully discloses and transmits in writing* to the client the terms and the lawyer's role in the transaction or acquisition in a manner that should reasonably* have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(c) the client thereafter provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

Comment

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this Rule may apply to a transaction entered into with a former client. Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ("[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable* to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule) even if the representation has otherwise ended [and] It appears that [the client] became a target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated].") and *Wallis v. State Bar* (1942) 21 Cal.2d 322 (finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her).

[5] This Rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by Rule 1.5. This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[6] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-300)

Rule 1.8.1 [3-300 ~~Avoiding~~] Business Transactions with a Client and Pecuniary Interests Adverse to a Client

A ~~member~~lawyer shall not enter into a business transaction with a client~~;~~, or knowingly* acquire an ownership, possessory, security~~,~~ or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(~~A~~a) ~~The~~ the transaction or acquisition and its terms are fair and reasonable* to the client and ~~are fully disclosed and transmitted~~the lawyer fully discloses and transmits in writing* to the client the terms and the lawyer's role in the transaction or acquisition in a manner ~~which~~that should reasonably* have been understood by the client; ~~and~~

(~~B~~b) ~~The~~ the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing ~~that the client may~~* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(~~C~~c) ~~The~~ the client thereafter ~~consents in writing~~provides informed written consent* to the terms of the transaction or ~~the terms of the~~ acquisition~~.~~, and to the lawyer's role in it.

~~Discussion~~Comment

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this Rule may apply to a transaction entered into with a former client. Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ("[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable* to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule) even if the representation has otherwise ended [and] It appears that [the client] became a target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated].") and *Wallis v. State Bar* (1942) 21 Cal.2d 322 (finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms

she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her).

[5] This Rule ~~3-300 is~~does not ~~intended to~~ apply to the agreement by which the ~~member~~lawyer is retained by the client, unless the agreement confers on the ~~member~~lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by ~~rule 4-200.~~ Rule 1.5. This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[6] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

~~Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.~~

~~Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.~~

V. RULE HISTORY

Rule 3-300 originated with the first rules promulgated in 1928. Former rule 4 provided an outright prohibition: "A member of the State Bar shall not acquire an interest adverse to a client." When the entire rules were revised operative January 1, 1975, rule 4 became new rule 5-101 (Avoiding Adverse Interests), which narrowed the original prohibition by permitting a "business transaction with a client" or acquisition of an "ownership, possessory, security or other pecuniary interest adverse to a client" if three conditions were all met: (1) the transaction and terms are fair and reasonable to the client and fully disclosed in writing in a manner and terms which should have reasonably been understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel; and (3) the client consents in writing.

The entire rules were revised operative on May 29, 1989. Rule 5-101 was renumbered as rule 3-300 and reorganized with subparagraphs. The rule was amended to refine the requirements by: setting apart the concepts of a "business transaction" and "ownership, possessory, security or other pecuniary interest;" adding a requirement that the client be advised in writing that the client may seek independent counsel; and clarifying that the client's consent must be after paragraphs (A) and (B) are satisfied. Three Discussion paragraphs were also added.

The rule was last amended effective September 14, 1992. The only change revised the rule's title to "Avoiding Interests Adverse to a Client" to better distinguish the rule from rule 3-310 (Avoiding the Representation of Adverse Interests).

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC believes there should be a Comment that fee modifications would and should normally apply to this Rule. (See OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, already provided in OCTC's August 26, 2008 comments to the Rules. See also *In the Matter of Mark Scott* (Review Dept. 2007) Case No. 01-O-05066, Slip Op. p. 19, fn. 22 [contingency fee agreements *renegotiated* at the time of settlement may be governed by rule 3-300, unpublished]; *In re Corcella* (Ind. 2013) 994 N.E.2d 1127.)

   Commission Response: The Commission did not achieve a strong consensus on whether, and if so, how the issue of modifications of fee agreements should be addressed in the Rule. In the absence of a strong consensus, the Commission determined to restore the status quo language of the current rule Discussion and not attempt to make any change.

2. The Rule should be amended to include transactions involving relatives of the attorney when the attorney knows or should know of these transactions or potential transactions. (See *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776-777 [not applying former rule 5-101 to a transaction between the client and respondent's parents]; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 123-124 [not applying rule 3-300 when respondent negotiated a transfer of real property between two of his clients, and as a result of the transfer the attorney's minor son received a 50 percent interest in the property from one of the clients].[1] (But see *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [applying former rule 5-101 when attorney persuaded client to loan money to attorney's ex-client and the attorney received most of proceeds of one of the loans as payment of the ex-client's legal fees].) The courts have disciplined real estate brokers for failing to disclose that the purchaser was related to the broker. (*Whitehead v. Gordon* (1969) 2 Cal.App.3d 659 [brother-in-law].) The courts have also applied the presumption of unfair transactions when the purchasers were relatives of the fiduciary. (See *Batson v. Stehlow* (1968) 68 Cal.2d 662, 675; *Adams v. Herman* (1951) 106 Cal.App.2d 92, 99.) Attorneys should be required to comply with rule 3-300 when they *know* or reasonably should know of a transaction or potential transaction between their clients and their relatives. This is necessary for public protection.

[1] The respondents in these cases were found culpable of either violating rule 3-310 or § 6106 for their conduct.

Commission Response: The Commission disagrees. A lawyer under current law does not owe the fiduciary duties of a lawyer-client relationship to a non-client even if that person has a close or even a family relationship with a client. We see no basis for altering this well-understood concept.

3. The Rule should also be amended to cover attorney-client transactions for three years after the attorney-client relationship terminated. (Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-372 [applying former rule 5-100 to a transaction after the termination of the attorney-client relationship] and *In the Matter of Allen* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 198, 203-205 [not applying rule 3-300 to a transaction after the termination of the attorney-client relationship].) The current law is confusing on this issue, applying the rule to some but not all post-representation transactions. One of the purposes of rule 3-300 is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship. (*Hunniecutt, supra,* 44 Cal.3d at p. 370.) Further, "if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [former] rule 5-101 even if the representation has otherwise ended." (*Id*.) Amending the rule to include all transactions within three years of the representation protects clients and clarifies when the rule applies to a transaction and when it does not. Further, such an amendment is consistent with Business & Professions Code § 6175.3 (which requires certain disclosures when an attorney sells financial products to a client or former client within three years of the attorney-client relationship terminating).

   Commission Response: The Commission disagrees because this would not correctly reflect current law as stated in *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362 and Beery v. State Bar (1987) 43 Cal.3d 802. They describe a nuanced approach to the question of whether the Rule should be applied to a transaction involving a former client based on factors such as closeness in time and whether the transaction or acquisition is related to the former representation. Consistent with the approach in case law, the Commission added a new Comment [4] that helps to alert lawyers that the rule may in some circumstances apply dealings with a person who technically is not a current client of the lawyer at the time of the transaction or acquisition.

4. OCTC supports Comments [1], [2], [4], and [5].

   Commission Response: No response required.

5. OCTC supports Comment [3]. However, the Comment should also make clear that it is the attorney's burden to establish that the transaction is fair and reasonable. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314.)

   Commission Response: It is correct that the burden is on the lawyer both in the disciplinary setting under rule 3-300 and in the civil setting under Prob. Code

§ 16004, but including this in the Comment would amount to additional practice guidance , which is contrary to the Commission's Charter.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the Rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the Rule and the Commission's responses to OCTC remained the same.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. One comment agreed with the proposed Rule, six comments disagreed, and two comments agreed only if modified. During the 45-day public comment period, three public comments were received. One comment agreed with the proposed Rule, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed Rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Fiduciary Self-Dealing – Presumption of Undue Influence

California law recognizes a fiduciary's potential for exerting undue influence in transactions with a beneficiary. Under Probate Code, § 16004, the law presumes a fiduciary has used this influence to the fiduciary's advantage in all dealings with the beneficiary of the trust that ". . . occurs during the existence of the trust or while the trustee's influence with the beneficiary remains . . . ." Section 16004 applies to the lawyer-client relationship. (See *BGJ Associates, LLC v. Wilson* (2003) 113 Cal. App.4th 1217, 1227. See also, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 916.) This standard does not apply to the negotiation of the agreement creating the fiduciary relationship. (See *Seltzer v. Robinson* (1962) 57 Cal.2d 213, 217 [concluding that an attorney should not be put in the "impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not."].)

2. Business and Professions Code, § 6175.3 (Sale of Financial Products to an Elder, Dependent Adult, Client or Former Client)

Business and Professions Code, § 6175.3 is similar to current rule 3-300 in that it governs transactions with persons with whom the lawyer has a fiduciary relationship. It applies to a lawyer selling financial products to an elder, or dependent adult, client or former client and has similar requirements to rule 3-300 (e.g. fair and reasonable terms, requirement to advise client they may seek independent advice, client's written consent). It also includes additional heightened requirements (e.g. the written disclosure must be clear and conspicuous and meet specific formatting requirements, the lawyer must disclose the lawyer's interest in the sale), and applies for three years following the termination of the lawyer-client relationship.

In its 2001 comment, the Office of Chief Trial Counsel suggested language changes to rule 3-300 that tracked the requirements under § 6175.3, reasoning that the changes would simply extend protections already provided for some clients to all clients.

3. Duty to Advise Client: Seeking Independent Counsel

Current rule 3-300 requires lawyers to advise the client that the client "may seek the advice" of independent counsel regarding the transaction or acquisition. The State Bar Review Department indicated that the language of the current rule is inconsistent with California Supreme Court authority that requires a lawyer to advise the client *to seek* independent advice. (*Matter of Silverton II* (2004) 4 Cal. State Bar Ct. Rptr. 643, fn. 16.) In *Rose v. State Bar* (1989) 49 Cal.3d 646, 663 [262 Cal.Rptr. 702], where the lawyer told the client that she could consult another lawyer regarding the transaction, but did not advise her to, and implied that doing so would be unnecessary, the court stated that the lawyer, in entering such transactions with the client, was required to advise the client to seek independent counsel. In *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 309 [256 Cal.Rptr. 381], where the client transferred conservatorship funds to the lawyer for investment with the lawyer's former client, who owed the lawyer money, the court stated that the lawyer was required to *encourage* the client to consult with other counsel.

4. Modification of Fee Agreements

No rule of professional conduct specifically addresses modifications to fee agreements. The Discussion to rule 3-300 states the rule is not applicable to agreements by which the lawyer is retained unless it confers an interest adverse to the client, but is silent regarding modification of the initial agreement. Since the last amendments to rule 3-300, numerous diverging interpretations of the rule's applicability to modifications of fee agreements have emerged.[2]

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[2] See, Ethics Hotliner, Ethics Alert: Uncertain Ethics Requirements for Attorney Fee Modifications - Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement (COPRAC 2009) found at:

http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf

B. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf [last visited 2/13/17]

- Twenty-nine jurisdictions have adopted the model rule 1.8(a) verbatim,[3] fourteen jurisdictions have adopted variations of model rule 1.8(a),[4] and eight jurisdictions have a different rule or a materially modified version of model rule 1.8(a).[5]

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

A. Concepts Accepted (Pros and Cons):

1. Change the title of the Rule.

   - Pros: The current title is not descriptive of the rule's content. A more specific title should assist lawyers in locating this Rule.

   - Cons: None identified.

2. Specify in paragraph (a) that the required disclosure includes the lawyer's role in the transaction or acquisition,

   - Pros: There is substantial authority that the lawyer's role cannot be hidden from the client. (See, e.g., *In the Matter of Crane and DePew* (Rev. Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139.) In addition, because the disclosure must be in writing, the information about the lawyer's role will be readily available to any independent lawyer who the client might choose to provide advice on the transaction or acquisition.

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[3] The twenty-nine jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine; Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, West Virginia, and Wyoming.

[4] The fourteen jurisdictions are: Alabama, Alaska, California, Georgia, Hawaii, Illinois, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Texas, Virginia, and Washington.

[5] The eight jurisdictions are: Connecticut, District of Columbia, Florida, Maryland, Minnesota, Montana, New York, and North Dakota.

- Cons: This addition is unnecessary and micro-manages the concept of a full disclosure to the client about the transaction or acquisition.

3. Clarify in paragraph (b) that there is no requirement to advise a client to seek an independent lawyer in circumstances where the client is already represented on the transaction or acquisition.

   - Pros: No public protection is realized by requiring an advisement in such circumstances because the objective of the requirement is already met. Moreover, this pointless advisement might be perceived by the client as denigrating the independent lawyer that the client has already chosen and therefore could interfere with the client's confidence in that lawyer's advice.

   - Cons: The required advisement should be given even if the client is already represented by an independent lawyer. In such circumstances, this would function as an opportunity for the client to communicate confirmation that the client has in fact secured an independent lawyer concerning on the transaction or acquisition. Also, nothing in the Rule dictates that the advisement be presented in a manner that denigrates the lawyer-client relationship that is being confirmed by the advisement. For example, the client's right to continue with their chosen independent counsel can be emphasized in conveying the advisement.

4. In paragraph (b), revise the requirement in current rule 3-300(B) to advise the client that it "may" seek independent counsel in order to make the first lawyer's disclosure more definitive, i.e., require that the client is advised "to seek the advice of an independent lawyer."

   - Pros: Case law tends to read the rule in this stricter fashion, and a lawyer's more definite statement is more likely to convince the client to seek independent counsel. To this end, the proposed Rule omits the "may seek" concept and requires the lawyer to advise the client to seek independent counsel.

   - Cons: None identified.

5. In paragraph (c), change the consent requirement in current rule 3-300(C) ("the client consents in writing") to "informed written consent."

   - Pros: OCTC made this recommendation and the Commission agrees. This change brings into the Rule a term defined in proposed Rule 1.0.1(e) ("informed consent") and 1.0.1(e-1) ("informed written consent").

   - Cons: None identified.

6. Add Comment [1], which explains the meaning of the term "other pecuniary interest adverse to the client" by reference to examples from case law.

    - Pros: This is a difficult concept that has been addressed in the case law, in part because the scope of its application is confusing to lawyers.

    - Cons: None identified.

7. Add Comment [2], which explains what is meant by "an independent lawyer" for purposes of this Rule.

    - Pros: The question of whether a lawyer is independent within the meaning of this Rule does cause confusion. It is important to define the concept to help assure that the client actually receives independent advice. The receipt of truly independent advice can provide crucial protection for the client. This issue has been litigated under the prior rule (Rule 5-101). In *Conner v. State Bar* (1990) 50 Cal.3d 1047, 1058–59, the Supreme Court concluded that, as a general rule, a member, associate, or partner of a law firm cannot serve as the "independent counsel" required by the rule. In this case the purported independent counsel was the respondent's law partner and girlfriend. While it might be correct, as suggested immediately below, that it might be more difficult in the smallest communities to locate an independent lawyer, we believe that all clients are entitled to the protection afforded by having a truly independent voice, and the Rule applies to all lawyers. The proposed Comment is based on the work of the first Commission.

    - Cons: The proposed definition would disqualify a person who is in a close legal, business, financial, professional, or personal relationship with the lawyer. In a small rural community with few lawyers, this might be burdensome.

8. Add Comment [3], which clarifies that the "fair and reasonable" standard is measured at the time of the transaction or acquisition.

    - Pros: A lawyer should not be second guessed based on subsequent developments not known at the time of the transaction. This coordinates the proposed Rule with the long-standing standard that the conscionability and the reasonableness of a fee agreement are measured when the agreement is made.

    - Cons: None identified.

9. Add Comment [4], which explains that under some circumstances, the Rule might apply to business transactions with a former client.

    - Pros: For purposes of public protection, it is important to alert lawyers that under certain circumstances, i.e., where there is residual trust placed in the lawyer after the lawyer-client relationship has ended, the Rule may be applicable.

- Cons: None identified.

10. Add Comment [5], which carries forward the concept in current rule 3-300, Discussion ¶. 1, and notes that advances for fees are governed by Rules 1.5 and 1.15.

    - Pros: With respect to the Comment's first sentence, it is well-settled that this rule does not apply to the agreement by which the client retains the lawyer. There is no reason to change that rule. As for the sentence regarding advances for fees, this is particularly important because that Commission has recommended the adoption of rule 1.15, which requires that advances for fees must generally be placed in trust.

    - Cons: None identified.

11. Add Comment [6], which carries forward the concept in current rule 3-300, Discussion ¶. 2.

    - Pros: The Commission is not aware that this provision has caused any problems.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include within the scope of the Rule any new or modified fee agreement with current client.

    - Pros: OCTC and a group of California law professors have argued that fee negotiations with current clients should be included in the Rule, in substance under the theory that a fiduciary relationship exists with current clients but not with a potential client.

    - Cons: The first sentence in the official Discussion to current rule 3-300 states: "Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200." It sometimes has been argued that this sentence applies only to the agreement by which a lawyer *first* is retained by a client although it does not be its terms refer only to initial retention. (See *Priester v. Citizens Natl. Bank*(1955) 131 Cal. App.2d 314, 321 [holding that a lawyer has burden of proving that fee agreement with existing client was fair and reasonable and no advantage was taken].) This states the correct concept that the negotiation of a standard fee agreement is an arms-length transaction but one that a court will review to see whether the lawyer exercised any undue influence. (See also, Cal. State Bar Op. 1989-116 ["Ethical considerations do exist, however, whenever an attorney attempts to negotiate an arbitration provision with a

client during the course of an existing attorney-client relationship. Although rule 3-300 still does not apply because no ownership, possessory, security, or other pecuniary interest is involved, an attorney nevertheless has an ongoing ethical duty to preserve the trust and confidence existing clients place in the attorney."].) Other courts have tacitly recognized this by ignoring rule 3-300 when addressing fee agreements between lawyers and current clients. (See, e.g., *Stroud v. Tunzi* (2008) 160 Cal. App.4th 377 [holding that any modification or amendment to a contingent fee agreement must comply with § 6147]; *Severson & Werson v. Bolinger* (1991) 235 Cal. App.3d 1569, 1573 [holding, among other things, that a lawyer may not change billing rates during a representation with notice to the client]; *Ramirez v. Sturdevant* (1994) 21 Cal. App.4th 904, 913; *Walton v. Broglio* (1975) 52 Cal. App.3d 400, 404 [discussing the possible application of Probate Code section 16004 but ignoring rule 3-300].) Courts and law firms properly do not generally treat the renegotiation of a fee agreement in a current representation to change the billing rate, the amendment of a fee agreement with a current client to alter the scope of services, or the negotiation with a current client of a fee agreement in a new matter as subject to rule 3-300. If this Rule were to apply to all fee agreements between a lawyer and a current client, it would require compliance each time a lawyer: (i) agrees to represent a current client in a new matter; (ii) agrees to a change in the billing rate; and (iii) agrees to alter the scope of a current representation. Discipline already is available when a lawyer utilizes the lawyer-client relationship to manipulate a client. (See *Matter of Shalant* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 829.) In addition, we believe that including fee agreements with current clients within this rule would denigrate the importance of the standards that apply to initial fee agreements; any impropriety in dealings with a new client will cause the lawyer to violate the unconscionable fee standard of *Herrscher v. State Bar of California* (1935) 4 Cal. 2d 399. The first Commission dealt with this topic through the following Comment sentence: "This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees." The ABA Model Rules takes the approach we recommend and, as did the first Commission, does so through a Comment: "[This Rule] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." In lieu of the wording selected by the first Commission or the ABA, the language used in this draft comes directly from Probate Code section 16004(c) in order to make clear that the application in this respect is the same for disciplinary and for civil purposes. Finally, the theoretical premise for applying the Rule to fee agreements with current clients is that there is no fiduciary relationship with someone who is not yet a client. That is

not certain as current rule 3-300 applies to fee agreements entered into before the formation of a lawyer-client relationship and a lawyer can have a duty of communication with someone who is not and never becomes a client. (See Calif. Practice Guide: Professional Responsibility at ¶ 5:839, *Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)

2. Include a provision providing that the Rule applies to fiduciary relationships as well as lawyer-client relationships, arguing that this is already the law. (See, e.g., *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297.)

    - Pros: Such a provision would conform to State Bar Court precedent.

    - Cons: It is correct that the lawyer in *Hultman* was disciplined under rule 3-300 for utilizing his position as a trustee to make loans to himself, but the lawyer was the drafter of the trust instrument on behalf of his law client. It therefore is not certain from *Hultman* that the result would have been the same if there had been no lawyer-client relationship. *Hultman* has been cited as a lawyer-client business transaction case. (See *Matter of Van Sickle* (Review Dept. 2005) 2005 Calif. Op. LEXIS 3.)

3. Include a provision applying the Rule to an attempt to enter into a business transaction or acquire an adverse pecuniary interest.

    - Pros: Even if a client balks at their lawyer's attempt to enter into a self-dealing transaction, that client's expectation of loyalty and fidelity is already harmed. The underlying client protection policy of the current rule is strengthened by clarifying that attempts are prohibited. Compare Business and Professions Code section 6090.5 that prohibits a lawyer from seeking an agreement to hide misconduct from the State Bar or to withdraw a disciplinary complaint that has already been filed. Under this statute, it does not matter if the lawyer is successful in achieving the prohibited agreement. If trust and confidence in the legal profession is a valued objective in revising the rules, then the prohibition against self-dealing transactions with a client should follow the approach of § 6090.5.

    - Cons: Including attempts within this Rule would create a new and undefined body of law dealing with the scope of "attempt". This would leave open many questions. For example: How far along in the process would a lawyer have to go to be subject to discipline under the Rule? Would a lawyer be subject to discipline if the client rejected the attempt so quickly that the transaction was not yet in writing as required by the Rule? What if the lawyer withdrew the attempt on the lawyer's own volition?

4. Expand the scope of the Rule to include much of Bus & Prof Code § 6175.3 ("Sale of financial products to elder or dependent adult clients; Disclosure").

    - Pros: This is a client protection duty that should be specified in the proposed rule so that lawyers can readily comply. Leaving this Rule silent on the

related statutory prohibition is contrary to the Commission's practice in other proposed Rules of alerting lawyers through citations in the Rule Comments. For example, the proposed Rule on sexual relations with a client, Rule 1.8.10, includes a reference to the statutory prohibition on sexual relations with a client. There is no reason not to take a similar approach in this Rule or to do more by including specific prohibitions in the Rule text.

- Cons: The conduct is already addressed as part of a statutory scheme that creates specific remedies in § 6175.3 and authorizes professional discipline in § 6175.5. There would be no benefit to including portions of this scheme in the Rule. This would make the Rule considerably more complex and cumbersome, and therefore less easily accessible to readers, and would risk creating conflicts between the Rule and the statutory scheme. Instead, proposed Comment [1] references § 6175.3 for the information of readers.

5. Extend the Rule to apply to transactions between a lawyer and a client's agent.

   - Pros: Under Hornbook agency law, a transaction with an authorized agent binds the principal. Revising the Rule to apply to a lawyer's dealings with a client's agent would help avoid indirect violations of the Rule.

   - Cons: The change is unnecessary. A transaction will be with the client if entered into in the client's name, even if the negotiations are with the client's agent. The result would be the same if entered into in the name of the agent for the benefit of the client if the client's position is disclosed to the lawyer (see Restatement (Third) of Agency § 6.01 (3rd Ed. 2006).) In these two situations the recommendation would serve no purpose. There is a third situation, which is where the agent's principal is not disclosed. In that situation, the lawyer's conduct should not be governed by this Rule, but it would be under the OCTC recommendation because an undisclosed principal is a party to a contract made by an agent on the principal's behalf. (See Restatement (Third) of Agency § 6.02 (3rd Ed. 2006).) A lawyer should not be subject to scrutiny under this Rule for entering into a transaction with a client's agent if the lawyer does not know of that agency relationship.

6. Extend the Rule be extended to apply to transactions with a client's close relative.

   - Pros: Family entanglements can be just as problematic as direct transactions between a lawyer and a client. In *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, a violation was found where a transaction benefited the lawyer's son. As this aspect of the equation is covered by discipline case law, the missing public protection component requires revising the rule to address a lawyer's transaction with a client's close relative.

- Cons: A lawyer under current law does not owe the fiduciary duties of a lawyer-client relationship to a non-client even if that person has a close or even a family relationship with a client. We see no basis for altering this well-understood concept.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

1. Requiring that the disclosure must include the lawyer's role in the transaction or acquisition is a substantive change to the Rule.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the Rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding Rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. New paragraph (d), defining "independent lawyer," is a non-substantive change to the rule; it merely clarifies what the law is. (See IX.A.7, above.)

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Ham submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.1 [3-300] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.1 [3-300] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.8.1(a)

This message states my dissent from proposed Rule 1.8.1(a), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

Current rule 3-300(A) states, as one of the conditions to a lawyer entering into a transaction with or acquiring a pecuniary interest adverse to a client, that the terms of the transaction or acquisition "are fully disclosed and transmitted in writing to the client". The use of the passive voice recognizes that the source of the writing makes no difference as long as the client has the writing before the transaction or acquisition. The passive voice has been part of California's Rules since the original 1975 ancestor of the current rule (then, rule 5-101) and, so far as I know, the passive voice is used in the corresponding Rule in every U.S. jurisdiction.

During the October 2016 Commission meeting, the passive voice was restated in the active voice. Unfortunately, it was not until the revised Rule went out for public comment and there was time to study it that anyone caught the resulting substantive change. We were alerted to the problem by a public comment letter filed by the L.A. County Bar Assoc. The L.A. letter objects to this change, correctly pointing out that some lawyer-client deals are created by the client, and that the client might know more about the deal than does the lawyer. That letter also says that the source of the information does not provide any additional client protection, which certainly is correct. Here are some examples of lawyer-client transactions that are created by the client:

- Publicly traded corporations commonly offer stock options, ESOP, or other securities-based benefits to employees, including legal staff, and modify outstanding ownership rights.

- Many real estate development and real estate syndication companies routinely have granted limited partnership interests or LLC membership interests in its projects to its key employees, including legal staff.

- On occasion a wealthy individual or family hires a lawyer on terms that include minority interests in particular business assets.

In each of the three preceding examples, the lawyer might have nothing to do with the choice, structuring or expression of the transaction, and the lawyer might not be competent to explain the transaction, and the client might have been independently represented.

To take the first of the listed examples, the in-house lawyer would be subject to disciplinary risks (and potentially to civil risks) for not having responded to the corporation's stock option notice with a return notice saying: "Here is a copy of all the materials you provided to me." Even worse, the individual lawyer might not have a fully copy of all deal documents (some public security, ESOP, and other transactions might

include related documents not provided to individual participants), so the lawyer might find it impossible to comply with the new requirement.

The use of the passive voice tacitly creates an affirmative obligation for the lawyer: the lawyer must make certain the client has the full terms in writing because otherwise the lawyer is subject to professional discipline and to the risk that failure to comply with the rule will have civil consequences. The proposed use of the active voice does not alter this but only imposes a new and unnecessary requirement as to the source of the writing.

The L.A. letter says that our current rule is not broken and needs no repair. I agree.[1] Shifting the disclosure obligation to the lawyer will cause needless confusion, in some situations make the lawyer and the Bar look silly by requiring meaningless gestures, and provide no client protection benefit. Because the new requirement would be counter-intuitive and contrary to established California and outside authority, some lawyers will be sandbagged.

For these reasons, I respectfully dissent from proposed Rule 1.8.1(a).

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.8.1(a)

Current Rule 3-300(A) prohibits a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the "transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client." The Commission's Proposed Rule 1.8.1(a) provides that a lawyer may not enter into such a transaction unless "the transaction or acquisition and its terms are fair and reasonable to the client and *the lawyer fully discloses and transmits in writing* the lawyer's role in the transaction or acquisition in a manner that should reasonably have been understood by the client." (Emphasis added)

Our colleague Robert Kehr has no objection to the requirement that a lawyer disclose the lawyer's role in any transaction to the client. Instead, he dissents to the Commission changing the passive voice to the active voice as it concerns disclosure and transmission of the terms to the client. Mr. Kehr believes that imposing a duty on the lawyer to disclose in writing the terms of a transaction that the client has originated creates a trap for the unwary because, in such circumstances, the client will have more information about the transaction than the lawyer.

The Commission does not agree that the proposed revision creates the disciplinary trap that Mr. Kehr seems to think it does. The "Guidelines for Drafting and Editing Court

[1] The Commission's schedule made it difficult to correct the problem although I believe that all three members of the Rule 1.8.1 drafting team agreed with the L.A. letter.

Rules" prefers the use of the active voice over the passive voice. Beyond having the virtues of making the rule clearer, the use of the active voice in this Proposed Rule has what the Commission considers the virtue of squarely placing the primary responsibility on the lawyer for disclosing the terms of a deal in which the client and lawyer both have a financial stake. That is where the responsibility should be, whether the investment originates with the lawyer, the client, or a third party.

Where the deal comes fully-formed from the client, that disclosure obligation will be simple enough, satisfied as easily as a link to the terms of the transaction with the required disclosure of the attorney's (perhaps non-existent) role in the transaction. There is no obligation on the face of the proposed rule that the lawyer "explain the transaction" to the client in such cases, as the dissent suggests. There should be no ambiguity, however, about who has the responsibility for making sure the lawyer and client literally are on the same page with respect to a transaction in which each has a financial stake. Although there may be some instances as identified in the dissent where a sophisticated business client originates the transaction and proposes the terms, it is just as, if not more, likely that the proposal will originate with the lawyer and be offered to a client who lacks the same sophistication in business matters. The Commission believes that it is appropriate for the rule to signal to the profession's members that it is their responsibility to ensure that all clients understand the terms and the lawyer's role so that the client's consent is truly informed. The proposed rule makes the locus of that responsibility clear.

As a matter of style and as a matter of a lawyer's duty to a client in a context fraught with the possibility of conflict between the two, the choice the Commission made to use the active voice was sound.

Proposed Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client
Synopsis of Public Comments

TOTAL = 3 *A = 1* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-6a	Los Angeles County Bar Association (LACBA) (Schmid) (12-14-16)	Y	M	(a)	Rule should be modified to reflect the fact that the lawyer may not always propose the transaction and thus the lawyer may not always be in the best position to transmit the terms to the client. The goal is to make sure that the terms have been disclosed and transmitted to the client. If that occurs, it shouldn't matter if the lawyer or independent counsel transmit the terms.	The Commission has not made the suggested change. It continues to believe that the primary responsibility for ensuring that the client is adequately advised regarding the transaction should lie with the lawyer. The proposed rule's language, which requires that the lawyer make the disclosure, recognizes that responsibility. The Commission notes, however, that during the further discussion of this comment, a Commission member stated an intent to submit a written dissent to this proposed change to the current rule. The dissent agrees with the commenter that the change to the active voice is problematic and that the passive voice language of the current rule should be retained.
Y-2016-21f	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC believes there should be a Comment that fee modifications would and should normally apply to this rule.	1. After extensive discussion about the possible application of this Rule to fee modifications, the Commission

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						decided to retain the language from the current rule 3-300 Discussion, with non-substantive wording changes, and to leave to case development the question of when, if at all, the Rule would be applied to fee modifications.
					2. The rule should be amended to include transactions involving relatives of the attorney when the attorney knows or should know of these transactions or potential transactions.	2. The Commission disagrees. A lawyer under current law does not owe the fiduciary duties of a lawyer-client relationship to a non-client even if that person has a close or even a family relationship with a client. The Commission sees no basis for altering this well-understood concept.
					3. The rule should also be amended to cover attorney-client transactions for three years after the attorney-client relationship terminated.	3. The Commission agrees that the rule may apply to a former client but disagrees that a bright-line standard applying the rule for three years after termination of the lawyer-client relationship is appropriate. Such a rule would not correctly reflect current law as stated in *Hunniecutt v. State Bar*, 44 Cal.3d 362 (1988) and *Beery* v. *State Bar*, 43 Cal.3d 802 (1987). These cases describe a nuanced approach to the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						question of whether the rule should be applied to a transaction involving a former client based on factors such as closing in time and whether the transaction or acquisition is related to the former representation. However, the Commission has added comment [4] to alert lawyers to the fact that the rule may apply to a former client under appropriate circumstances.
					4. OCTC supports Comments 1, 2, 4, and 5.	4. No response required.
					5. OCTC supports Comment 3. However, the Comment should also make clear that it is the attorney's burden to establish that the transaction is fair and reasonable. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314.)	5. It is correct that the burden is on the lawyer both in the disciplinary setting under rule 3-300 and in the civil setting under Prob. C. § 16004, but including this in the Comment would amount to additional practice guidance, which is contrary to the Commission's Charter.
Y-2016-7d	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-21-16)	Y	A		COPRAC supports proposed Rule 1.8.1 as revised following 90-day public comment period.	No response required.

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client (Commission's Proposed Rule Adopted on January 20, 2017 – Redline to Public Comment Draft Version)

A lawyer shall not enter into a business transaction with a client, or knowingly* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) ~~The~~ the transaction or acquisition and its terms are fair and reasonable* to the client and the lawyer fully discloses and transmits in writing* to the client the terms and the lawyer's role in the transaction or acquisition in a manner that should reasonably* have been understood by the client;

(b) ~~The~~ the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(c) ~~The~~ the client thereafter provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

Comment

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this Rule may apply to a transaction entered into with a former client. Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ("[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable* to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule) even if

the representation has otherwise ended [and] It appears that [the client] became a target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated].") and *Wallis v. State Bar* (1942) 21 Cal.2d 322 (finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her).

[5] This Rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by Rule 1.5. This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[6] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.2
(No Current Rule)
Use of Current Client's Information

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-100 (prohibition on disclosure of confidential information) and Business and Professions Code § 6068(e) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA counterparts, a series of rules that address confidentiality issues as they might arise in a different contexts: Model Rules 1.6 (prohibition on *disclosure* of a *current* client's confidential information), 1.8(b) (prohibition against *use* of confidential information to a current client's disadvantage), and 1.9(c)(1) and (2) (prohibition against *use* of confidentiality to a *former* client's disadvantage and prohibition on *disclosure* of a *former* client's confidential information). The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having separate rules that regulate different aspects of protecting the confidential information of a lawyer's clients: proposed rule 1.6 (prohibiting disclosure of a current client's confidential information); 1.8.2 (prohibiting use of a current client's confidential information to the client's disadvantage); and 1.9(c) (prohibiting use or disclosure of a former client's confidential information); and

(2) proposed Rule 1.8.2 (Use of Current Client's Information), which regulates the use of a current client's confidential information. Proposed Rule 1.8.2 is derived from Model Rule 1.8(b) but incorporates language that more accurately reflects the source of confidentiality duties in California.

Rule As Issued For 90-day Public Comment

1. ***Recommendation of the ABA Model Rule Confidentiality Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of lawyers' confidentiality duties. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific confidentiality duties. This is of particular concern in California, which traditionally has the strictest duty of confidentiality in the country. At the same time, this approach will promote a national standard for how the confidentiality duty in different contexts is organized within the Rules.[1]

2. ***Recommendation to expressly address the duty owed to current clients not to use their confidential information to the client's disadvantage***. As noted, the proposed rule regulates a lawyer's *use* of a client's confidential information. The existing duties of confidentiality and loyalty in the Rules (rules 3-100 and 3-310(E)) and State Bar Act (Business and Professions Code § 6068(e)) do not expressly address the type of client protection advanced by proposed rule 1.8.2. These current provisions are lacking to the extent that they could be narrowly construed to prohibit improper *disclosure* of client information (confidentiality)

[1] Every other jurisdiction in the country has adopted the ABA confidentiality rules framework that regulates the duty through three provisions: Model Rules 1.6, 1.8(b) and 1.9(b).

or the actual representation of an adverse interest (conflicts of interest). Such an interpretation could impair disciplinary actions that would otherwise address the type of misconduct – use of confidential information – that is targeted by this proposed rule.

The Commission did consider that a new rule might be unnecessary because § 6068(e)(1) is not limited to protection of client information. Section 6068(e) is arguably broad enough to encompass the trust and confidence that a client reposes in an attorney, the policy that underlies the rule. Compare the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] to the proposed Rule. On balance, however, the Commission determined that a rule which expressly prohibits the use of a client's confidential information to the client's disadvantage is preferable to relying on implied duties parsed from the Nineteenth Century language of section 6068(e)(1). As such, the proposed rule's express prohibition will better promote compliance and facilitate enforcement.

Text of Rule 1.8.2. Proposed rule 1.8.2 is a single paragraph rule that largely tracks Model Rule 1.8(b). It substitutes the term "information protected by Business and Professions Code § 6068(e)(1)" for the Model Rules' term "information relating to the representation of a client" because § 6068(e)(1) is the source of the confidentiality duty in California. It also adds "or the State Bar Act" to the exception clause because lawyers in California are uniquely regulated by the State Bar Act. The Model Rule's phrase "or required" has been deleted because there is no provision in either the Rules or the State Bar Act that requires a lawyer to compromise the duty of confidentiality owed a client.

There is a single comment to proposed Rule 1.8.2 that clarifies that a lawyer also violates the lawyer's duty of loyalty to the client when the lawyer uses the client's information to the client's disadvantage.

National Background – Adoption of Model Rule 1.8.2

Every jurisdiction except California has adopted some version of Model Rule 1.8(b). Thirty-five jurisdictions have adopted Model Rule 1.8, paragraph (b) verbatim;[2] 12 jurisdictions have adopted a rule provision substantially similar to 1.8(b)[3]; three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b).[4]

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

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[2] The 35 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia.

[3] The twelve jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Texas [the corresponding rule is Texas Rule 1.05(b)], Virginia and Wyoming.

[4] The three jurisdictions are: Georgia, Mississippi and North Dakota.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.2

Commission Drafting Team Information

Lead Drafter: Dean Zipser
Co-Drafters: Lee Harris, Tobi Inlender, Dean Stout, Mark Tuft

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.8(b), from which proposed Rule 1.8.2 is derived.]

Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules

* * * * *

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

* * * * *

Comment

* * * * *

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

* * * * *

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.8.2
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.8.2
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.2 Use of Current Client's Information

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted by these Rules or the State Bar Act.

Comment

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 1.8(B))

Rule 1.8.2 ~~Conflict Of Interest:~~Use of Current ~~Clients: Specific Rules~~Client's Information

* * * * *

~~(b)~~ A lawyer shall not use a client's information ~~relating to representation of a client~~protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted ~~or required~~ by these Rules or the State Bar Act.

* * * * *

COMMENT

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.

* * * * *

~~Use of Information Related to Representation~~

~~[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.~~

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V. RULE HISTORY

Although the origin and history of Model Rule 1.8(b) was not the primary factor in the Commission's consideration of proposed Rule 1.8.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 193 - 228, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

There is no direct California rule counterpart to Model Rule 1.8(b). Nevertheless, there are statutes and rules that embody the policies underlying proposed Rule 1.8.2. See Section VIII.A, below.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
  (In response to 90-day public comment circulation):

  1. OCTC supports the rule and especially the use of informed written consent.

     Commission Response: No response required.

  2. The Comment, which is a philosophical discussion of the reasons for the rule, is obvious and unnecessary.

     Commission Response: The Commission did not delete the comment because it explains that although this would be a "new" rule, the historical basis of this duty resides in California statute (§6068(e)) and the common law duty of loyalty.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Three comments agreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE 1.8(B) ADOPTIONS

A. Related California Law

There is no direct counterpart to Model Rule 1.8(b) in California. Nevertheless, there are statutes and rules that embody the policies underlying proposed Rule 1.8.1. The primary principles underlying the proposed rule are a lawyer's duties of loyalty and confidentiality owed to a client.[1] These principles are reflected in current rules 3-100 (Confidential Information of a Client) and 3-310 (Avoiding the Representation of Adverse Interests), section 6068(e), and California case law.

1. Business And Professions Code Section 6068(e)

Section 6068(e), subdivision (1) requires every lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Current rule 3-100, in concert with subdivision (2) of section 6068(e), provides a narrow exception that permits a lawyer to "reveal" confidential client information "to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." The mandate in subdivision (1) goes beyond a general prohibition on "revealing" that information. The mandate is to maintain inviolate and preserve client information, which necessarily precludes the unauthorized "use" of such information.

2. Current Rule 3-100

Current rule 3-100 is the rule complement to section 6068(e). Current rule 3-100 recognizes that a lawyer's duties of loyalty and confidentiality are related concepts. Paragraph (a) of rule 3-100 generally prohibits a member from revealing information protected from disclosure by section 6068(e)(1) without the informed consent of the client. Discussion paragraph [12] to current rule 3-100 cautions that in deciding whether to *reveal* information to prevent a life-threatening criminal act, a lawyer "should consider

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[1] Proposed Comment [1] provides in relevant part:

> Use of information protected by Business and Professions Code section 6068(e), whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty.

his or her duties of loyalty and competency (rule 3-110)." This statement recognizes that rule 3-100 encompasses loyalty concerns.

3. Current Rule 3-310(E)

Current rule 3-310(E) provides:

> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

The rationale underlying the prohibition is that in representing the second client, the lawyer might feel obligated to *use* the material confidential information to the disadvantage of the first client. (See, e.g., *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618], quoting Rest. (3d) Law Governing Lawyers § 134 ("there exists a 'substantial risk' the present representation will involve the *use* of information acquired during the prior representation 'where it is reasonable to conclude that it would materially advance the [present] client's position in the subsequent matter to use confidential information obtained in the prior representation.'"))

Rule 3-310(E) is limited to situations involving a second client. Proposed Rule 1.8.2 and Model Rule 1.8(b), on the other hand, are not limited to a lawyer's subsequent employment by another client.

4. *Oasis West Realty, LLC v. Goldman*

California case law recognizes a proscription on a lawyer's use of a former client's information outside of a lawyer-client relationship. *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] ("Oasis West") held that a lawyer breached the duties of loyalty and confidentiality by using confidential client information to oppose, on his own behalf, a former client's development project, for which the lawyer had previously been retained. In *Oasis West*, Goldman, the lawyer, had been retained to help a developer obtain local government approvals for a development project. After the representation had ended, however, Goldman opposed the project on his own behalf. The Court rejected the Court of Appeal's position that whatever alleged use the lawyer made of the information was outside of a subsequent representation and therefore did not violate any duty.

Although *Oasis West* involved a former client, this Court's statements regarding a lawyer's duties owed to clients when using confidential information to the client's disadvantage are highly relevant to a consideration of proposed Rule 1.8.2. This Court set forth the general principles regarding the lawyer's duties to the former client:

> Oasis contends that Goldman, as its lawyer, was "a fiduciary ... of the very highest character" and bound "to most conscientious fidelity–uberrima fides." (*Cox v. Delmas* (1893) 99 Cal. 104, 123, 33 P. 836.) Among those fiduciary obligations were the duties of loyalty and confidentiality, which continued in force

> even after the representation had ended. (*Wutchumna Water Co. v. Bailey, supra*, 216 Cal. at pp. 573–574, 15 P.2d 505.) As we have previously explained, "[t]he effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146–1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Accordingly, "an attorney is forbidden to do either of two things after severing [the] relationship with a former client. [The attorney] may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client] nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship."

(*Oasis West Realty, LLC v. Goldman*, *supra,* 51 Cal.4th at p. 821, citations omitted.)

The Court rejected the Court of Appeal's conclusion that the foregoing duties were limited to circumstances "(1) where the attorney has *undertaken a concurrent or successive representation* that is substantially related to the prior representation and is adverse to the former client, or (2) where the attorney has *disclosed* confidential information," (emphasis added):

> [N]either defendants nor the Court of Appeal offer any justification for limiting an attorney's duty to a former client in this manner, especially where the attorney has *used* the former client's confidential information to actively oppose the former client with respect to an ongoing matter that was the precise subject of the prior representation. It is well established that the duties of loyalty and confidentiality bar an attorney not only from using a former client's confidential information in the course of 'making decisions when representing another client,' but also from 'taking the information significantly into account in framing a course of action' such as 'deciding whether to make a personal investment'—even though, in the latter circumstance, no second client exists and no confidences are actually disclosed.

Id. at pp. 822-823, quoting Rest. (3d), Law Governing Lawyers, § 60, com. c(i), p. 464. (Emphasis added.)

It is instructive that this Court relied on a comment in the Restatement. Moreover, the Court recognized the need to "protect clients' legitimate expectations of loyalty to preserve [the] essential basis for trust and security in the attorney-client relationship" by not using information learned by virtue of the lawyer-client relationship, (*Oasis West, supra*, 51 Cal.4th at p. 821, quoting *SpeeDee Oil Exchange Systems, supra,* 20 Cal.4th at pp. 1146 – 1147). Thus, the *Oasis West* reasoning would apply equally to current clients.

B. ABA Model Rule 1.8(b) Adoptions

The ABA State Adoption Chart for Model Rule 1.8(b), revised December 1, 2016, which addresses use of information related to representation by comparing paragraph (b), is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/7/2017]

- Thirty-five jurisdictions have adopted Model Rule 1.8(b) verbatim;[2] 12 jurisdictions have adopted a rule provision substantially similar to Model Rule 1.8(b);[3] three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b)[4]. California remains the only jurisdiction that has not adopted any version of Model Rule 1.8(b).

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

A. Concepts Accepted (Pros and Cons):

1. General: Adopt a new rule that prohibits the use a client's information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent.

    - Pros: The existing duties of confidentiality and loyalty in the Rules and State Bar Act do not expressly state this type of client protection. The current provisions are lacking to the extent that they might be narrowly construed to prohibit improper *disclosure* of client information (confidentiality) or the actual *representation* of an adverse interest (conflicts of interest). This could impair disciplinary actions that would otherwise address this type of misconduct.

    - Cons: A new rule may be unnecessary because § 6068(e)(1) is not limited to protection of client information. The language of § 6068(e)(1) is broad enough to encompass the trust and confidence that a client reposes in an attorney. Compare the following to the proposed rule: (i) the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011)

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[2] The 34 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and Wisconsin.

[3] The 12 jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Texas, Virginia, and Wyoming. (Texas's corresponding rule provision can be found at Texas Rule .1.05(b)(2).)

[4] The three jurisdictions are Georgia, Mississippi and North Dakota.

51 Cal.4th 811 [124 Cal.Rptr.3d 256]; and (ii) Rest. (3d), Law Governing Lawyers, § 60, com. c(i).

2. Include a client consent provision in the new rule.

   - Pros: In recognition of the client's authority, the new rule should not be an inflexible ban on the use of client information. The Rule should permit the client to give informed consent and to authorize an attorney's use of client information.

   - Cons: This Rule is intended to prohibit a lawyer from disadvantaging a client's interests. It should not include a client consent option as some of the circumstances that would trigger the Rule's application might involve facts constituting an "unwaivable" conflict.

B. Concepts Rejected (Pros and Cons):

1. Require that client authorization be by "written" informed consent.

   - Pros: Written consent (which requires written disclosure) provides added protection to a client because a writing elevates the perception of the importance of the client's consent and would operate to assure greater understanding on the part of the client. The written requirement would also facilitate the disciplinary application of the rule as a writing would serve as evidence in a disciplinary proceeding.

   - Cons: A writing requirement is rigid and burdensome to both clients and lawyers. A written consent requirement should only be required when the reasonably foreseeable adverse consequences of providing the consent are not apparent. Under such circumstances, the highest degree of precautionary disclosure would be needed to help the client understand any potential harm. In general, situations that would trigger the proposed rule – when the use of the information is to the client's disadvantage – should not require an explicit written explanation because the adverse consequences to the client would be apparent.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. This is a proposal for a new rule that has no direct current California counterpart. It would require a lawyer to seek a client's informed consent to *use* client information in certain situations. As discussed in section VIII.A. of this Report, however, the policies and principles underlying the proposed rule are already

entrenched in California law, so the rule would not appear to create any new duties.

D. Non-Substantive Changes to the Current Rule:

1. This proposal for a new rule has no direct current California rule counterpart. However, non-substantive changes to the Model Rule include: (i) including the clarifying word "current" in the rule title in referring to a client to clarify that this rule applies to current clients; and (ii) designating a tentative rule number of "1.8.2." The first Commission recommended giving separate rule numbers (1.8.1, 1.8.2, etc.) to rules corresponding to the individual paragraphs in Model Rule 1.8 (e.g., 1.8(a), 1.8(b), etc.), which is a compilation of diverse rules that have in common their statement of lawyers' duties owed to current clients. This Commission has not yet determined whether to number the 1.8 paragraphs similarly. The Commission's tentative consensus is to number the Rule 1.8.2.

2. Regarding the Comment to the Model Rule (Cmt. [5] to Model Rule 1.8), the proposed rule includes only the first sentence of the Model Rule Comment, converted to the active voice to conform to California rule drafting style. The proposed Comment does not include the remaining Model Rule text that is simply repetitive of the black letter or gives illustrations and examples as the Commission's charter is to recommend only commentary that is necessary to explain a rule. The Commission determined that neither the examples nor the other deleted text add to the understanding of how the rule applies.

E. Alternatives Considered:

1. The only alternative considered was to not recommend this new rule.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.2 in the form attached to this Report and Recommendation.

Proposed Rule 1.8.2 Use of Current Client's Information
Synopsis of Public Comments

TOTAL = 4	A = 3
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43n	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-02-16)	Yes	A	1.8.2	COPRAC supports the adoption of proposed Rule 1.8.2.	No response required.
X-2016-104o	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.8.2	OCTC supports the rule and especially the use of informed written consent. However, The Comment, which is a philosophical discussion of the reasons for the rule, is obvious and unnecessary.	No response required. The Commission did not delete the comment because it explains that although this would be a "new" rule, the historical basis of this duty resides in California statute (§6068(e)) and the common law duty of loyalty.
X-2016-115b	Lamport, Stanley (10-03-16)	No	M	1.8.2	Rule 1.9(c) refers to both Business and Professions Code § 6068(e)(1) and Rule 1.6. Since Proposed Rule 1.8.2 is the current client version of the rule, it should use the same references. The Comment should either be deleted or revised because it is not necessary. It does not aid in the application of the rule. If the Comment is retained, it should be revised to restate the duty in Section 6068(e)(1).	The Commission agreed and made the requested addition of a reference to Rule 1.6 The Commission did not delete the comment because it explains that although this would be a "new" rule, the historical basis of this duty resides in California statute (§6068(e)) and the common law duty of loyalty.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.8.2 Use of Current Client's Information
Synopsis of Public Comments

TOTAL = 4 *A = 3* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-120d	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.2	LGBT supports this rule.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.3
(Current Rule 4-400)
Gifts From Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 4-400 (Gifts From Client) in accordance with the Commission Charter. The Commission also considered the ABA Model Rule 1.8(c) (concerning gifts from clients). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules, including relevant Probate Code sections. The result of the Commission's evaluation is proposed rule 1.8.3 (Gifts From Client).

Rule As Issued For 90-day Public Comment

The proposed rule reflects three significant changes from current rule 4-400. First, in paragraph (a)(1), the word "solicit" has been substituted for the word "induce." In its study, the Commission was unable to identify any other jurisdiction using the term "induce." The Commission is unaware of any problems concerning the operation of the rule in jurisdictions that employ the term "solicit." Second, paragraph (a)(1) substitutes the phrase "a person related to the lawyer" for the phrase "the member's parent, child, sibling or spouse" and defines the phrase in a separate paragraph (paragraph (b)), as "a person who is 'related by blood or affinity'" with reference to Probate Code section 21374(a).[1] Defining which relatives are covered under the rule by reference to the Probate Code brings the rule in line with the definitions currently used in that Code. Third, the proposed rule adds a new black letter provision, paragraph (a)(2), that prohibits a lawyer from preparing an instrument that gives the lawyer or a related person a substantial gift, unless: (i) the lawyer or related person is related to the client, or (ii) an independent lawyer has reviewed the transfer and advised the client, and provided a "certificate of independent review" pursuant to Probate Code section 21384.[2] This amendment clarifies that

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[1] Probate Code § 21374(a) provides:

(a) A person who is "related by blood or affinity" to a specified person means any of the following persons:

(1) A spouse or domestic partner of the specified person.

(2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.

(3) The spouse or domestic partner of a person described in paragraph (2).

[2] Under Probate Code § 21380(a), an instrument making a donative transfer "is presumed to be the product of fraud or undue influence" if the transfer is to:

(1) The person who drafted the instrument.

(2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

Under sections 21382(a) and (b), the presumption does not apply to:

lawyers are permitted to draft an instrument that gives a gift to the lawyer or a related person under certain circumstances, as expressly permitted by the Probate Code. The addition brings California in line with every other jurisdiction as they have each adopted either an identical or substantially similar rule as Model Rule 1.8(c). Every other jurisdiction has adopted a rule expressly prohibiting a lawyer from preparing an instrument that gives a substantial gift to the lawyer or a person related to the lawyer, unless the lawyer or other recipient of the gift is related to the client.

There are two comments to the rule. Comment [1] states a lawyer or a person related to a lawyer may accept a gift from a lawyer's client, subject to general standards of fairness and absence of undue influence. The last two sentences provide an example of what would not constitute an improper solicitation and a citation to a California Supreme Court case where impermissible influence was found. Comment [2] states the rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer appointed as executor of the client's estate, or to another potentially lucrative fiduciary position. However, such an appointment will be subject to proposed rule 1.7(b).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission has added the phrase "unless the lawyer or other recipient of the gift is related to the client" in paragraph (a)(1). In addition, the Commission revised the reference in Comment [2] which stated "Rule 1.7(b)" to read, "Rules 1.7(b) and (c)." This change is made to comport to the revisions made to Rule 1.7.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

(a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

(b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

Section 21384(a) provides:

(a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate [in the form described in the statute].

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.3 [4-400]

Commission Drafting Team Information

Lead Drafter: James Ham
Co-Drafters: George Cardona, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 4-400 Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.8.3 [4-400]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017
Action: Board Adoption of Proposed Rule 1.8.3
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.3 [4-400] Gifts From Client

(a) A lawyer shall not:

(1) solicit a client to make a substantial* gift, including a testamentary gift, to the lawyer or a person* related to the lawyer, unless the lawyer or other recipient of the gift is related to the client, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person* related to the lawyer any substantial* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.

(b) For purposes of this Rule, related persons* include a person* who is "related by blood or affinity" as that term is defined in California Probate Code § 21374(a).

Comment

[1] A lawyer or a person* related to a lawyer may accept a gift from the lawyer's client, subject to general standards of fairness and absence of undue influence. A lawyer also does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].

[2] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to Rule 1.7(b) and (c).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-400)

Rule 1.8.3 [4-400] Gifts From Client

(a) A lawyer shall not:

(1) ~~A member shall not induce~~solicit a client to make a substantial* gift, including a testamentary gift, to the ~~member or to the member's parent, child, sibling, or spouse, except where the client is~~lawyer or a person* related to the ~~member.~~lawyer, unless the lawyer or other recipient of the gift is related to the client, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person* related to the lawyer any substantial* gift, unless (i) the lawyer or other recipient of the gift is related to the client or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code § 21384.

(b) For purposes of this Rule, related persons* include a person* who is "related by blood or affinity" as that term is defined in California Probate Code § 21374(a).

CommentDiscussion

[1] A memberlawyer or a person* related to a lawyer may accept a gift from a member'sthe lawyer's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, A lawyer also does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate. (where impermissible influence occurs. See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to Rule 1.7(b) and (c).

V. RULE HISTORY

Current Rule 4-400 originated with the State Bar's comprehensive revision and renumbering of the rules that became operative in 1989. (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987.) The State Bar's recommendation summarized proposed Rule 4-400 as follows:

> Proposed rule 4-400 is new and was developed as a result of consideration of ABA Model Rule 1.8(c) and Rule 8.11 of the American Trial Lawyers' Association American Lawyers' Code of Conduct. Rule 1.8(c) prohibits an attorney from preparing an instrument which gives a gift to the lawyer while Rule 8.11 prohibits a lawyer from participating in arranging for a gift from a client.
>
> The absolute prohibition of these model rules is too broad. A lawyer may accept a gift from a client, subject to general standards of fairness and absence of undue influence. The lawyer who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. This is evident in existing case law, and the draft rule reflects this law (see *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]). Also, it was felt that the rules mentioned above cover symptoms of the problem and not the problem itself. In short, the question is not who writes the will but what caused the testator to provide for the gift in the will, the influence of the lawyer or the testator's own judgment. Rule 4-400 is intended to address the problem, not the draftsperson.

(December 1987 memorandum at pages 46 – 47.)

The text of the original 1989 rule provided:

Rule 4-400. Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

In October 1994, the State Bar submitted to the Supreme Court a proposed amended version of rule 4-400. (See "Request That The Supreme Court Of California Approve Amendments To Rule 4-400 Of The Rules of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Supreme Court case no. S043016, October 1994.) Submission of that proposal followed the 1993 enactment of Probate Code § 21351 (Statutes 1993, Chapter 293, Assembly Bill No. 21), which implemented a new exception to the prohibition against an attorney's preparation of certain donative instruments. The proposed rule provided (redline markings show changes to the 1989 rule):

Rule 4-400. Gifts From Client

A member shall not:

(A) ~~Induce~~ Induce a client to make ~~a substantial~~ any gift, including a testamentary gift, to the member or to ~~the member's parent, child, sibling, or spouse, except where the client is related to the member,~~ a person whom the member knows is related to the member; or

(B) Prepare an instrument which provides for any gift from a client, including a testamentary gift, to the member or to a person whom the member knows is related to the member, except where the client is related to the member or transferee.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. ~~The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See~~ Magee v. State Bar ~~(1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)~~

Rule 4-400 is intended to prohibit another lawyer in the member's law firm from preparing an instrument where the lawyer knows that the member is prohibited from preparing an instrument.

For purposes of this rule, a person "related to" the member means the member's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the member, the member's spouse or predeceased spouse; cohabitants with the member; partners or shareholders of any partnership or corporation in which any person described previously has a 10% or greater ownership interest, and any employee of any such person, partnership or corpration; and employees of the member.

For purposes of this rule, a client "related to" the member means the member's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the member, the member's spouse or predeceased spouse; and cohabitants with the member.

For purposes of this rule, a client "related to" the transferee means the transferee's spouse or predeceased spouse; relatives and spouses of relatives within the third degree of the transferee, the transferee's spouse or predeceased spouse; and cohabitants with the transferee.

Under Probate Code § 21351,[1] a lawyer's preparation of an instrument, including certain disqualified gifts (to the lawyer or to persons related to the lawyer), was not prohibited so long as an independent attorney counseled the client concerning the lawyer's preparation of the instrument and rendered a "certificate of independent review" as detailed in the statutory scheme. By following this procedure, both the gift and the lawyer's preparation of the instrument were authorized notwithstanding the general prohibitions in the Probate Code.

This statutory reform, however, did not appear to account for the preexisting attorney disciplinary standard in Rule 4-400 that generally prohibited a lawyer from inducing a client to make a substantial gift (to the lawyer or to persons related to the lawyer). At the time § 21351 was enacted, Rule 4-400 did not, and currently does not, have any exception comparable to a "certificate of independent review" procedure. However, the rule Discussion did, and currently does, contain the following guidance: "A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)"

Rather than authorizing an otherwise prohibited gift through a "certificate of independent review" procedure, the State Bar's 1994 proposal sought to enhance public protection,

[1] Probate Code §§ 21350 et seq. were repealed operative January 1, 2014. Comparable provisions now appear at §§ 21380 et seq. The conflict with Rule 4-400, however, remains.

in part, by expanding the general prohibition on gifts to cover "any" gift as opposed to a "substantial" gift. In doing so, the State Bar's proposal charted a different policy course from the Legislature by rejecting the Probate Code's exception for a "certificate of independent review" procedure. The State Bar enumerated the following reasons for the 1994 proposal:

1) the proposed rule is the result of an extensive study;

2) the regulation of attorney conduct is best achieved through California Rules of Professional Conduct promulgated by this Court, not through legislative enactments;

3) the proposed amended rule offers greater public protection than Probate Code sections 21350 – 21355;

4) the proposed amended rule is written more clearly that the Probate Code, which is difficult to decipher;

5) the proposed amended rule is a reasoned, balanced rule that provides increased public protection and can be understood and followed by State Bar members;

6) the Legislature appears willing to seek amendment of the Probate Code to harmonize it with the amended rule; and

7) the State Bar should take a leadership role in this matter by adopting the best rule it can for transmission to this Court for approval.

(October 1994 memorandum at pages 14 – 15.)

In February 1995, the Supreme Court denied the State Bar's request to approve proposed amended rule 4-400. The Supreme Court's order stated:

> The request of the State Bar Board of Governors that rule 4-400, State Bar Rules of Professional Conduct, be amended is denied. The proposed amendments appear to conflict with the provisions of Probate Code sections 23150 and 23151. The existence of a rule of professional conduct and statutory provisions governing the same conduct may in this instance be confusing to members of the bar and the public. ¶ Mosk, J. and Kennard, J. are of the opinion the request should be granted.

(Supreme Court Order No. S043016, filed February 23, 1995.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

    1. OCTC supports this rule and the Comments.

        Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

    1. OCTC supports this rule and the Comments.

        Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule and one comment agreed only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Probate Code §§ 21380 et seq. may conflict with the improper inducement standard in Rule 4-400.

2. Primacy of Judicial Regulation of the Legal Profession. Legislative standards for discipline are only minimal standards and the Supreme Court retains inherent power to expand upon them. See, *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889-90 (123 Cal.Rptr. 101, 102, 538 P.2d 229]. The Supreme Court of California extensively addresses its inherent authority over the legal profession in *In re Attorney Discipline System* (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836]. The Court states:

    > Our inherent authority over the discipline of licensed attorneys in this state is well established. Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, municipal courts, and justice courts. "Since the 'courts are set up by the Constitution without any special limitations' on their power, they

'have . all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. [Citations.]' [Citations.] [¶] In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. [Citation.] 'This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.' [Citations.]" (*Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329, 336-337, fns. omitted.) "This principle, which was first recognized in California in 1850 [citation], has been reaffirmed on numerous occasions. [Citations.]" (Id. at p. 336, fn. 5, 178 Cal.Rptr. 801, 636 P.2d 1139; see also *In re Shannon* (Ariz.1994) 179 Ariz. 52, 876 P.2d 548, 571 ["The judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292."]; Martineau, *The Supreme Court and State Regulation of the Legal Profession* (1980-1981) 8 Hastings Const.L.Q. 199, 202 ["In each state it is the supreme court, with or without the legislative approval, that dictates the standards for education, admission and discipline of attorneys." (Fn. omitted.)].) Our more recent decisions have continued to recognize this power. (E.g., *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 542-544, 28 Cal.Rptr.2d 617, 869 P.2d 1142; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418, 25 Cal.Rptr.2d 80, 863 P.2d 150.)

Witkin has described our authority in this area as follows: "The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power. [Citations.]" (1 Witkin, Cal. Procedure (4th ed.1996) Attorneys, § 356, p. 438, original italics.)

In re Attorney Discipline at pp. 592-593 (Footnotes omitted.)

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf [Last visited 2/7/17]

- Twenty-eight jurisdictions have adopted Model Rule 1.8(c) verbatim.[2] Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.8(c).[3] California has adopted a rule regulating gifts from a client that is substantially different from Model Rule 1.8(c).

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

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a)(1), substitute the word "solicit" for the word "induce" used in current Rule 4-400.

   - Pros: Almost every other jurisdiction uses ABA Model Rules term "solicit" rather than "induce." The Commission is not aware of any problems with the operation of the rule in jurisdictions that employ the term "solicit." The Commission was unable to identify any other jurisdiction using the term "induce." Uniformity is desirable where consistent with advancing the goal of public protection. The term "induce" is arguably vague, implying that nonverbal conduct which causes a gift to be made could be subject to discipline, such as by inducing a gift by providing loyal and excellent legal services to a client over many years.

   - Cons: The word "induce" is used in the current Rule 4-400 and there is no evidence that it has caused any problems in applying the rule to lawyers who have inappropriately sought a gift from a client. It would reach conduct that might not be considered a "solicitation" but nevertheless reflects the undue influence and other overreaching conduct by a lawyer that the rule is intended to address.

2. In paragraph (a)(1), substitute the phrase "a person related to the lawyer" for the phrase "the member's parent, child, sibling or spouse" and define the term in a separate paragraph, (paragraph (b)), as "person who is related by blood or affinity" by reference to Probate Code § 21374(a).[4]

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[2] The twenty-eight jurisdictions are: Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, and West Virginia.

[3] The twenty-two jurisdictions are: Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

[4] Probate Code § 21374(a) provides:

(a) A person who is "related by blood or affinity" to a specified person means any of the following persons:

(1) A spouse or domestic partner of the specified person.

- Pros: Retaining the current rule's scope of application to extend to a lawyer's relatives continues the public protection of avoiding undue influence or overreaching that could occur when the transferee is a relative of the lawyer. Defining which relatives are covered under the rule by reference to the Probate Code brings the rule in line with the definitions currently used in the Code. Those definitions will automatically be updated when the Probate Code sections are updated.

- Cons: None identified.

3. Add a new blackletter provision, paragraph (a)(2), that prohibits a lawyer from preparing the instrument that gives the lawyer or related person a substantial gift, *unless* (i) the lawyer or related person is related to the client or (ii) an independent lawyer has reviewed the transfer and advised the client, and provided a "certificate of independent review" pursuant to Probate Code § 21384.[5]

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(2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.

(3) The spouse or domestic partner of a person described in paragraph (2).

[5] Under Probate Code § 21380(a), an instrument making a donative transfer "is presumed to be the product of fraud or undue influence" if the transfer is to:

(1) The person who drafted the instrument.

(2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

Under § 21382(a) and (b), the presumption does not apply to:

(a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

(b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

Section 21384(a) provides:

(a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate [in the form described in the statute].

- Pros: The amendment would clarify that lawyers are permitted to draft an instrument that gives a gift to the lawyer or related person under certain circumstances, as expressly permitted by the Probate Code. This provision will alert lawyers to the requirements under the Code and promote compliance with the law. Further, this additional paragraph brings California in line with all other jurisdictions that have adopted either an identical or substantially similar rule as Model Rule 1.8(c). All of those rules expressly prohibit a lawyer preparing an instrument that gives a substantial gift to a lawyer or relative unless the client is related. Finally, including an exception where the lawyer or related person is related to the client creates a parallel construction with subparagraph (a)(1), which carries forward that exception from current rule 4-400.

- Cons: None identified.

4. Amend current rule 4-400, Discussion and include as Comment [1].

   - Pros: The first sentence of proposed Comment [1] recognizes that the rule is intended to prevent a lawyer from exercising undue influence over a client or engaging in other overreaching conduct. It provides important interpretive guidance in applying the rule to a course of conduct. The last two sentences provide, respectively, an example of what would not constitute an improper solicitation and a citation to California Supreme Court case where overreaching was found. Both provide valuable guidance on applying and complying with the Rule.

   - Cons: The last two sentences of the Comment are unnecessary surplusage. The first sentence adequate describes the scope of the rule. Further, the rule should not cite to an opinion that was decided before the rule was promulgated.

5. Add a new Comment [2], based on Model Rule 1.8, Cmt. [3], to the effect that the Rule does not prohibit a lawyer from seeking appointment as executor of a client's estate.

   - Pros: The Comment does not create an exception to the Rule but alerts the reader to the fact that the Rules do not prohibit a lawyer or lawyer associated with that lawyer from being appointed as an executor of the client's estate provided the lawyer or associated lawyer complies with Rule 1.7(b) and (c) [conflicts with current client]. Because it does not create an exception to this Rule, but merely provides a cross-reference to duties in another rule, it is more appropriate as a Comment.

   - Cons: The provision, which alerts a lawyer to the ability to be appointed as an executor of the estate, thus creating a potential conflict between lawyer and client, belongs in the blackletter.

B. Concepts Rejected (Pros and Cons):

1. Retaining the term "induce" in the rule in addition to the term "solicit".

    - Pros: See Section IX.A.1, "Cons".

    - Cons: See Section IX.A.1, "Pros".

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. Addition of paragraph (a)(2) regarding the drafting of an instrument giving the lawyer or related person a substantial gift in conformance with the Probate Code.

    - Pros: See Section IX.A.3, "Pros".

    - Cons: See Section IX.A.3, "Cons".

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "solicit" for "induce".

    - Pros: See Section IX.A.1, "Pros".

    - Cons: See Section IX.A.1, "Cons".

2. Substitute the phrase "a person related to the lawyer" for the phrase "the member's parent, child, sibling or spouse".

    - Pros: See Section IX.A.2, "Pros".

    - Cons: See Section IX.A.2, "Cons".

3. Substitute the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

4. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

5. Assign the number 1.8.3 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(c).

    - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

    - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.5 [4-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.3 [4-400] in the form attached to this Report and Recommendation.

Proposed Rule 1.8.3 [4-400] Gifts from Client
Synopsis of Public Comments

TOTAL = 2 *A = 2* *D = 0* *M = 0* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21g	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	A		OCTC supports this rule and the Comments	No response required.
Y-2016-7e	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	A		COPRAC supports the adoption of proposed Rule 1.8.3 as revised.	No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.5
(Current Rule 4-210)
Payment of Personal or Business Expenses Incurred by or for a Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 4-210 (Payment of Personal or Business Expenses Incurred by or for a Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(e) (Conflict Of Interest: Current Clients: Specific Rules), pertaining to financial assistance to a client. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the evaluation is proposed rule 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client).

Rule As Issued For 90-day Public Comment

The main issues considered were whether to permit lawyers to pay the costs and expenses for a pro bono or indigent client, and whether to allow gifts to existing clients. While the Commission adopted payments to pro bono or indigent clients in order to promote access to justice, permitting gifts to existing clients was excluded from the proposed rule due to the potential of unintended expectations and confusion between the personal and professional relationship between the lawyer and client.

Proposed rule 1.8.5(a) prohibits the direct or indirect payment of personal or business expenses of a prospective or existing client.

Paragraph (b) allows for a lawyer to make payments to a client under the following defined circumstances:

> (1) with the client consent, making payments to third parties from funds collected on behalf of the client during the representation;
>
> (2) after being retained by the client, loaning money to the client with client's written promise to repay the loan and the lawyer's compliance with rules 1.7(b)[1] and 1.8.1;
>
> (3) advancing the costs of prosecuting or defending a client's claim or action, repayment of which may be contingent on the outcome of the matter;
>
> (4) paying the costs of prosecuting or defending a claim or action of an indigent or pro bono client.

Paragraph (c) clarifies costs under (b)(3) and (b)(4) to include reasonable expenses for litigation or providing other legal services to the client.

Paragraph (d) reinforces the applicability of proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made only two revisions. In paragraph (b)(2), the Commission updated

[1] One member of the Commission submitted a written dissent stating general support for the Commission's draft rule but objecting to the inclusion of a reference to proposed rule 1.7(b). The full text of the dissent is attached to this summary. (See also, the executive summary of proposed rule 1.7.)

a cross reference to rule 1.7 (re current client conflicts of interest) to account for changes made to that rule. In paragraph (b)(4), the Commission substituted the phrase “an indigent person” for “an indigent or pro bono client” to refine and simplify the language.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.5 [4-210]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild
Co-Drafters: Tobi Inlender, Judge Dean Stout, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

(1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or

(2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or

(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.8.5 [4-210]
Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.8.5 [4-210]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;

(2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with Rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;

(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and

(4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

(c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.

(d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-210)

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

(~~A~~a) A ~~member~~lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent~~, or sanction a representation~~ that the ~~member or member's~~lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client~~, except that this rule shall not prohibit a member:~~.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) ~~With the consent of the client, from paying or agreeing~~pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client; ~~or~~

(2) ~~After employment, from lending~~after the lawyer is retained by the client, agree to lend money to the client ~~upon the client's~~based on the client's written* promise ~~in writing~~ to repay ~~such~~the loan~~; or~~, provided the lawyer complies with Rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;

(3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter~~.~~ ~~Such costs~~; and

(4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

(c) "Costs" within the meaning of ~~this subparagraph (3) shall be limited to all~~paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation ~~or~~, including court costs, and reasonable* expenses in ~~preparation~~preparing for litigation or in providing ~~any~~other legal services to the client.

(~~B~~d) Nothing in ~~rule 4-210~~this Rule shall be deemed to limit ~~rules 3-300, 3-310, and 4-300~~the application of Rule 1.8.9.

V. RULE HISTORY

Current rule 4-210's concept became part of the rules in 1960 with former rule 3a, which prohibited a member from directly or indirectly paying or agreeing to pay medical, hospital or nursing bills, or other personal expenses of the client as a condition of, or for the purpose of, securing professional employment (*Report on Rules of Professional Conduct, effective January 5, 1960* (1959) 34 Cal. State Bar J. 857). Former rule 3a, however, permitted members to advance the costs of prosecuting or defending a claim or action, including related costs.

Former rule 3a was amended in 1970 to expand the ability of a member, with the client's consent, to pay or agree to pay to third parties expenses from funds collected or to be collected for the client. At the same time, rule 3a was amended to permit a member to lend money to the client *after* the attorney was retained by the client. In 1972, rule 3a was renumbered rule 5-104; however, rule 5-104's text was identical text to former rule 3a:

Rule 5-104 Payment of Personal Expenses Incurred by or for a Client

A member of the State Bar shall not directly or indirectly pay or agree to pay, or represent or sanction the representation that he will pay, medical, hospital or nursing bills or other personal expenses incurred by or for a client, prospective or existing; provided this rule shall not prohibit a member;

(1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or

(2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or

(3) from advancing the costs of prosecuting or defending a claim or action. Such costs within the meaning of this subparagraph (3) include all taxable costs or disbursements, costs of investigation and costs of obtaining and presenting evidence.

Former rule 5-104 was amended in 1975 to prohibit a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. The 1975 rule revision expressly permitted a member to read or show the rule to a prospective client, in order to explain the nature and extent of conduct the rule prohibited. The 1975 version of rule 5-104 also retained the three exceptions which permitted a member to pay or agree to pay third persons, allowed the member to lend money to the client after the member became employed by the client, and allowed the member to advance the costs of prosecuting or defending a claim or action:

Rule 5-104 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:

(1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or

(2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or

(3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable

expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in Rule 5-104 shall be deemed to abrogate any of the provisions set forth in Rules 5-101 through 5-103.

(C) Nothing in this Rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this Rule.

In 1989, rule 5-104 was renumbered rule 4-210. It was also revised to remove language that prohibited a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. With the removal of that provision, former rule 5-104(C), which permitted a member to read or show a client the rule was no longer necessary and was also removed. A substantive revision explicitly permitted a member to advance the costs of litigation, contingent upon the outcome of the matter:

Rule 4-210. ~~5-104.~~ Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member ~~of the State Bar~~ shall not directly or indirectly pay or agree to pay, guarantee, ~~or~~ represent, or sanction ~~the~~ a representation that ~~he~~ the member or member's law firm will pay the personal or business expenses ~~incurred by or for~~ of a ~~client,~~ prospective or existing client, ~~and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided~~ except that this rule shall not prohibit a member:

(1) ~~w~~With the consent of the client, from paying or agreeing to pay such expenses to third persons ~~such expenses~~ from funds collected or to be collected for the client as a result of the representation; or

(2) ~~a~~After ~~he has been employed~~ employment, from lending money to ~~his~~ the client upon the client's promise in writing to repay such loan; or

(3) ~~f~~From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule ~~5-104~~ 4-210 shall be deemed to ~~abrogate any of the provisions set forth in~~ limit rules ~~5-101 through 5-103~~ 3-300, 3-310, and 4-300.

~~(C) Nothing in this rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this rule.~~

The rule was not amended in the comprehensive 1992 revisions and current rule 4-210 is identical to the text of the 1989 amendments.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. OCTC generally supports this rule. However, OCTC is concerned that subsection (b)(4) does not define indigent person. The rule exempts an attorney from the requirements of this rule when the attorney pays expenses for an indigent client, but does not define when a person is considered indigent. This lack of precision will make this rule difficult to understand or enforce. This subsection could be used by attorneys to incite or promote unnecessary litigation.

     Commission Response: The Commission did not make the suggested change. The Commission believes that the term "indigent" is sufficiently defined in other areas of the law (see, for example, Bus. & Prof. Code sec. 6213(d)) and does not require a specific definition for this rule. In addition, the rule adopted in most states use the term "indigent" without a specific definition.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. All four comments agreed with the proposed Rule. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Public Protection Afforded by the Current Rule (avoiding solicitation of clients by the lawyer and interference with the lawyer's professional judgment): Rule 4-210 prevents a lawyer from acquiring a potential financial stake in a client's legal

proceedings that might create a conflict of interest between a lawyer and a client, and injuriously affect the performance of the duties owed to the client. The rule prohibits a lawyer from "purchasing" a client's loyalty by promising loans or other remuneration in an effort to have the client retain the lawyer. The proposed rule expressly provides that such promises or guarantees are disallowed and prohibits a lawyer from making a loan until after the client has retained the lawyer.

2. Adverse Interests and Business Transactions (avoiding conflicts of interest developing during the representation): Rule 4-210 works in concert with Rule 3-300. To the extent a lawyer is permitted by rule 4-210 to make a loan to a client, rule 3-300 imposes requirements (e.g., client consent, fair and reasonable terms, and advice to seek the counsel of an independent lawyer) that prevent overreaching. Similarly, California Probate Code § 16004(c) provides:

A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.8(e), which is the counterpart to current rule 4-210, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf [Last accessed on 2/7/17]

- Thirty jurisdictions have adopted Model Rule 1.8(e) verbatim.[1] Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(e).[2] Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.8(e)."[3]

[1] The thirty jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

[2] The sixteen jurisdictions are: Alabama, Connecticut, District of Columbia, Georgia, Hawaii, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Texas, Utah, Vermont, Virginia, and Washington.

[3] The five jurisdictions are: California, Louisiana, Mississippi, New York, and Oregon.

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

A. Concepts Accepted (Pros and Cons):

1. Revise the rule to expressly state that a lawyer may *pay* certain costs and expenses of an indigent or pro bono client.

   - Pros: Current rule 4-210 does not permit a lawyer to *pay* court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client. Rule 4-210 only permits a lawyer to advance such costs, the repayment of which may be contingent on the outcome in the matter. Proposed paragraph (a)(4) does not require a similar contingency. Permitting a lawyer to make such payments should contribute to promoting access to justice.

   - Cons: None identified.

2. Delete the phrase "sanction a representation" as vague and unnecessary.

   - Pros: This phrase does not add anything given that the existing language prohibits direct or indirect representations concerning a lawyer's payment of personal expenses of a current or prospective client

   - Cons: This phrase is found in the current rule and there is no evidence or authority that suggests it is confusing or problematic.

3. Change the rule structure by substituting the phrase "Notwithstanding paragraph (a), a lawyer may" for the current rule clause: "except that this rule shall not prohibit a member."

   - Pros: With the proposed change, conduct permitted under the rule is not mischaracterized as "exceptions" to the conduct prohibited. There is a disconnect in current rule 4-210 because not all of the items identified as "exceptions" actually involve conduct that would violate the rule. The concept underlying a loan or an advance generally is a debtor – creditor relationship that leaves the debtor financially liable rather than absolving them of a financial obligation. It may even be more costly to the debtor if interest is involved. In that sense, a loan from a lawyer to client does not constitute a *payment* by the lawyer of a client's personal expense or cost that frees the client from accountability.

   - Cons: The proposed change in rule structure is only necessary if the proposed "exception" for a "gift" to a current client is added.

4. Revise the description of a permitted client loan to substitute the phrase "after the lawyer is retained" for the current phrase, "after employment."

    - Pros: This change removes an ambiguity in the existing rule. There is a potential for the phrase "after employment" to be misinterpreted as after a client's representation has concluded and the attorney-client relationship terminated when the intent is to permit such conduct during the representation, i.e., *after the lawyer is retained*.

    - Cons: None identified.

5. Add to the description of a permitted client loan, a proviso that references other applicable rules (e.g., proposed Rule 1.7 regarding current client conflicts of interests).

    - Pros: This change promotes compliance with the Rules and advances client protection in settings (business transactions between lawyer and client) that potentially) pose great risks for a client. Moreover, retaining these rule references is consistent with paragraph (B) of the current rule.

    - Cons: A loan to a client is a business transaction between fiduciary and a beneficiary. A lawyer should be expected to know that other rules apply.

6. Add a Comment clarifying the scope of the term "costs" as used in the rule.

    - Pros: This change removes a possible misperception that the term "costs" is intended to encompass only that term's meaning in litigation.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Deleting the current rule in its entirety.

    - Pros: The current rule is a remnant of outdated concepts of maintenance and champerty. Deleting the current rule would obviate the need for proposing additional permitted conduct. In fact, the new proposed paragraphs (b)(4) and (b)(5) tend to show that the general prohibition is no longer needed.

    - Cons: Permitting a lawyer to induce a prospective client to hire the lawyer based upon promises of financial assistance is permitting a form of overreaching and commercializes the practice of law.

2. Revise the rule to expressly state that it is not a violation for a lawyer to offer or give a gift to a current client.

    - Pros: Permitting bona fide gifts would remove an apparent ambiguity in the current rule without contradicting the policy underlying the prohibition against entering into an agreement to pay costs or personal expenses.

- Cons: Gift giving between a lawyer and a client could confuse the line between a personal and a professional relationship and precipitate unintended expectations.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. A lawyer's payment of certain costs and expenses of an indigent or pro bono client would be expressly permitted.

2. A lawyer's giving of a bona fide gift to a client would be expressly permitted.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Assign the number 1.8.5 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(e).

   - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

   - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.8.5

Proposed Rule 1.8.5 states the general prohibition on a lawyer bidding for clients by promising benefits to a potential client other than the benefit of the quality of the lawyer's services and the price at which they will be provided. I don't disagree with that policy, which is in current rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with "Rules 1.7(b), 1.7(c), and 1.8.1" a condition to a lawyer making a loan to the lawyer's client.

Proposed paragraph (b)(2) continues the current exception to the general prohibition on a lawyer providing benefits to a client that permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. It is my view that a lawyer's loan transaction with a client is a "business transaction" within the meaning of current rule 3-300 and proposed Rule 1.8.1, and I therefore believe that the proposed reference to Rule 1.8.1 in paragraph (b)(2) is both correct and helpful.

However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to proposed Rules 1.7(b) and (c), and this is the reason for my dissent. My dissent to paragraph (b)(2) overlaps to an extent with my separate dissent to proposed Rules 1.7(b) and (c), but I will minimize my dissent to those proposals.

Let me first get out of the way a small drafting error. Any reference to Rules 1.7(b) and (c) is incorrect because there is no situation in which both would apply. The correct statement would be "17(b) or (c), as applicable". I will assume that proposed Rule 1.8.5(b)(2) uses "or" rather than "and".

Current rule 3-310(B) contains four subparagraphs, all of which now have been blended into – and I would say "hidden" – in proposed Rules 1.7(b) and (c). The only part of current rule 3-310(B) that has any conceivable connection to a lawyer's loan to a client is subparagraph (4). It includes within a lawyer's "disclosure" requirement the situation in which the lawyer "has or had a legal, business, financial, or professional interest *in the subject matter of the representation*." (emphasis added).[1]

The Commission's discussion on the rule 3-310(B)(4) reference was to the effect that the existence of a creditor – debtor relationship between lawyer and client could have an effect on the representation as might occur if there were any unwanted change in the lawyer's position as a debtor, such as might occur if the client were to default on the loan or the lawyer were to sense that possibility. This of course is correct, but the logic

[1] Rule 3-310(A)(1) states in full: "'Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;" Proposed Rule 1.0.1(e) implicitly contains a requirement of "disclosure": "'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct."

of this view would require lawyers to make rule 3-310(B) disclosures to their clients whenever any relationship between a lawyer and client might change and, in changing, affect the lawyer-client relationship. This would mean that rule 3-310(B)(4) would require a "disclosure" whenever a lawyer has a "legal, business, financial, or professional" relationship with the client. This would include the representation of family members, neighbors, acquaintances from clubs and other social situations, social relationships based on common connections (the client was referred to the lawyer by their common accountant or dentist), and so on. To take one of many possible examples, imagine a lawyer who represents her brother-in-law in a matter. In that situation, the Commission's logic is that the lawyer's "disclosure" would have to warn the brother-in-law about the possible hazard to the lawyer-client relationship if the new client were to divorce the lawyer's sister.

That "disclosure" would be plain silly. It would trivialize the important role that a "disclosure" has under the conflict rules by requiring the lawyer to say things that are perfectly obvious. It would be a waste of effort by the lawyer, would make the lawyer appear foolish to the client and thereby potentially interfere with the client's willingness to rely on the lawyer's advice, and would be a trap for unwary lawyers without any client protection benefit. Given the frequency with which many lawyers represent their family members and social and acquaintances, this is not a small matter.

Most important, the use of rule 3-310(B)(4) in these situations would be possible only by reading out of the current rule that the lawyer's interest be "*in the subject matter of the representation*." One example of what is included within this Rule is a lawyer who is asked to sue a company in which the lawyer has invested. There, the disclosure would include "the relevant circumstances" (lawyer has an investment in the target defendant) and the "reasonably foreseeable adverse consequences" (that investment amounts to roughly $X, which the client might consider to be large enough to compromise the lawyer's zeal in the representation).

It should be perfectly obvious to the hypothetical brother-in-law/client that his relationship with his lawyer would be affected if he were to divorce his lawyer's sister, so no explanation should be needed. But disclosures currently required under rule 3-310(B)(4) are of facts that might not be known to the client (the lawyer's interest in or relationship with others), and the consequences of that interest or relationship (the client's confidence that the lawyer performance of her duties of loyalty, confidentiality, and competence would not be affected). Thus, a Rule 1.8.5 reference to the rule 3-310(B) could be seen as altering the meaning of what now is rule 3-310(B). This would lead to "disclosures" under proposed Rule 1.7(c) that have no client benefit and make the lawyer and the legal system appear foolish.

I would remove from Rule 1.8.5 the reference to Rule 1.7 but otherwise would adopt Rule 1.8.5 as drafted by the Commission. I believe that, as is true under current rule 4-210, satisfaction of the business transaction rule provides ample protection to the client. Any Rule 1.7 reference in Rule 1.8.5 would provide no material client benefit, would

imply a gap in the current for which there is no evidence, and would create Rule 1.7 issues even if that Rule were corrected.[2]

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.8.5

Proposed Rule 1.8.5, which carries forward the substance of current Rule 4-210, addresses payment of personal or business expenses of a client. The Commission and the dissent agreed as to the language of the rule with one exception. The dissent objects to the inclusion of references to Rule 1.7 in paragraph (b) of the proposed rule. The dissent believes that the language of proposed Rule 1.8.5 (b)(2) requires that the lawyer give the disclosures required by Rule 1.7 in any situation that comes within the scope of Rule 1.8.5(b)(2). The reference to Rule 1.7 is the same, in different words, as the reference to Rule 3-310 in the current Rule 4-210. The only differences are to refer to Rule "1.7," the number in the proposed Rules that corresponds to rule 3-310 in the current Rules, and the placement of the reference in the text of the rule rather than a comment to conform to the principles of the Commission's Charter.

Proposed Rule 1.8.5 (a) prohibits a lawyer from paying the personal or business expenses of a prospective or existing client. Paragraph (b) lays out a series of exceptions to the rule. In relevant part, paragraph (b) provides:

> (b) Notwithstanding paragraph (a), a lawyer may:
>
> * * *
>
> (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, *provided that the lawyer complies with Rules 1.7(b), 1.7(c) and 1.8.1* before making the loan or agreeing to so." [emphasis added.]

Proposed Rules 1.7(b) and 1.7(c) require either "informed written consent" of the client or "written disclosure" to the client to allow representation where there is a possible conflict of interest between current clients. The lawyer's duty to obtain the client's consent or make disclosure is required only where the circumstances spelled out in Rule 1.7 are met. Since Rule 1.8.5 cannot change Rule 1.7, the only reasonable reading of Rule 1.8.5 (b)(2) is that *only if the circumstances that trigger the application of Rule 1.7 are present* will the disclosures or consent be required. If those circumstances are not present, then no action by the lawyer is required to comply with Rule 1.7. The references in paragraph (b)(2) to Rules 1.7(b), 1.7(c), and 1.8.1 are

[2] Although I see consistency with the other states' Model Rule variations as being the least important of our rule-drafting goals, I should add that Model Rule 1.8(e) has nothing that corresponds to proposed Rue 1.8.5(b)(2) and therefore no reference to Model Rule 1.7.

intended to remind the lawyer to ensure the requirements of those rules are satisfied if they apply. In the cases cited by the dissent, the terms of Rule 1.7 would not apply, so the lawyer would not need to comply with the proposed Rule 1.7(b) or (c).

During its deliberations, the Commission discussed the concerns of the dissent and concluded, with only the one negative vote of the dissent, that the proposed language does not create the concerns expressed by the dissent.

Proposed Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
Synopsis of Public Comments

TOTAL = 2 *A = 0* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21h	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	1.8.5	OCTC generally supports this rule. However, OCTC is concerned that subsection (b)(4) does not define indigent person. The rule exempts an attorney from the requirements of this rule when the attorney pays expenses for an indigent client, but does not define when a person is considered indigent. This lack of precision will make this rule difficult to understand or enforce. This subsection could be used by attorneys to incite or promote unnecessary litigation.	The Commission did not make the suggested change. The Commission believes that the term "indigent" is sufficiently defined in other areas of the law (see, for example, Bus. & Prof. Code sec. 6213(d)) and does not require a specific definition for this rule. In addition, the rule adopted in most states use the term "indigent" without a specific definition.
Y-2016-7e	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Y	M	1.8.5	COPRAC does not support the current revision of proposed Rule 1.8.5 because of the deletion of the phrase "or pro bono client" from subparagraph (b)(4). Prohibiting a lawyer from paying the costs of prosecuting or defending a claim or action, or otherwise protecting or promoting the interests of a pro bono client, could deprive non-indigent clients (including non-profit organizations) of access to justice. In addition, it imposes an unacceptable burden on the First Amendment rights of lawyers to support those causes or persons	The Commission did not make the suggested change. The Commission believes that the term "pro bono" would be overbroad in the context of this rule's intended exception to the general prohibition against a lawyer's payment of a client's costs. In ordinary usage "pro bono" includes, for example, a lawyer's provision of free legal services to a symphony organization regardless of the financial circumstances of that organization. To retain the public protection of the rule,

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
Synopsis of Public Comments

TOTAL = 2 *A = 0* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					in which a lawyer may believe.	the term "indigent person" is a more appropriate concept. In addition, rule 1.0.1(g-1) defines "person" to include both natural persons and organizations. Accordingly, if an organization is indigent, then the exception would apply. Finally, the corresponding provision in the ABA Model Rules, Rule 1.8(e), which has been adopted in a substantial majority of jurisdictions, is limited to "an indigent client" and the Commission is not aware that this provision has created the access to justice problem asserted by the commenter.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.6
(Current Rule 3-310 (F))
Compensation From One Other Than Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310(F) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.8(f) (Conflict of Interest Current Clients: Specific Rules), pertaining to accepting compensation for representing a client from one other than the client. The result of the Commission's evaluation is proposed rule 1.8.6 (Compensation From One Other Than Client).

Rule As Issued For 90-day Public Comment

Current rule 3-310(F) prohibits a member from accepting compensation from one other than the client unless there is no interference with the lawyer's independent professional judgment and the duty of confidentiality owed to a client. The rule is intended to protect the client in situations where the lawyer's independent professional judgment may become compromised based upon the lawyer's fees being paid by one other than the client. Proposed rule 1.8.6 retains the substance of current rule 3-310(F) while expanding the public protection of the current rule. The proposed rule expands the current language of "accepting compensation" to include "enter into an agreement for or charge or accept compensation."

In general, the proposed rule would retain the disclosure and waiver requirements found in current rule 3-310(F)(3). A substantive change that is recommended by the Commission is the addition of a new timing requirement in proposed paragraph (c) that requires a lawyer to obtain a client's consent "at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . ." The rationale for this addition is to enhance the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. A possible concern posed by this addition is whether a lawyer's ability to render services to the client in time sensitive matters would be compromised; however, this concern is mitigated by including the phrase "as soon thereafter as reasonably practical."

Paragraph (a), incorporates the concept that the lawyer's independent professional judgment shall not be compromised due to an agreement between the lawyer and a third-party payor. This is consistent with the language of 3-310(F)(1) and Model Rule 1.8 (f)(2).

Paragraph (b), the current rule uses the phrase "information relating to the representation of the client" to describe the information protected by the duty of confidentiality. The proposed rule substitutes the phrase "information protected by the Business and Professions Code § 6068 (e)(1) and Rule 1.6." The Commission believes the proposed phrase provides enhanced guidance by citing to the specific provisions of California law that establish a lawyer's duty of confidentiality.

Paragraph (c), of proposed rule 1.8.6 requires the lawyer to obtain a client's consent "at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . ." (See discussion above.)

Paragraph (c)(1). The current rule excepts a lawyer from the requirement to obtain consent where the lawyer's compensation is otherwise authorized by law. The proposed rule would expand the exemption to include court orders.

Paragraph (c)(2) **e**xcepts a lawyer from the requirement to obtain consent where the lawyer is rendering legal services on behalf of any public agency that provides legal services to the public or other public agencies. The proposed rule expands the concept of public agency to include non-profit organizations.

Proposed rule 1.8.6 contains four comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [1], which recognizes the existence of overlapping duties in a situation where the lawyer represents both a client and the third-party payor in the same matter. Comment [2] has been added to clarify the scope of the exemption from the disclosure and consent requirements under paragraph (c). Comment [3] further clarifies the scope of the rule as it relates to existing relationships between insurers and insureds. Comment [4] acknowledges that there might be some limited situations where a lawyer might not be able to obtain a client's consent.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.6 [3-310(F)]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Dean Stout

I. CURRENT CALIFORNIA RULE 3-310(F)

Rule 3-310(F) Avoiding the Representation of Adverse Interests (Payments Not From Client)

* * * * *

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion

* * * * *

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.8.6 [3-310(F)]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2017
Action: Board Adoption of Proposed Rule 1.8.6 [3-310(F)]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;

(b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and

(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

(2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted

compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-310(F))

Rule 1.8.6 [3-310(F)] ~~Avoiding the Representation of Adverse Interests~~ Compensation From One Other Than Client

~~(F)~~ A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1)~~(a) ~~There~~ there is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

~~(2)~~(b) ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(1) and Rule 1.6; and

~~(3)~~(c) ~~The member~~ the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

~~(a)~~(1) ~~such~~ nondisclosure or the compensation is otherwise authorized by law or a court order; or

~~(b)~~(2) the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

~~Discussion~~Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] ~~Paragraph (F)~~This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.8(F))

Rule ~~1.8 Current Clients: Specific Rules~~1.8.6 [3-310(F)] Compensation From One Other Than Client

~~(f)~~ A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1) the client gives informed consent;~~

(~~2~~a) there is no interference with the lawyer's ~~independence of~~independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

(~~3~~b) information ~~relating to representation of a client~~ is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6~~.~~; and

(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

(2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

* * *

~~*Person Paying for a Lawyer's Services*~~

~~[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).~~

~~[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.~~

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in

certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

VI. RULE HISTORY

Current rule 3-310(F) originated with the comprehensive revision of all of the rules approved by this Court operative on May 26, 1989. It originally was denominated paragraph (E) and provided:

> (E) A member shall not accept compensation for representing a client from one other than the client unless:
>
> (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
>
> (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and
>
> (3) The client consents after disclosure, provided that no disclosure is required if:
>
> (a) Such nondisclosure is otherwise authorized by law, or
>
> (b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

The State Bar's memorandum to this Court seeking approval observed that: "Paragraph (E) is new and is adopted from ABA Model Rule 1.8(f). It is intended to regulate those situations in which an attorney is paid by someone other than the client." (See page 34 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987, Bar Misc. No. 5626.)

A Discussion paragraph to the 1989 rule excepted from its application situations where an insurer pays for legal representation:

> Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

In 1992, subparagraph (E)(3) was amended to conform it to a new definition section that was added as section (A) and which defined the terms "disclosure" and "informed

written consent." The addition of paragraph (A) resulted in former paragraph (E) being re-lettered as paragraph (F). Subparagraph (F)(3) was also revised as follows:

> (3) The member obtains the client's informed written consents ~~after disclosure~~, provided that no disclosure or consent is required if:
>
> (a) such nondisclosure is otherwise authorized by law~~,~~; or
>
> (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

As noted in the 1992 comprehensive rule filing, the foregoing revision created a stricter standard. (See page 16 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, Supreme Court File No. 24408.) In the 1989 version, the rule required the client to "consent after disclosure." Since the 1992 amendments, however, "informed written consent" has been defined as "the client's or former client's written agreement to the representation following written disclosure."[1] Both disclosure and consent must be in writing. There was also a non-substantive revision to the discussion paragraph to conform it to the relettering of the rule text.

There have been no revisions subsequent to the 1992 amendments.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule and its Comments.

     Commission Response: No response required.

  2. OCTC believes, however, that a Comment should be added requiring lawyers to advise both the client and the paying non-client in writing that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client, and, even with such designation, the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to OCTC because they do not understand that the lawyer cannot communicate with them.

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[1] See current rule 3-310(A)(2).

Commission Response: The Commission did not make the suggested change. The suggested addition would exceed the scope of the rule and add practice requirements that should not be in the Rules.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed rule, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494] (payment of attorney fees in insurance tripartite relationships involving a "Cumis counsel")
- State Bar Formal Ethics Op. 2013-187 (concluding that if a third-party pays the attorney's fees for a client and there are funds remaining after the representation is concluded, the attorney must return the balance to the payor, rather than to the client, unless the agreements with the client and the payor specify otherwise)
- State Bar Formal Ethics Op. 1995-139 (duty of insurance defense counsel to protect the interests of the client insured, notwithstanding that the insurer is paying for the representation and the insured has not been candid with the insurer)

B. ABA Model Rule Adoptions

Model Rule 1.8(f). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflicts of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf (Last accessed on 2/7/17)

- Thirty-three jurisdictions have adopted Model Rule 1.8(f) verbatim,[2] and eighteen jurisdictions (including California) have adopted slight variations of the Model Rule .[3]

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

A. Concepts Accepted (Pros and Cons):

1. Expand the scope of rule's coverage. The current rule provides that a lawyer shall not "accept compensation" from one other than a client. The proposed rule expands the existing language to state that a lawyer shall not "enter into an agreement for, charge, or accept compensation" from a third-party payor.

    - Pros: This change extends the public protection of the current rule in a manner consistent with purpose of the rule. Acceptance of compensation is not the crux of the harm to a client. For example, a client would be harmed where the lawyer's independent professional judgment was compromised due to a third-party payor agreement regardless of whether that lawyer actually accepted or received compensation from the third-party payor). This change also is consistent with the language used in current rule 4-200, the prohibition against illegal or unconscionable fees.

    - Cons: None identified.

2. Revise cross-reference in the rule to be more specific. The current rule incorporates by reference the duty of confidentiality, citing Bus. & Prof. Code § 6068(e). Paragraph (b) of the proposed rule updates this by referring to subdivision (e)(1) of Business and Professions Code § 6068 and by adding a reference to Rule 1.6.

    - Pros: This revision is a conforming change to track amendments to the State Bar Act and the Rules since the current rule was first adopted.

    - Cons: None identified.

3. Substitute language term from proposed Rule 1.6 to describe protected confidential information. The current rule uses the phrase "information relating to

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[2] The thirty-three jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

[3] The eighteen jurisdictions are: Alabama, Alaska, California, Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, and Wisconsin.

the representation of the client" to describe the information protected by the duty of confidentiality. Paragraph (b) of the proposed replaces that phrase with "information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6."

- Pros: The proposed phrase is a more accurate and precise description of the information protected by the duty of confidentiality. The Commission has made similar changes in other rules and the change here maintains consistency.

- Cons: This phrase is found in the current rule and there is no evidence or authority that suggests it is been problematic in applying the rule.

4. Add new timing element for obtaining client consent. The current requires a lawyer to obtain consent prior to accepting compensation from a third-party payor. Paragraph (c) would add a new timing element requiring that consent be obtained "at or before the time the lawyer has entered into an agreement for, charged, or accepted compensation, or as soon thereafter as reasonably practicable."

   - Pros: This change enhances the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. Under the current rule, seeking consent might be delayed until just prior to the lawyer's acceptance of compensation; however, the harm to be prevented by the rule might have already occurred by this time. In addition, the proposed change is not rigid because it permits the lawyer to obtain consent as soon as reasonably practicable. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 [17 Cal.Rptr.3d 486] for an analogous discussion of the timing of client consent when there is a division of fees among lawyers who are not in the same law firm.)

   - Cons: The combination of this change and the proposed expansion to cover entering into agreements and charging compensation (in addition to actual acceptance of compensation) might lead to delays in a lawyer's ability to begin rendering services to client in a time sensitive matter. (But see Comment [5]).

5. Add consent exception for nonprofit organization. The current rule excepts a lawyer from the requirement to obtain client consent where the lawyer is rendering legal services on behalf of any "public agency" that provides legal services to the public or other public agencies. Paragraph (c)(2) of the proposed rule add a reference to a similarly situated a nonprofit organization.

   - Pros: This change clarifies the exception in the existing rule and reflects the fact that public agencies are not the only type of entity that provides legal services to the public. (See current rule 1-600 and proposed Rule 5.4 that address the participation of a lawyer in a legal services organization.)

- Cons: None identified.

6. Recommend adoption of numbering similar to the ABA Model Rules numbering scheme. Move the proposed rule out of Rule 3-310 and make it a standalone rule. Assign the number 1.8.6 rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(f).

   - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

   - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

7. Comment [1]. Add a Comment, proposed Comment [1], recognizing that there may be situations where a lawyer represents a client and also represents the third-party payor.

   - Pros: This change provides a cross-reference to the conflict of interests rule and avoids a potential misunderstanding that the third-party payor rule applies to the exclusion of the conflicts rules.

   - Cons: This Comment is unnecessary as lawyers should be expected to know that separate rules may have overlapping application to a particular situation.

8. Comment [2]. Add a Comment, proposed Comment [2], clarifying that a lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

   - Pros: This addition helps assure that the obligations to avoid interference and breaches of confidentiality that might arise due to a third-party payor relationship are understood as duties independent of the requirement to obtain client consent.

- Cons: The black letter is clear that the exceptions only apply to paragraph (c), rendering the Comment unnecessary if you assume that a lawyer will carefully read the entire rule.

9. Comment [3]. Add a Comment, proposed Comment [3], which carries forward current rule 3-310, Discussion ¶. 12, which recognizes the unilateral contractual right of an insurer to select counsel for the insured when there is no conflict of interest.

    - Pros: This is an important concept that explains the provision requiring that a lawyer's independent professional judgment not be compromised does not affect the well-settled ability of insurers to select counsel for the insured. There is no evidence that this provision has impaired lawyer's ability to represent an insured.

    - Cons: None identified.

10. Comment [4]. Add a Comment, proposed Comment [4], which recognizes that in certain circumstances, strict compliance with timing requirement for informed consent might not be possible.

    - Pros: The Comment provides important guidance on the application of the timing requirement and an explanation of what is meant by "as soon thereafter as practicable" by providing two concrete examples of when a lawyer cannot obtain the client's consent contemporaneously with entering into an agreement for, charging or accepting compensation from a third person. The first Commission recommended adoption of a similar Comment in response to public comment.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain the rule as a part of current rule 3-310 rather than as a separate rule following the Model Rule 1.8 approach.

    - Pros: Retaining the rule as a part of current rule 3-310 recognizes that a third-party payor arrangement is a current client conflicts issue. It also continues the familiarity that lawyers presently have with the current rule's approach to the topic of conflicts of interest.

    - Cons: A majority of states have adopted Model Rule 1.8 and leaving the third-party payor rule with current rule 3-310 is an unnecessary departure from the national standard.

2. Add a Comment explaining that the rule does not apply to a payment pursuant to a settlement agreement, a court order, or other payment otherwise provided for by law.

- Pros: This change would clarify the scope of the rule, recognizing that payments pursuant to a settlement or a court order ordinarily would not implicate the harm that the rule is intended to prevent.

- Cons: This change would either be unnecessary given the precise terms of the proposed rule, or would constitute an exception to the rule that does not belong in a Comment.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. In addition to accepting compensation, the proposed rule expands the prohibition to cover entering into agreements with, or charging, a third-party payor.

2. The proposed rule adds a new timing element requiring that a lawyer obtain a client's consent "at or before the time the lawyer has entered into an agreement for, charged, or accepted compensation, or as soon thereafter as reasonably practicable."

3. The proposed rule excepts a lawyer from the requirement to obtain client consent where the lawyer is rendering legal services on behalf of a nonprofit organization.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member".

   - Pros: The current rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case

law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.6 [3-310(F)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.6 [3-310(F)] in the form attached to this Report and Recommendation.

Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
Synopsis of Public Comments

TOTAL = 4	A = 2
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ay	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	M		COPRAC supports the proposed rule but recommends that the first sentence be rewritten. The sentence as presently drafted reads: "A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless: …." This language seems awkward and appears to have a misplaced prepositional phrase. The statement "from one other than the client" looks like it should modify "enter into an agreement for, charge, or accept compensation from" and not "representing a client." We suggest revising the first sentence to read: "A lawyer shall not enter into an agreement for, charge, or accept compensation from one other than a client for representing that client unless: …."	The Commission has not made the suggested change. The Commission believes the requested language is implicit in the rule. In any event, the language is verbatim from current rule 3-310(F) and the Commission is not aware that it has caused any problems.
X-2016-82b	Polish, James (09-26-16)	No	M		1. I do not believe that this rule should apply to a situation where the client has applied for insurance or has otherwise requested and is receiving payments under an indemnity agreement.	1. The Commission has not made any changes to the rule or comment. It believes that Comment [3] adequately addresses the issue.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. Also, the comment should be clarified to specify whether the rule applies where one of multiple clients in a matter pays the legal expenses of the others, a very common situation.	2. The Commission does not believe such a comment is necessary. The rule applies to any situation in which a third party is compensating the lawyer for representing a client. The situation the commenter identifies clearly falls within the rule.
X-2016-104r	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		1. OCTC supports this rule and its Comments. 2. OCTC believes, however, that a Comment should be added requiring lawyers to advise both the client and the paying non-client in writing that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client, and, even with such designation, the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to OCTC because they do not understand that the lawyer cannot communicate with them.	1. No response required. 2. The Commission did not make the suggested change. The suggested addition would exceed the scope of the rule and add practice requirements that should not be in the Rules.

Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
Synopsis of Public Comments

TOTAL = 4	*A = 2*
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-120g	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		LGBT Bar of LA supports the proposed revisions to 1.8.6	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.7
(Current Rule 3-310 (D))
Aggregate Settlements

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310(D) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter. In addition, the Commission considered the ABA counterpart, Model Rule 1.8) (Conflict of Interest Current Clients: Specific Rules), paragraph (g). The result of the Commission's evaluation is proposed rule 1.8.7 (Aggregate Settlements).

Rule As Issued For 90-day Public Comment

Proposed rule 1.8.7 retains the substance of current rule 3-310(D) while expanding the public protection of the current rule. Current rule 3-310 (D) prohibits a lawyer who represents two or more clients from entering into an aggregate settlement of the claims of or against the clients without the informed written consent of each client. The current rule does not refer to criminal matters. The Commission believes this omission creates an ambiguity as to the applicability of the rule in criminal matters. To address this concern, the Commission is recommending the addition of the following language: "in a criminal case an aggregate agreement as to guilty or nolo contendere pleas." The rationale for the expanded language is to ensure that joint clients in criminal, as well as civil matters, are entitled to receive full disclosure from their lawyer and should be empowered to give or decline to give consent to an aggregate settlement.

Lastly, the Discussion section of current rule 3-310 (D) states that the rule "is not intended to apply to class action settlements subject to court approval." Proposed rule 1.8.7 incorporates this language into the body of the rule.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added the second sentence from ABA Model Rule 1.8(g) to paragraph (a) to clarify that informed written consent includes disclosure to the clients of all the claims or pleas involved and the participation of each person in the settlement.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.7 [3-310(D)]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310(D) Avoiding the Representation of Adverse Interests (Aggregate Settlements)

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

Discussion

* * * * *

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.8.7 [3-310(D)]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.8.7 [3-310(D)]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.7 [3-310] Aggregate Settlements

(a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

(b) This Rule does not apply to class action settlements subject to court approval.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-310(D))

Rule 1.8.7 [3-310(D)] ~~Avoiding the Representation of Adverse Interests~~ Aggregate Settlements

~~(D)~~(a) A ~~member~~lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients ~~without the~~, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent ~~of each client~~.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

~~**Discussion**~~

~~Paragraph (D) is~~(b) This Rule does not ~~intended to~~ apply to class action settlements subject to court approval.

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.8(G))

Rule ~~1.8 Current Clients: Specific Rules~~1.8.7 [3-310] Aggregate Settlements

* * * * *

(~~g~~a) A lawyer who represents two or more clients shall not ~~participate in making~~enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an ~~aggregated~~aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent~~, in a writing signed by the client.~~.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

(b) This Rule does not apply to class action settlements subject to court approval.

~~**Comment**~~

* * * * *

~~*Aggregate Settlements*~~

~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on~~

~~behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~

* * * * *

VI. RULE HISTORY

The predecessor to current rule 3-310, former 5-102, originally approved and made operative on January 1, 1975, was entitled "Avoiding the Representation of Adverse Interests." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 was the rule that governed conflicts. The text of rule 5-102 was identical to the text of the previous rule 7.

A. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.[1]

Paragraph (C) was new and adopted from ABA Model Rule 1.8(g). It was intended to make clear that an aggregate settlement of the claims of two or more clients is a special of conflict and could not be entered into absent the informed written consent of the client.

> (C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

B. Summary of 1992 Proposed Amendments

Proposed amendments to rule 3-310 were substantive and substantial. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and so on throughout the rule.

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[1] See page 34 of Bar Misc. No. 5626, —Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,‖ December 1987.

New paragraph (D) was identical to current paragraph (C) except that "informed written consent" became "written consent...after disclosure." No substantive change was intended.

(~~C~~D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients , ~~except with their~~ without the informed written consent of each client.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. Supports adoption of proposed Rule 1.8.7.

     Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. Supports adoption of proposed Rule 1.8.7.

     Commission Response: No response required.

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Two comments, including the above comment from OCTC, were received. Both agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule and two comments agreed only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule.

B. ABA Model Rule Adoptions

Model Rule 1.8(g). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflicts of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf (Last accessed on 2/7/17)

- Thirty-one jurisdictions have adopted Model Rule 1.8(g)[2] and twenty (including California) have adopted variations of Model Rule 1.8(g).[3]

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

A. Concepts Accepted (Pros and Cons):

1. The current rule does not refer to criminal matters. The proposed rule adds: "in a criminal case an aggregate agreement as to guilty or nolo contendere pleas."

    - Pros: This change extends the public protection of the current rule in a manner consistent with purpose of the rule. An aggregate agreement in a criminal matter involving two or more clients implicates the public protection that the current rule is intended to provide. Joint clients in criminal, as well as civil matters, are entitled to receive full disclosure from their lawyer and they should be empowered to give or decline to give consent to an aggregate settlement. Moreover, the consequences in criminal matters suggest that the policy of the current rule is even more important than in a typical civil matter.

    - Cons: None identified.

2. The current rule does not specify particular matters that ought to be disclosed when a lawyer seeks consent from clients with respect to an aggregate settlement. The proposed rule follows the ABA Model Rule in specifying the following elements of a written disclosure: "the existence and nature of all the claims or pleas and of the participation of each person in the settlement."

    - Pros: As the ABA Model Rule recognizes, in the context of an aggregate settlement, these disclosures are part of what a client should know before providing consent. While "informed written consent" might be interpreted as requiring these disclosures even without specifying them in this rule, the specification makes the requirement clear. Moreover, the specification of

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[2] The thirty-one jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming.

[3] The twenty jurisdictions are: Alabama, California, Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and West Virginia.

these disclosures in the rule governing aggregate settlements makes the requirement easier for lawyers to find.

- Cons: Although a typical civil matter involves a plaintiff's release/dismissal in exchange for monetary compensation, other civil matters can involve injunctive relief and other interests (i.e., child custody rights). This change is incomplete to the extent that it does not offer any guidance regarding disclosures on these points. The specification is unnecessary as the requirement of these disclosures is already implicit in the definition of "informed written consent."

3. Move the proposed rule out of rule 3-310 and make it a standalone rule. Assign the number 1.8.7 rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(f).

   - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

   - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

B. Concepts Rejected (Pros and Cons):

1. Retain the rule as a part of current rule 3-310 rather than as a separate rule following the Model Rule 1.8 approach.

   - Pros: Retaining the rule as a part of rule 3-310 recognizes that a lawyer addressing an aggregate settlement must approach it as a current client conflicts issue. It also continues the familiarity that lawyers presently have with the current rule's approach to the topic of conflicts of interest.

- Cons: A majority of states have adopted Model Rule 1.8 and leaving the aggregatehe settlement rule with current rule 3-310 is an unnecessary departure from t national standard.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The proposed rule adds a reference to aggregate agreements in the representation of two or more clients in a criminal matter.

2. The proposed rule adds a description of the required client disclosures for aggregate settlements.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

2. Assign comparable Model Rule number to the proposed rule (1.8.7) rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(g).

E. Alternatives Considered:

None.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.7 [3-310(D)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.7 [3-310(D)] in the form attached to this Report and Recommendation.

Proposed Rule 1.8.7 [3-310(D)] Aggregate Settlements
Synopsis of Public Comments

TOTAL = 2 *A = 2* *D = 0* *M = 0* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21i	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	A		OCTC supports this rule.	No response required.
Y-2016-7f	State Bar Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Yes	A		COPRAC supports the adoption of proposed Rule 1.8.7 as revised.	No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.8
(Current Rule 3-400)
Limiting Liability to Client

EXECUTIVE SUMMARY

The Commission has evaluated current rule 3-400 (Limiting Liability to Client) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(h) (Conflict Of Interest: Current Clients: Specific Rules) as well as relevant California statutes, rules, and case law.

Rule As Issued For 90-day Public Comment

Proposed rule 1.8.8 carries forward the substance of current rule 3-400. The main issues considered were whether to require a lawyer to advise the client to seek the advice of an independent lawyer regarding the settlement, and whether to not require a lawyer to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement. The Commission adopted both substantive changes.

Paragraph (a) restricts a lawyer from contracting prospectively with the client for the purpose of limiting liability to the client for the lawyer's professional malpractice.

Paragraph (b) restricts a lawyer from settling a claim or potential claim for the lawyer's professional malpractice liability to a current or former client, unless the client is either:

> (1) represented by an independent lawyer concerning the settlement;
>
> (2) advised by the lawyer in writing to seek the advice of an independent lawyer of the client's choice regarding the settlement and the client is provided with a reasonable opportunity to seek that advice.

Comment [1] clarifies that Paragraph (b) of the proposed rule does not absolve the lawyer from their obligation to comply with other law, specifically California Business and Professions Code § 6090.5.[1]

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[1] Business and Professions Code § 6090.5:

(a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:

(1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.

(2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.

(3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.

(b) This section applies to all settlements, whether made before or after the commencement of a civil action.

Comment [2] is derived from the Discussion section of current rule 3-400 and adds that a lawyer may reasonably limit the scope of representation, which cross-references proposed rule 1.2 (Scope of Representation and Allocation of Authority).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.8 [3-400]

Commission Drafting Team Information

Lead Drafter: Lee Harris
Co-Drafters: Howard Kornberg, Toby Rothschild

I. CURRENT CALIFORNIA RULE

Rule 3-400 Limiting Liability to Client

A member shall not:

(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.8.8 [3-400]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.8.8 [3-400]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.8 [3-400] Limiting Liability to Client

A lawyer shall not:

(a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:

(1) represented by an independent lawyer concerning the settlement; or

(2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

Comment

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably* limiting the scope of the lawyer's representation. See Rule 1.2(b).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-400)

Rule 1.8.8 [3-400] Limiting Liability to Client

A ~~member~~lawyer shall not:

~~(A)~~(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client or former client is ~~informed~~either:

(1) represented by an independent lawyer concerning the settlement; or

~~(B)~~(2) advised in writing ~~that~~* by the ~~client may~~ lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and ~~is~~ given a reasonable* opportunity to seek that advice.

Comment~~Discussion~~

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule ~~3-400 is~~does not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is it intended to~~does it prevent a ~~member~~lawyer from reasonably* limiting the scope of the ~~member's employment or~~lawyer's representation. See Rule 1.2(b).

V. RULE HISTORY

Current rule 3-400 was originally adopted operative on January 1, 1975 as former rule 6-102, under the same title, "Limiting Liability to Client." Former rule 6-102 incorporated the substance of Disciplinary Rule 6-102 of the ABA Model Code of Professional Responsibility. Former Rule 6-102 stated: "A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State bar from settling or defending a malpractice claim."

Former rule 6-102 was amended in 1989. The amendments included renumbering the rule 3-400, dividing the rule into two paragraphs, (A) and (B), and adding a Discussion paragraph. Paragraph (A) continued the prohibition contained in former rule 6-102 on attorneys attempting to limit their liability to a client for their professional malpractice. Paragraph (B) was new and provided a lawyer must not settle a claim for the lawyer's malpractice unless the lawyer informed the client in writing that the client may seek the advice of independent counsel with respect to the settlement. In addition, the client must be given a reasonable opportunity to seek that advice. A Discussion paragraph was added to clarify the scope of the rule by stating that the rule was not intended to apply to limitations or qualifications pertaining to legal opinions and memoranda, nor was the rule intended to prevent a lawyer from limiting the scope of the lawyer's representation.

In 1992, paragraph (B) was amended to provide that a lawyer shall not:

> (B) Settle a claim or potential claim for ~~such~~ the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

This change was not intended to be substantive. Rather, the amendment was made in order to allow the precatory language, and paragraph (B), to stand alone.

Rule 3-400 has not been amended since 1992.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule. OCTC would recommend, however, that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's Model Rule limiting liability because that rule does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA Rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering," 3rd Edition, § 12.19.)

   Commission Response: The Commission did not make the requested change. The Commission determined the protection of the client's interest to be appropriately addressed by the inclusion in the Rule of independent counsel requirements. That is what the current rule applies and the Commission is not aware of any problems that warrant a change to the rule.

2. OCTC supports Comment 1.

   Commission Response: No response required.

3. OCTC finds the first part of Comment [2] to be vague. It does not understand what the Comment means by "customary qualifications and limitations." This needs to be either explained or the Comment should be stricken. Without an explanation or definition of what the Comment is referring to, this rule will be difficult to understand or enforce, or will end up covering something not intended to be covered. It is not necessary to have a Comment that states the rule does not prevent a lawyer from reasonably limiting the scope of the representation. This rule on its face does not address that issue and limiting the scope of representation does not limit liability.

   Commission Response: The Commission did not make a change to Comment [2]. The questioned language of Comment [2] comes directly from the Discussion to current rule 3-400. The Commission is not aware of any confusion or problems in enforcement caused by that language.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE 1.8(H) ADOPTIONS

A. Related California Law

1. Civil Code Section 1542

When settling an attorney-client fee dispute, attorneys in California sometimes include a Civil Code § 1542 waiver of all known or unknown claims that the client has or may have against the attorney which necessarily extends to any malpractice claims. This type of waiver provision in a fee dispute settlement may violate California Rule of Professional Conduct 3-400(A) because it prospectively limits the attorney's liability to the client for malpractice. *The California Practice Guide on Professional Responsibility* includes a Comment regarding this issue which states: "To avoid a possible violation of CRPC 3-400(A), the § 1542 waiver could include language to the effect that it does *not* apply to future malpractice claims."

The ethical issue of including a § 1542 waiver as part of a fee dispute with a client was addressed by the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) in Formal Opinion No. 2008-179. That opinion states that when an agreement to settle a fee dispute is broad enough to include a release of malpractice claims, or where the lawyer intends to obtain a release of legal malpractice claims through a settlement agreement, a general release that includes a Civil Code § 1542 waiver from the client requires compliance with rule 3-400(B) by (1) informing the client in writing that the client may seek the advice of an independent lawyer regarding the settlement, and (2) giving the client a reasonable opportunity to seek that advice.

2. Provision in Initial Fee Agreement Requiring Arbitration of Attorney-Client Disputes

An initial fee agreement that contains a provision specifying mandatory and/or binding arbitration of client disputes, including potential malpractice claims, does not violate rule 3-400. California case law has stated such provision are not ethically improper in retainer agreements with new clients: "An attorney may ethically, and without conflict of interest, include in an initial retainer agreement with a client a provision requiring the arbitration of both fee disputes and legal malpractice claims." [*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1108-1109. See also, Cal. State Bar Form. Opn. 1989-116; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501]. The rationale is that standard arbitration provisions in a fee agreement neither limit an attorney's professional duties owed to the client, nor limit the attorney's liability for breaching those duties. Rather, the arbitration provision simply states in which forum any potential liability issues will be determined. [*Powers v. Dickson, Carlson & Campillo*, supra, 54 Cal.App.4th at 1115].

3. Limited Scope Representation

The Discussion section to rule 3-400 states the rule is not intended to prevent a lawyer from reasonably limiting the scope of his or her employment or

representation. In addition to Discussion paragraph [2] to current rule 1-650, this is the only reference to limited scope representation in the California Rules of Professional Conduct. This Commission has approved the Commission's proposal to recommend adoption of ABA Model Rule 1.2(c), which permits a lawyer to limit the scope of representation under circumstances. Under California case law, although a lawyer may limit the scope of representation, the lawyer still has an obligation to advise the client regarding reasonably apparent alternative remedies and legal liabilities even if those issues reside outside the scope of representation. (See, *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 – malpractice claim against workers' comp attorney for failure to advise client of potential third-party claim.)

B. ABA Model Rule 1.8(h) Adoptions

All jurisdictions have adopted some version of ABA Model Rule 1.8(h). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/7/2017]

- Twenty-seven jurisdictions have adopted Model Rule 1.8(h) verbatim.[1] Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(h).[2] Eight jurisdictions have adopted a version of the rule that is substantially different than Model Rule 1.8(h).[3]

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

A. Concepts Accepted (Pros and Cons):

1. Add subparagraph (b)(1) to current rule 3-400: to the Commission recommends including a provision that states a lawyer is not required to advise the client to

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[1] The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

[2] The sixteen jurisdictions are: Alabama, Alaska, Arkansas, California, District of Columbia, Florida, Michigan, Mississippi (Mississippi retains the former Model Rule language from 1983), New Jersey, New York, North Carolina, North Dakota, Tennessee, Texas (Texas retains the former Model Rule language from 1983, as Texas Rule 1.8(g)), Virginia, and Washington.

[3] The eight jurisdictions are: Arizona, Georgia, Hawaii, Indiana, Iowa, Ohio, Oregon, and Wisconsin.

seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.

- Pros: Requiring the lawyer to advise the client to seek the advice of an independent lawyer when the client is independently represented would be redundant and unnecessary. If the client is already being represented by independent counsel, some of the policy reasons behind the rule have been achieved. Further, such action would likely be a separate violation of proposed Rule 4.2.

- Cons: The required advice should be given even if the client is already represented by an independent lawyer concerning the settlement. This would afford an opportunity for the lawyer to confirm that the client has in fact secured an independent lawyer concerning the settlement. Also, nothing in the rule dictates that the lawyer's advice be presented in a manner that would denigrate the lawyer-client relationship that is being confirmed. For example, the client's right to continue with the client's chosen independent counsel can be emphasized in advising the client.

2. Substitute "advised in writing" for "informed in writing."

   - Pros: "Advised" is appropriate because it is read in conjunction with the lawyer's duty to advise the client "to seek" rather than the client merely having been "informed" that the client "may seek" the advice of an independent lawyer. There is little risk that "advise" will be viewed as requiring a lawyer to give comprehensive legal advice; similar language limiting a lawyer's advice to retain counsel is found in proposed Rule 4.3. The revised language is more client protective.

   - Cons: The Commission is unaware of any published State Bar Court cases indicating that the phrase "informed in writing" has been problematic as a disciplinary standard in the current rule. In addition, continuing to use "informed" rather than "advised" might guard against a lawyer misreading this requirement as a duty to give comprehensive legal advice to the client concerning the advantages and disadvantages of the settlement.

3. Carry forward the current rule's requirement that the communication be in writing.

   - Pros: This approach retains the current rule's requirement which is more client protective than if the rule's requirement could be achieved orally.

   - Cons: None identified.

4. Recommend that the rule expressly state it is the lawyer who must advise the client. The current rule does not expressly state who must inform the client in writing that the client may seek the advice of an independent lawyer.

    - Pros: The suggested revision should result in greater compliance, understanding and client protection by clarifying that it is the lawyer's duty to advise the client, thus ensuring the client is advised. In addition, the revision should alleviate potential ambiguity when prosecuting the rule in the discipline system because a lawyer will not be able to argue, after the fact, that someone else might have advised the client.

    - Cons: None identified.

5. Recommend replacing the phrase "may seek" with "to seek."

    - Pros: "To seek" is closer than "may seek" in how case law has interpreted a lawyer's duty to inform a client about the importance of consulting with an independent lawyer.

    - Cons: None identified.

6. Recommend adoption of the first Commission's Comment [3] as Comment [1]. The first Commission's Comment has been modified by this Commission by inserting the verb "absolve" in place of "override."

    - Pros: This Comment clarifies that paragraph (b) does not provide a means by which a lawyer might circumvent the application of Bus. & Prof. Code § 6090.5.[4]

    - Cons: The word "absolve" has several different meanings and the Comment may suffer from ambiguity as to which meaning is intended. Further, the Comment refers to a lawyer's "obligation" under other law, yet a lawyer has no affirmative obligations under the statute cited (B&P Code § 6090.5).

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[4] Business and Professions Code § 6090.5 provides:

(a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:

(1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.

(2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.

(3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.

(b) This section applies to all settlements, whether made before or after the commencement of a civil action.

7. Recommend adoption of the first Commission's Comment [4] as Comment [2].

    - Pros: This Comment is similar to the Discussion paragraph to current rule 3-400. Including a cross-reference to the limited scope representation provision in proposed Rule 1.2(b) should enhance compliance and understanding of this important concept.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include "attempts to contract" in paragraph (a) or "attempts to settle" in paragraph (b).

    - Pros: An unsuccessful attempt to limit liability should be as equally prohibited as a successful attempt to do so. (See *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747 – 738.

    - Cons: Such a provision would be difficult to prove, especially with oral offers. Such a provision would most likely devolve into a he/said, she/said contest.

2. Include the concept contained in ABA Model Rule 1.8(h)(1) which permits a lawyer to contract with a client to prospectively limit malpractice liability where "the client is independently represented in making the agreement."

    - Pros: As long as the client is independently represented and advised of all the risks and concerns associated with such an agreement, individuals at arms-length should be free to contract.

    - Cons: The absolute prohibition is a better policy to promote and is more client protective. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm's liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed. Such situations would be extraordinarily rare, but the risk that such a provision might be used with clients not experienced in the use of legal services is great.

3. Retain the first Commission's Comment [1].

    - Pros: Explaining the rule's purpose and the policy underlying the rule can provide interpretative guidance regarding the rule's application.

    - Cons: This Comment merely restates the policy underlying, and the purpose of, the rule but it does not contribute to explaining the rule's meaning or application.

4. Retain the first sentence of the first Commission's Comment [2] regarding the use of alternative dispute resolution procedures.

    - Pros: Such provisions are commonly included in attorney-client fee agreements. Including within a Comment the authority permitting the use of such provisions would help educate both lawyers and clients.

    - Cons: Although the sentence accurately states the law, there is a question whether the rules of professional conduct should promote the use of a dispute resolution mechanism that is perceived as anti-consumer and thus not protective of the public.

5. Retain the second sentence of the first Commission's Comment [2] regarding lawyers practicing in the form of limited liability entities.

    - Pros: The sentence would usefully clarify that the rule does not prohibit lawyers from practicing in a limit liability entity so long as a lawyer's individual liability is not limited.

    - Cons: This sentence is unnecessary because it does not explain either the meaning of the rule or how it is applied, and the sentence is also potentially confusing. First, it might suggest that practicing in a limited liability entity will protect the actual actor from malpractice liability and, second, the reference to "limited liability entity" is vague and overbroad as California only permits lawyers to practice as an LLP or law corporation, not as an LLC.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. A substantive change to the current rule is that the proposed rule expressly states the lawyer is not required to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.

2. Under the proposed rule, the lawyer would expressly be required to advise the client "*to seek"* the advice of an independent lawyer regarding the settlement and not just be advised that the client "may seek the advice."

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The

Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.8 [3-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.8 [3-400] in the form attached to this Report and Recommendation.

Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client
Synopsis of Public Comments

TOTAL = 4	*A = 2*
	D = 0
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-14	Greene Radovsky Maloney Share & Hennigh LLP (Fotenos) (07-29-16)	Yes	M	1.8.8	Modify the proposed rule to conform to ABA Model Rule 1.8(h)(1) that permits lawyers to limit their prospective liability to a client for malpractice when a client is independently represented in making the agreement.	The Commission believes that proposed rule 1.8.8 should not be changed to conform to Mode Rule 1.8(h)(1). In considering proposed California Rule 1.8.8 vs. ABA Model Rule 1.8(h)(1), the Commission deemed California's long standing absolute prohibition of prospective limitation of malpractice liability as better policy and more client protective. The ABA Model Rule would permit a lawyer to contract with a client to prospectively limit malpractice liability where the client is independently represented in making the agreement. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm's liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed in hindsight. The Commission believes such situations are rare, but the risk that such a provision might be used with clients not

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						experienced in the use of legal services is great. Additionally, Comment 2 provides appropriate guidance noting that "This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2(b)."
X-2016-43p	COPRAC (Baldwin) (8-12-16)	Y	A	1.8.1	Supports adoption of proposed Rule 1.8.8.	No response required.
X-2016-104t	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M		1. OCTC supports this rule. OCTC would recommend, however, that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's Model Rule limiting liability because that rule does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering," 3rd Edition, § 12.19.) 2. OCTC supports Comment 1.	1. The Commission did not make the requested change. The Commission determined the protection of the client's interest to be appropriately addressed by the inclusion in the Rule of independent counsel requirements. That is what the current rule applies and the Commission is not aware of any problems that warrant a change to the rule. 2. No response required.

Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client
Synopsis of Public Comments

TOTAL = 4 ***A = 2*** ***D = 0*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					3. OCTC finds the first part of Comment 2 to be vague. It does not understand what the Comment means by "customary qualifications and limitations." This needs to be either explained or the Comment should be stricken. Without an explanation or definition of what the Comment is referring to, this rule will be difficult to understand or enforce, or will end up covering something not intended to be covered. It is not necessary to have a Comment that states the rule does not prevent a lawyer from reasonably limiting the scope of the representation. This rule on its face does not address that issue and limiting the scope of representation does not limit liability.	3. The Commission did not make a change to Comment [2]. The questioned language of comment [2] comes directly from the Discussion to current rule 3-400. The Commission is not aware of any confusion or problems in enforcement caused by that language.
X-2016-120i	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		Supports adoption of proposed Rule 1.8.8.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.9
(Current Rule 4-300)
Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

EXECUTIVE SUMMARY

The Commission evaluated current rule 4-300 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review) in accordance with the Commission Charter. California has had a variation of current rule 4-300 since 1928. However, there is no counterpart to rule 4-300 in the ABA Model Rules. The result of the Commission's evaluation is proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting this proposed rule was whether the proposed rule's language should conform to the Probate Code provisions which allow an attorney to purchase a client's property at a Probate sale under certain circumstances. Current rule 4-300 prohibits a lawyer from purchasing property at various sales under legal process[1] where the lawyer, or any other lawyer affiliated with the lawyer or the lawyer's firm, is acting either as an attorney for a party or as an executor, receiver, trustee, administrator, guardian, or conservator. The rule also prohibits a lawyer from representing the seller at such a sale in which the buyer is a spouse or relative of the lawyer or another attorney in the lawyer's firm or is an employee of the lawyer or the lawyer's firm. However, current rule 4-300 conflicts with Probate Code sections 9880-9885, which do permit a lawyer for an estate's personal representative to make *probate* purchases, upon court order authorizing the purchase, provided all known heirs and devisees are notified and consent.[2] Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

After careful consideration of whether to conform the current rule to the Probate Code, the Commission has approved retaining current rule 4-300, revised to incorporate the Commission's global changes, i.e., Model Rule numbering, format and style and substitution of the word "lawyer" for "member."

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[1] These sales include a probate, foreclosure, receiver's, trustee's, or judicial sale.

[2] Probate Code §§ 9881 and 9882 provide:

> **9881**. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if all of the following requirements are satisfied:
>
> (a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.
>
> (b) The written consents are filed with the court.
>
> (c) The purchase is shown to be to the advantage of the estate.
>
> **9882**. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative's attorney to purchase the property.

There are several reasons for the Commission's recommendation. First, when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. Second, rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct.[3] Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. Third, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. Lastly, the Office of the Chief Trial Counsel has on three separate occasions submitted a comment urging the prior Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

[3] See *Eschwig v. State Bar* (1969) 1 Cal. 3d 8 (attorney purchased principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client.").

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.9 [4-300]

Commission Drafting Team Information

Lead Drafter: Carol Langford
Co-Drafters: Nanci Clinch, Raul Martinez, Hon. Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.8.9 [4-300]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.8.9 [4-300]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm* is acting

as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-300)

Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(~~A~~a) A ~~member~~lawyer shall not directly or indirectly purchase property at a probate, foreclosure, ~~receiver's, trustee's~~receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that ~~member~~lawyer or with that ~~member's~~lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(~~B~~b) A ~~member~~lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer's law firm* or is an employee of the ~~member~~lawyer or the ~~member's~~lawyer's law firm.*

V. RULE HISTORY

Current rule 4-300 originated in 1928 as former rule 8, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No. 1, p. 17.) Rule 8 originally read: "A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party."

In 1972, former rule 8 was renumbered as rule 5-103, "Purchasing Property in a Matter in Which a Member Appears as Attorney" with the identical text of former rule 8. Rule 5-103 was amended operative January 1, 1975 and titled "Purchasing Property at a Probate, Foreclosure or Judicial Sale." The 1975 version of the rule extended the proscription on purchasing property at the described sales to partners and associates of the member. The rule also prohibited a member from purchasing property at the specified sales if the member, or a partner or associate of the member acts as executor, trustee, administrator, or guardian or conservator. Finally, for the purposes of the rule, rule 5-103 defined the term "associate" to mean an employee or fellow employee who is a member of the State Bar. The 1975 version of the rule provided:

Rule 5-103. Purchasing Property at a Probate, Foreclosure or Judicial Sale.

A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member or any partner or associate of such member appears as attorney for a party or is acting as executor, trustee, administrator, or guardian or conservator.

As used in this rule, the term "associate" means an employee or fellow employee who is a member of the State Bar.

In 1989, rule 5-103 was amended and renumbered as rule 4-300 as part of a comprehensive revision and renumbering of the entire rules. Rule 4-300 was retitled "Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review." Receiver's and trustee's sales were added to the rule because such sales were viewed as similar to the type of sales already prohibited under the rule. The rule was also amended to apply to members who may have never appeared on behalf of the client but had provided legal services to the client. In addition, the phrase "partner or associate of such member" was deleted and replaced with "any member affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm." This last change rendered the definition of the term "associate" unnecessary to the rule and the definition was removed.[1] (See page 46 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules of Professional Conduct Of The State Bar of California, And Memorandum And Supporting Documents In Explanations," December 1987.) The 1989 version of rule 4-300 provided:

Rule 4-300. ~~5-103.~~ Purchasing Property at a ~~Probate,~~ Foreclosure or a ~~Judicial~~ Sale Subject to Judicial Review

A member ~~of the State Bar~~ shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~partner or associate of such~~ member affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm ~~appears as~~ is an attorney for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator.

~~As used in this rule, the term "associate" means an employee or fellow employee who is a member of the State Bar~~.

Rule 4-300 was last amended in 1992. An amendment to rule 1-100(B)(3)'s definition of "lawyer" extended the application of rule 4-300 to foreign-licensed attorneys, as well as California or out-of-state attorneys, who are affiliated by reason of personal, business or professional relationship with a member or a member's firm. An additional, non-substantive change intended for brevity and clarity was made to paragraph (A). (See below).

[1] Nevertheless, the definition of "associate," which is relevant to other current rules, was moved to current rule 1-100(B)(4).

Paragraph (B) was added to prohibit a member from representing a seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm. This addition extended the protection of a client's interest where the attorney's relationship to the buyer created a conflict with the lawyer's representation of the interests of the seller-client. (See pages 18 – 19 of Supreme Court File No. 24408, "Request That The Supreme Court of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991.) The 1992 version of rule 4-300 provided:

> **Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**
>
> (A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~member~~ lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is ~~an attorney~~ acting as a lawyer for a party or ~~is acting~~ as executor, receiver, trustee, administrator, guardian, or conservator.
>
> (B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

When current rule 4-300 was being revised during the 1992 rule revision process, the 1992 Rule Revision Commission was aware of Probate Code §§ 9880 – 9885, which became operative on July 1, 1988. These Probate Code sections permit a "personal representative *or the personal representative's attorney,*" (emphasis added), to purchase property from a probate estate if certain requirements are satisfied, including notice to, and consent of all heirs and devisees to the purchase, and approval after court review. Notwithstanding the direct conflict between rule 4-300 and the Probate Code, the 1992 Rule Revision Commission recommended that rule 4-300 should be continued.[2]

[2] Specifically, the recommendation to adopt rule 4-300 notwithstanding a conflict with the Probate Code was presented in Enclosure 6 of the "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December 1991, Supreme Court File No. 24408.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

California has had a variation of rule 4-300 since 1928. There is no ABA Model Rule directly analogous to rule 4-300. Although the first Commission numbered its proposed rule 4-300 successor as Rule 1.8.9, suggesting the rule is analogous to Model Rule 1.8(i), neither the first Commission's rule nor current rule 4-300 should be considered analogous to Model Rule 1.8(i), which applies to a lawyer's acquisition of "a proprietary interest in the cause of action or subject matter of litigation," a scope of coverage that is broader (not limited to specific types of sales connected to the litigation) than rule 4-300's.[3]

California's divergence from ABA rules regulating lawyers with respect to rule 4-300 and its predecessors is long-standing. The 1908 ABA Canons of Professional Ethics, Canon 10, provided: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." In 1928, the State Bar of California adopted its Rules of Professional Conduct, including Rule 8, which provided: "A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party." (See,

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[3] Model Rule 1.8(i) provides:

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

The State Bar Journal (July 1928) Vol. III, No.1, p. 17.) There was no rule analogous to ABA Canon 8 in the 1928 Rules, nor has California adopted a rule analogous to current Model Rule 1.8(i) [successor to ABA Canon 8] in the intervening years.

Nevertheless, Model Rule 1.8(a)[4] [ABA counterpart to Cal. Rule 3-300] and its predecessor, ABA Model Code of Professional Responsibility DR 5-104, have been applied to facts that would fall under rule 4-300. For example, in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Stamp* (Iowa 1999) 590 N.W.2d 496, 500, a lawyer who probated an estate was disciplined for violating Iowa rule DR 5-104(A) [the predecessor to MR 1.8(a)], in part, for representing the estate and purchasing stock from the estate without required court approval and at a price substantially below market value. (See also, citations in 35 A.L.R.3d 674 reporting on "Attorney and client: disciplinary proceeding based upon attorney's direct or indirect purchase of client's property.")

Although California is not unique in regulating the described lawyer conduct through discipline, California presently diverges from the approach taken in other jurisdictions by its adoption of a rule specifically regulating a lawyer's purchase of assets at any of the identified types of sales subject to judicial review.

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

A. Introduction: History of Rule 4-300 and related Probate Code sections, and Reasons For the Commission's Recommendation

As noted in Section VIII, above, California is unique in its adoption of a rule that regulates a lawyer's purchase of client assets at specific types of sales. Other jurisdictions appear to regulate such transactions by applying their rule corresponding to Model Rule 1.8(a) [Cal. Rule 3-300]. (See Section VII.) This raises the question whether rule 4-300 is still necessary. The Commission concluded it is. Current rule 3-300 [MR 1.8(a)] by its terms refers only to transactions between a lawyer *and a client* or a lawyer's acquisition of a pecuniary interest adverse to a client. Rule 4-300, on the other hand, applies not only to such transactions or interests, but whenever the lawyer or a

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[4] Model Rule 1.8(a) is very similar to current California rule 3-300 and provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

lawyer in the lawyer's firm is representing a party (e.g., an estate's personal representative) or is acting as an "executor, receiver, trustee, administrator, guardian, or conservator" in the matter. By its terms, rule 4-300 applies to a much broader set of situations than does rule 3-300. Moreover, rule 4-300 provides for an absolute prohibition on lawyer purchases; unlike 3-300, there is no procedure under which a lawyer might obtain the consents of interest persons to the purchases.

However, current rule 4-300 conflicts with Probate Code §§ 9880-9885, which do permit a lawyer for an estate's personal representative to make *probate* purchases, provided all known heirs and devisees are notified and consent, and subject to judicial review.[5] Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

In recognition of this conflict, the first Commission proposed a rule that removed probate sales from the prohibitory language of 4-300(A) and added a rule section that informed lawyers of the existence of the Probate Code requirements and added further requirements with which the lawyer must comply, Rules 1.8.1 [current rule 3-300] and 1.7 [current rule 3-310(B)].[6]

Because of the conflict between rule 4-300 and the Probate Code sections permitting probate sales to the personal representative's lawyer subject to certain conditions, the Commission thoroughly considered the first Commission's proposed rule. However, after consideration of the legislative history and the process by which current rule 4-300 was adopted by the Board and approved by the Supreme Court, the Commission consensus is to recommend retaining current rule 4-300, revised to incorporate the Commission's global changes, i.e., Model Rule numbering, format and style and substitution of "lawyer" for "member."

There are numerous reasons for the Commission's recommendation. *First* and most important, when the Supreme Court approved rule 4-300, effective September 14, 1992,

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[5] Probate Code §§ 9881 and 9882 provide:

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if all of the following requirements are satisfied:

(a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.

(b) The written consents are filed with the court.

(c) The purchase is shown to be to the advantage of the estate.

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative's attorney to purchase the property.

See also Probate Code §§ 9880-9885.

[6] See note 7 for the first Commission's proposed Rule 1.8.9.

it was fully aware of the conflict that existed between the Probate Code sections and the rule. (See the State Bar's 1991 Supreme Court filing, case #S024408, seeking Supreme Court approval of the current rule, Enclosure 6.) Enclosure 6 fully explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court apparently concluded that the more stringent protections afforded by rule 4-300 were warranted. *Second*, Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See *Eschwig v. State Bar* (1969) 1 Cal.3d 8 (attorney purchased principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client."). Therefore, the fact that the Probate Code allows such purchases (upon court approval but with limited judicial supervision), does not vitiate a lawyer's obligation to comply with these higher ethical standards. Rules adopted by the Supreme Court can hold lawyers to a higher standard than corresponding legislation. *Third*, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. Fourth, a review of the legislative history has revealed no evidence that either the legislature or the California Law Review Commission, the principal sponsor of the comprehensive revision of Probate Code in 1987 and 1991, considered rule 5-103, the predecessor to rule 4-300, or considered the public protection policies underlying the rule. There is no mention at all of rule 5-103 anywhere in the legislative history, including the California Law Revision Commission's two lengthy reports on the proposed amendments to the Probate Code.

B. Concepts Accepted (Pros and Cons):

1. Retain the substance of the current rule and only revise the language to implement non-substantive terminology and format changes.

    - Pros: The current rule sets the appropriate standard of public protection and there are no known problems notwithstanding inconsistency with the Probate Code. (See also paragraph A (Introduction), above.)

    - Cons: There is a risk of confusion in having a rule that subjects a lawyer to discipline even though the conduct is authorized by statutory law.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Concepts Rejected (Pros and Cons):

1. Change the rule to state that it is not a violation for a lawyer to participate in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but that such transactions remain subject to other applicable rules, such as the rules governing business transactions with a client [current rule 3-300] and the representation of adverse interests [current rule 3-310]. In effect, this proposal is to adopt the first Commission proposed Rule 1.8.9.[7]

    - Pros: This change would harmonize the rule with statutory law and avoid the potential anomalous result of a lawyer who participates in a legally enforceable probate sale under the Probate Code would nevertheless be subject to discipline.

    - Cons: This change would diminish the existing public protection afforded by the absolute prohibition in current rule 4-300 and facilitate attorney self-dealing. (See also paragraph A (Introduction), above.)

D. Changes in Duties/Substantive Changes to the Current Rule:

None.

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[7] The first Commission's proposed Rule 1.8.9 provided:

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.

(b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.

(c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

E. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court, rule 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Assign the number 1.8.9 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the Model Rule that is rule 4-300's closest analog as Rule 1.8(i).

   - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the

first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

- Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

F. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.9 [4-300] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.9 [4-300] in the form attached to this Report and Recommendation.

Proposed Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments

TOTAL = 3 ***A = 2*** ***D = 0*** ***M = 1*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ba	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-2016)	N	M	1.8.9	Proposed Rule 1.8.9 directly conflicts with certain Probate Code sections 9881 and 9882, which expressly permit the purchases by a lawyer that the proposed rule prohibits. Such a direct conflict between statutory law and ethical rules is confusing and a trap for the unwary, and implies that the laws passed by our legislature expressly authorized conduct that is unethical. COPRAC supports the approach proposed by the first Rules Revision Commission ("RRC1") in its proposed Rule 1.8.9, which exempted any transaction permitted by the Probate Code, as long as the transaction did not violate any other ethical rule.[2]	The Commission disagrees that a rule excepting sales pursuant to Probate Code §§ 9881 and 9882 should be substituted for the Commission's proposed rule. There are several reasons for the Commission's recommended rule: *First*, when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

[2] RRC1's proposed Rule 1.8.9 provided:

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.

(b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.

(c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

Proposed Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments

TOTAL = 3	A = 2
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The public is not protected by an inflexible rule that prohibits transactions that a court has determined to be to the advantage of the estate and which are fair, reasonable and subject to independent advice (as required by Rule 1.8.1).	Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. *Second*, Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct. Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. *Third*, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. *Lastly*, the Office of the Chief Trial Counsel on three separate occasions submitted a comment urging the first Commission or this Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections. The commenter's last point is that the court will confirm the lawyer's compliance with proposed Rule 1.8.1 [current rule 3-300] and its requirement to provide to the client [estate] an opportunity to seek independent advice and will result in public protection. However, Probate Code § 9881, the statute under which a lawyer would seek to have a court approve the sale, requires only "written consent" and does not require that the court determine that the transaction or acquisition is fair and reasonable to the estate

Proposed Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments

TOTAL = 3 ***A = 2*** ***D = 0*** ***M = 1*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						or beneficiaries and that the terms are fully disclosed in writing with an opportunity to seek the advice of independent counsel. RRC1's approach would not enhance public protection.
X-2016-104u	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.
X-2016-120j	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.10
(Current Rule 3-120)
Sexual Relations With Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-120 (Sexual Relations With Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.8(j). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 1.8.10.

Rule As Issued For 90-day Public Comment

The main issue considered was whether to retain California's current approach that prohibits sexual relations in limited circumstances where the relations are: (i) required as a condition of a representation; (ii) obtained by coercion, intimidation or undue influence; or (iii) cause the lawyer to perform legal services incompetently; **or** to adopt the approach used in most jurisdictions that follows ABA Model 1.8(j) in prohibiting all sexual relations unless the consensual sexual relationship existed at the time that the lawyer-client relationship commenced.

Proposed rule 1.8.10 substantially adopts Model Rule 1.8(j). The Commission believes that California's current rule renders it difficult to prove a violation in the typical circumstance of consensual sexual relations[1] because the rule is not a bright-line standard. For example, where consensual sexual relations occur, the State Bar must prove that the relations caused the lawyer to perform legal services incompetently. While this might represent a regulatory policy of imposing a least restrictive prohibition on conduct protected under a constitutional right of privacy,[2] it imposes a complexity that is likely frustrating enforcement.[3]

The potential for the current rule requirements to frustrate enforcement becomes apparent upon close examination of California's duty of competent representation that is formulated to be consistent with Supreme Court precedent. Discipline case law provides that mere negligence is not a violation of the duty of competence. In *Lewis v. State Bar* (1981) 28 Cal.3d 683 [170 Cal.Rptr. 634], the California Supreme Court reaffirmed this principle stating that: "This court

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[1] The current rule also prohibits sexual relations that are not consensual as well as improper conduct seeking sexual relations that may or may not result in the occurrence of any sexual relations (e.g., relations sought or obtained by coercion or as a quid pro quo for receiving legal services for a lawyer). The proposed rule would no longer include these aspects of the current rule. Lawyers would continue to be subject to discipline for such misconduct under both Business and Professions Code § 6106 (acts constituting moral turpitude) and § 6106.9 which is the statutory analog to current rule 3-120. Moving to the Model Rule standard in proposed Rule 1.8.10 is not intended to abrogate these existing statutory prohibitions.

[2] Although the general prohibition in the Commission's proposed rule is more restrictive than the current rule in regards to consensual sexual relations, it is not believed to be unconstitutional. In connection with the work of the first Commission, the State Bar inquired on more than one occasion with other jurisdictions that have the same or similar rule to Model Rule 1.8(j) (most recently in 2012) as to whether their rules have been challenged based on a constitutional right to privacy. No jurisdiction indicated a constitutional challenge and the published disciplinary case law of other states do not show any such challenges.

[3] There are no published California disciplinary cases applying rule 3-120.

has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." (*Lewis v. State Bar* at p. 688.) As a result of this longstanding interpretation of the duty of competence, even if a lawyer engages in consensual sexual relations that cause an act of simple negligence in the performance of a legal service, the lawyer cannot be held to have violated rule 3-120(B)(3). If the Commission's proposed rule is adopted, this outcome would be different because all consensual sexual relations arising during the lawyer-client relationship would constitute a rule violation regardless of whether the lawyer provided competent legal services.

The Commission also believes that this bright-line prohibition will have a salutary deterrent effect that is not present in the current California rule. Public commentators in connection with the first Commission's project provided anecdotal evidence of misconduct that was not deterred by the current rule. In addition, other professions, such as psychotherapists, have stricter rules that are more protective. By comparison with the restrictions in those professions, retaining the current rule could diminish public confidence in the legal profession.

In adopting the language of Model Rule .1.8(j), proposed Rule 1.8.10 would eliminate the express exception in the current rule that permits sexual relations between lawyers and their spouses. However, the Commission notes that: (1) most other jurisdictions do not have an express spousal exception but have not experienced known problems; and (2) a spouse who later becomes a client would fall under the exception for sexual relations that predate a lawyer-client relationship.

Proposed Rule 1.8.10 retains the definition of sexual relations in the current rule. This is a departure from the rule adopted in most jurisdictions but the Commission believes it is warranted because the definition promotes compliance and because the same definition appears in the statutory prohibition on sexual relations with a client (subdivision (d) of Business and Professions Code section 6106.9). In addition, the proposed rule includes a new comment (Comment [3]) that provides a reference to the statutory prohibition.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of paragraph (a) to include an express exception for sexual relations with a client who is the lawyer's spouse or registered domestic partner. The Commission also added a new paragraph (c) that is intended to value the privacy rights of a client in those circumstances where a person other than the client alleges a violation of the rule. New paragraph (c) was derived in part from the Commission's consideration of the comparable rule in Minnesota. The language in the Minnesota Rule 1.8(j) provides that: "(4) if a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director of the Office of Lawyers Professional Responsibility, in determining whether to investigate the allegation and whether to charge any violation based on the allegations, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge."

In addition, in Comment [1] the Commission removed the brackets around a cross reference to Rule 2.1. The brackets marked the reference to Rule 2.1 as being tentative until the Commission determined whether to recommend a version of that rule. The Commission has now considered Model Rule 2.1 and is recommending that a version of that rule be a part of the State Bar's comprehensive revisions. Accordingly, the brackets are omitted in the current version of proposed Rule 1.8.10.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.10 [3-120]

Commission Drafting Team Information

Lead Drafter: James Ham
Co-Drafters: Nanci Clinch, Judge Karen Clopton, Daniel Eaton

I. CURRENT CALIFORNIA RULE

Rule 3-120 Sexual Relations With Client

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Discussion

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost

strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.3
Vote: 14 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.3
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.10 Sexual Relations With Client

(a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.

(c) If a person* other than the client alleges a violation of this Rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this Rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

Comment

[1] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this Rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This Rule and the statute impose different obligations.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-120)

Rule 1.8.10 [~~3-120~~] Sexual Relations With Client

(a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(~~A~~b) For purposes of this ~~rule~~Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.

~~(B) A member shall not:~~

~~(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or~~

~~(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~

~~(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.~~

~~(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

(c) If a person* other than the client alleges a violation of this Rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this Rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

~~Discussion~~Comment

[1] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this Rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This Rule and the statute impose different obligations.

~~Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.~~

~~For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)~~

~~Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.~~

V. RULE HISTORY

In 1989, Assembly Bill No. 415 (Roybal-Allard) enacted Business and Professions Code § 6106.8 (Stats. 1989, ch. 1008), which required the State Bar, with the approval of the Supreme Court, to adopt a rule of professional conduct governing sexual relations between attorneys and their clients.

In 1991, a board subcommittee was appointed to study the subject. The subcommittee considered five versions of a rule of professional conduct. One version, Draft B, provided a bright-line ban similar to ABA Model Rule 1.8(j).[1] In a memorandum to the Board dated April 10, 1991, the subcommittee concluded that "a flat prohibition on lawyer-client sexual contact will not withstand constitutional challenge." Public comment also expressed concern about the constitutional issue. The subcommittee had considered the psychotherapist prohibition in Business and Professions Code § 729 and noted that no appellate court had addressed the constitutionality of that statute.[2]

In May 1991, the State Bar transmitted the April 10, 1991 memorandum and the five draft rules to the California Supreme Court. The Board recommended Draft F, which provided an evidentiary presumption that lawyer-client sexual relations violate the rule's prohibition and shifted the burden of proof to the lawyer in a disciplinary proceeding.

In a letter dated May 20, 1992, the Court directed the State Bar to provide additional legal analysis of the constitutional validity of Draft F, particularly whether the proposed rule and its rebuttable presumption were the least restrictive means of achieving the state's interests. Before the State Bar provided a response, the Court approved Draft F with modifications deleting the evidentiary presumption. Current rule 3-120 became operative on September 14, 1992 and has not been amended since.

In 1992, the Legislature added § 6106.9 (Stats. 1992, ch. 740) to regulate lawyer-client sexual relations.[3] Section 6106.9 and rule 3-120 have comparable restrictions.

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[1] ABA Model Rule 1.8(j) states: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

[2] There is still no appellate court decision addressing the constitutional issue.

[3] Section 6106.9 provides:

> (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to do any of the following:
>
> > (1) Expressly or impliedly condition the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the attorney.
> >
> > (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule and the Comments.

     Commission Response: No response required.

  2. The second sentence of Comment [3] should be clearer as to its meaning.

     Commission Response: The Commission declines to make the suggested change. It believes that the comment adequately and succinctly alerts lawyers to the differences between rule and statute ("This Rule and statute impose different obligations.")

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

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(3) Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently in violation of Rule 3-110 of the Rules of Professional Conduct of the State Bar of California, or if the sexual relations would, or would be likely to, damage or prejudice the client's case.

(b) Subdivision (a) shall not apply to sexual relations between attorneys and their spouses or persons in an equivalent domestic relationship or to ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

(c) Where an attorney in a firm has sexual relations with a client but does not participate in the representation of that client, the attorneys in the firm shall not be subject to discipline under this section solely because of the occurrence of those sexual relations.

(d) For the purposes of this section, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(e) Any complaint made to the State Bar alleging a violation of subdivision (a) shall be verified under oath by the person making the complaint.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seventeen public comments were received. Eight comments agreed with the proposed Rule, six comments disagreed, and three comments agreed only if modified. During the 45-day public comment period, three public comments, including the above comment from OCTC, were received. Two comments disagreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California's Constitutional Right to Privacy

In 1972, California voters amended Article I, § 1 of the California Constitution to provide a specific right to privacy:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

In *Am. Acad. Of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 341-342 [66 Cal.Rptr.2d 210], the California Supreme Court discussed the fundamental right of autonomy privacy, which consists of a class of interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. Sexual privacy is included under autonomy privacy. "California's privacy protection," the Court has held, "embraces sexual relations." *Vinson v. Sup. Ct.* (1987) 43 Cal.3d 833, 841 [239 Cal.Rptr. 292][privacy protection bars discovery into plaintiff's sexual history].

However, the California Supreme Court has emphasized that the right to privacy is not absolute. *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 38 [26 Cal.Rptr.2d 834]. The Court has stated, "[e]ven when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy," and those factors must be considered when weighing personal privacy rights. *Id.* at p. 36.

The only California case that has considered the right to privacy with respect to attorney-client sexual relations, *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369 [193 Cal.Rptr. 422], was decided before current rule 3-120 was enacted. The court in *Barbara A.* held that a woman who became pregnant by her former attorney was not barred from suing the attorney for battery and deceit. *Id*. at p. 385. The woman alleged that she consented to sexual intercourse in reliance on

the attorney's knowingly false representation that he was sterile, that the lawyer-client relationship produced in her a sense of trust, and that she justifiably relied on the attorney's representation. The court of appeal allowed the suit to proceed, but declined to address the plaintiff's claim that it was an ethical breach for an attorney to induce a client to have sexual relations during the course of the representation, stating that the question was more properly directed to the State Bar. *Id*. at p. 384.

In 1991, a California appellate court found that it was a breach of fiduciary duty for an attorney to withhold legal services when his client refused to grant him sexual favors. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363 [281 Cal.Rptr. 242]. Because of the attorney's "special relationship" with the client and because the attorney "was in a position of actual or apparent power over defendant," the court held that his behavior constituted outrageous conduct for the purposes of the client's claim of intentional emotional distress. *Id*. at p. 373. Because the attorney's advances were rejected, however, the court refused to address "whether sexual relations between an attorney and client constitute a per se violation of the fiduciary relationship," and there was no discussion of any state or federal constitutional right to engage in sexual relations with a seemingly willing client. *Id*. at p. 375.

2. California Law Regarding Sexual Relations in Other Professional Settings

California courts have upheld restrictions on sexual relations between physicians and their patients. See, *Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1353 [131 Cal.Rptr.3d 536], emphasis in original "the Legislature decided that the only way to stop physicians from engaging in these unethical practices was to ban '*any act* of sexual abuse, misconduct, or relations' between physician and patient." And in *Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal.App.4th 525 [6 Cal.Rptr.3d 406], the court of appeal upheld a private employer's policy prohibiting "consensual intimate relationship[s] between a supervisor and any employee," concluding that there is no violation of the right to privacy because a supervisor has no "reasonable expectation of privacy in pursuing an intimate relationship with a subordinate," particularly where the supervisor had advance notice of the company's express policy regarding employee relationships. *Id*. at pp. 532-533.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct Rule 1.8(j)," revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf [Last visited 2/6/17]

- Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim.[4] Sixteen jurisdictions have adopted Model Rule 1.8(j) with modifications.[5] Eight jurisdictions[6] address this issue in a different rule or in a Comment to a different rule.[7] Nine

[4] The eighteen jurisdictions are: Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Illinois; Indiana; Kansas; Kentucky; Missouri; Montana; Nebraska; New Hampshire; North Dakota; Pennsylvania; and South Dakota.

[5] The sixteen jurisdictions are: Alabama; Alaska; Iowa; Minnesota; Nevada; New York; North Carolina; Ohio; Oklahoma; Oregon; South Carolina; Utah; Washington; West Virginia; Wisconsin; and Wyoming.

[6] The eight jurisdictions are: California, District of Columbia; Florida; Maine; Maryland; New Mexico; Tennessee; and Vermont.

[7] Three examples of jurisdictions that have taken a different approach in their Rules of Professional Conduct to how they regulate a lawyer's sexual relations with clients are the District of Columbia, Florida and Maine.

The District of Columbia adds several comments to its Rule 1.7 (Conflict of Interest: Current Clients):

> **Sexual Relations Between Lawyer and Client**
>
> [37] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.
>
> [38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.
>
> [39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal involvement, and another

jurisdictions do not address sexual relations with clients at all in their Rules of Professional Conduct.[8]

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representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

Florida has adopted Rule 8.4(i), which provides it is misconduct for a lawyer to:

> (i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer - client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

Maine has added Comment [12] to its Rule 1.7 (Conflicts of Interest: Current Clients):

> Maine has not adopted the ABA Model Rules' categorical prohibition on an attorney forming a sexual relationship with an existing client because such a rule seems unnecessary to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that we do not believe should be a matter of attorney discipline. However, the lack of a categorical prohibition should not be construed as an implicit approval of such relationships. Attorneys have been disciplined under the former Maine Code of Professional Responsibility for entering into sexual relations with clients, and they may be disciplined for similar conduct under these rules. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. In certain types of representations such as family or juvenile matters, the relationship is almost always unequal; thus, a sexual relationship between lawyer and client in such circumstance may involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship.

[8] The nine jurisdictions are: Georgia; Louisiana; Massachusetts; Michigan; Mississippi; New Jersey; Rhode Island; Texas; and Virginia.

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

A. Introduction

The Commission voted to change the California rule so that it tracks more closely Model Rule 1.8(j), which establishes a bright line test prohibiting all sexual relations between client and lawyer. Current Rule 3-120 prohibits sexual relations between client and attorney only in cases involving (i) a demand for sexual relations incident to or as a condition of any professional representation; (ii) coercion, intimidation, or undue influence in entering into sexual relations with a client; or (iii) where the sexual relations cause the member to perform legal services incompetently. Consistent with the existing rule, the proposed rule does not apply to consensual sexual relations which predate the initiation of the lawyer client relationship.

B. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a bright-line prohibition on sexual relations between lawyers and their clients.

    - Pros: Establishing a violation of the current rule and its statutory counterpart, Bus. & Prof. Code § 6106.9, has been extremely difficult to prove. Consequently, improper sexual relations are not deterred by the current rule or statute because discipline is seldom imposed. The proposed broader prohibition significantly reduces enforcement obstacles and is a bright-line statement of the prohibition on sexual relations. The proposed revisions to the Rule also fulfill each of the five elements of this Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and the ABA Model Rule subsection and rules adopted by most of the states whose rules of conduct address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary Comment to the Rule.

    - Cons: The data does not establish that it is "extremely difficult to prove" valid cases of improper sexual conduct. According to State Bar data found in the May 31, 2012 Memorandum from State Bar Staff to the Supreme Court of California regarding proposed Rule 1.8.10, 135 case files alleging sex with a client were reviewed. Although many of those cases were closed, there is no explanation for why OCTC closed the files. In point of fact, OCTC has not taken these cases to trial and there is virtually no record of any losses or successes. Further, as long as there is a "he said/she said" dispute, the proposed rule will be just as "difficult" to prove as the present rule. Indeed, the May 31, 2012 memo reports that there were only 15 cases out of more than 450 complaints where the respondent acknowledged the existence of a sexual relationship. Those cases were presumably not pursued because there was

no evidence of misconduct under the existing rule or client harm. There is no evidence showing that these cases are made "difficult" because of requirements to show undue influence, duress, etc. Rather, any difficulty arises from a denial that sexual relations occurred. That will not change under the proposed rule. As the OCTC staff noted in the May 31, 2012 memorandum, the cases are often difficult to prove "because the evidence frequently amounts to a case of 'he said' versus 'she said.'" Further, "OCTC rarely receives a solid sex-with client complaint that is not supported by another allegation that is easier to prove. The better sex-with-client cases are more easily prosecuted and proven under [B&P Code] section 6106…" There is also little policy justification for easing the legal requirements of proof to justify attorney discipline. If a case is weak or lacks evidentiary support, it does not justify prosecution. If there are proof problems in establishing a claim, the answer is not to automatically discipline attorneys because that is not fair. A bright-line prohibition is also overbroad as it applies in situations where no protection is needed, and the purposes of discipline are not furthered by the imposition of discipline.

A broad bright-line prohibition implicates a lawyer's federal and state constitutional rights to association and privacy. The prohibition also prohibits two adults who, on the one hand, are not exerting, nor on the other, suffering from, undue influence or coercion, from consenting to an intimate relationship.

2. Recommend retaining the exceptions in current rule 3-120 for sexual relations with a client who is a spouse, updated to include a registered domestic partner, and where the sexual relationship existed prior to the formation of the lawyer-client relationship.

    - Pros: The Commission is aware of no evidence that these current exceptions have undermined the policies underlying the rule. That these exceptions do not interfere with the rule's objectives is indicated by the fact that every jurisdiction that has adopted a specific rule regulating client sexual relations has the exceptions.

    - Cons: None identified.

3. Delete current rule paragraph 3-120(D), which provides that a violation of the rule by a lawyer is not imputed to other lawyer's in that lawyer's firm..

    - Pros: Paragraph (D) has been removed because the Commission is recommending the adoption of proposed Rule 1.8.11, which provides that with

the exception of proposed Rule 1.8.10, prohibitions under the rules in the 1.8 series (Rules 1.8.1 through 1.8.9) are imputed to lawyers in the same firm.[9]

- Cons: None identified.

4. Recommend adoption of new paragraph (c), derived from Minnesota Rule 1.8(j), which provides that when a third party files a complaint under the rule, a Notice of Disciplinary Charges may not be filed under the rule until the State Bar has attempted to obtain the client's statement regarding whether the client will be unduly burdened by further investigation.

   - Pros: Paragraph (c) recognizes the California Constitution's express right of privacy and appropriately tailors the proposed rule to avoid a potential Constitutional infirmity. The focus is on the client's right of privacy. Further, although the client is provided with the opportunity to inform the investigation, the client does not have a veto power over the State Bar's ability to pursue a charge in the interests of public protection.

   - Cons: The provision does not go far enough to remove the potential Constitutional violations inherent in a rule that provides for an absolute prohibition on sexual relations with a client.

C. Concepts Rejected (Pros and Cons):

1. Retain the content of the first Discussion paragraph to current rule 3-120 as a Comment.

   - Pros: This paragraph is necessary because it identifies the policy basis of the rule – namely that sexual exploitation by an attorney is improper. The Comment explains the circumstances that justify the state's intervention and regulation of sexual conduct between adults. The California cases cited support these underlying principles.

   - Cons: This paragraph is not necessary for guidance.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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[9] The blackletter text of proposed Rule 1.8.11 provides:

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

D. Changes in Duties/Substantive Changes to the Current Rule:

1. The bright-line ban on sexual relations in the proposed rule is a substantially different approach from current Rule 3-120, which permits lawyer-client sexual relations unless a member violates a specific prohibition in Rule 3-120(B), i.e., a lawyer demanding sexual favors as a condition of representation, a lawyer employing coercion, intimidation, or undue influence in entering sexual relations with a client, or when the sexual relations cause the lawyer to perform legal services incompetently.

E. Non-Substantive Changes to the Current Rule or Clarifying Changes to Model Rule 1.8(j):

1. Substitute the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). See paragraph 3, below.

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current Rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Assign the number 1.8.10 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(j).

    - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the first Commission recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

    - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other jurisdictions to research California case law that might interpret and apply the rule.

4. Other non-substantive changes to the Model Rule include: the use of "lawyer-client" replaces the Model Rule's "client-lawyer." This conforms to state statutory language commonly used for the lawyer-client relationship. (E.g., Evid. Code § 958).

5. The verb "have" in Model Rule 1.8(j) is changed to "engage in" in proposed Rule 1.8.10(a): "A lawyer shall not engage in sexual relations with a client unless. . . ." Because the verb "have" might be misconstrued to mean that the lawyer must be the initiator or the aggressor, and that "engage in" would not suggest that the lawyer must be the initiator to trigger the prohibition, the Commission deviated from the Model Rule language. Ohio's variation of Model Rule 1.8(j) similarly replaces "have" with "solicit or engage in."

F. Alternatives Considered:

The only alternative considered was whether to retain the current California rule.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Ham submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.10 [3-120] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.10 [3-120] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by James Ham, on the Recommended Adoption of Proposed Rule 1.8.10

I dissent. While I agree that sexual relations with a client is usually unwise, and that sexual relations involving a quid quo pro, coercion, intimidation or undue influence, or under circumstances where the lawyer's competence is impaired, should subject a lawyer to discipline, I do not support the proposed expansion of the rule to prohibit all sexual relations, under any circumstances, under penalty of discipline.

Without question, some attorney-client relationships involve vulnerable clients and unequal bargaining positions. The existing rule protects the public against attorney misconduct in those cases by making it cause for discipline to engage in sexual relations in exchange for legal services, or under circumstances involving coercion, intimidation, or undue influence.

The proposed rule, however, bans all sexual relations, regardless of circumstance. I agree with the views expressed by members of the public, as well as the Los Angeles County Bar Association opposing this rule, and note the lack of consensus among the members of COPRAC concerning the wisdom of the proposed total ban. The existing rule articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults.

There is no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively. If, under the existing rule, the evidence is insufficient to support attorney discipline, the answer is not to pass a rule dispensing with proof of coercion, undue influence, quid pro quo or lack of competence, and imposing discipline based merely upon the fact that sexual relations occurred. Proponents of a complete ban cannot articulate why a lawyer should be disciplined for sexual relations with a mature, intelligent, consenting adult, in the absence of any *quid pro quo*, coercion, intimidation or undue influence. Nor can the proponents establish that the existing rule presents evidentiary burdens that are unjustified and which cannot be met by complaining witnesses.

The paradigm that all attorney-client relationships involve unequal bargaining power does not apply in many legal relationships and therefore cannot supply the rationale for this rule. Likewise, any attempt to analogize the legal professional to medical professionals or to psychologists is not persuasive because the range of relationships between legal professionals and clients is vastly different, as is the nature of the work performed. A complete ban would infringe personal rights in circumstances where there is no undue influence, coercion or risk to competent representation.

The proposed rule also vests entirely too much discretion in prosecutorial authorities, who may apply the complete ban rule against some, but not others, in an unfair, arbitrary or capricious manner.

Commission's Response to Dissent Submitted by James Ham on the Recommended Adoption of Proposed Rule 1.8.10

The dissent of our colleague James Ham to Proposed Rule 1.8.10 consists of a vigorous defense of the current rule that addresses sex with clients, Rule 3-120. The existing rule permits attorneys to have sex with their clients unless: (1) the attorney conditions the representation of a client on submission to sexual demands; (2) the attorney uses "coercion, intimidation, or undue influence" to get the client to submit to sexual demands; or (3) continued sexual relations with the client will cause the attorney to violate the attorney's duty to the client to perform legal services competently. (Rule of Professional Conduct 3-120(B).)

Mr. Ham asserts that the current rule "articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults."

But the current rule is broken and the Commission has fixed those inadequacies by proposing a revised rule that, unlike the existing rule, complies with the mandate of this Commission's charter in every respect. As an initial matter, Mr. Ham is simply incorrect when he asserts that proposed Rule 1.8.10 would prohibit an attorney from having any sexual relations with clients "under any circumstances, under penalty of perjury." In fact, the proposed rule carries forward the exceptions in the current Rule for sexual relations between lawyers and their spouses and for sexual relations which predate the establishment of the lawyer-client relationship. (Compare Rule 3-120(C) with Proposed Rule 1.8.10(a).)

The dissent's main point appears to be that there is "no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively." Leaving aside the mischaracterization of the proposed rule as a "complete ban," the Commission believes that our dissenting colleague misperceives our charge.

The proposed revisions to the Rule fulfill each of the five principles of the Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and ABA Model Rule 1.8(j) and rules adopted by the majority (31) of the jurisdictions whose rules address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary comment to the Rule.

The current Rule is defective in every one of these respects. Given the mandates of our Charter, it is inconceivable that the Commission would have adopted the existing Rule from scratch. It would have been equally inconceivable, therefore, for the Commission to have retained the current Rule as the dissent proposes.

The Commission has proposed replacing a rule that frames a lawyer's sex with clients as "permitted unless" with a rule that frames a lawyer's sex with clients as "prohibited unless." The Commission believes that strikes the appropriate balance between privacy concerns and the power dynamic of the lawyer-client relationship.

The State Bar of California has tried the existing rule for 25 years and it has not worked. There are virtually no instances in which discipline has been imposed under the existing Rule. Consequently, the Commission has proposed fixing it. That fulfills the charge of this Commission and will lead lawyers more appropriately to discharge their duties to their clients.

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

TOTAL = 4	A = 0
	D = 3
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-6b	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (Schmid) (12-14-16)	Y	D		1. For the reasons stated in our prior comment letter dated September 21, 2016, we continue to oppose Proposed Rule 1.8.10 in its current revised form.	1. The Commission reasserts it previous responses to the commenter's points in opposition to the proposed rule.
				(a)	2. We appreciate the changes introduced to paragraph (a) which seeks to address concerns raised in public comments about the potential invasion of constitutional rights of privacy and freedom of association by applying the rule only to a "current" client "who is not the lawyer's spouse or registered domestic partner."	2. No response required.
				(c)	3. We note that new paragraph (c) was added to Proposed Rule 1.8.10 (to the effect that, if the complainant is someone other than the client, the State Bar must consider whether the client would be unduly burdened by a charge against the attorney). If the elements of coercion, intimidation, or undue influence were present in the relationship, then the client could be pressured to resist the filing of charges, thereby impairing disciplinary proceedings and	3. The Commission carefully considered these comments and declined to make the suggested changes. The Commission has a basic disagreement with the commenter that the California Constitution requires the commenter's suggested changes or that considerations of public policy warrant them.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					frustrating public protection. Under current rule 3-120, there is no such constraint on investigation and prosecution; the issues presented by third-party complaints are addressed in Business and Professions Code 6106.9(3)(e), which requires that a complaint by any person alleging improper sexual relations between a lawyer and client be verified under oath. While the newly proposed language would narrow the scope of the rule's applicability, it does not cure the constitutional defects that an absolute ban would raise as to the rights of both lawyers and clients. We believe that the rule should retain the language of current rule 3-120, which prohibits sexual relations based on coercion, undue influence or intimidation, not merely on just whether an attorney engages in sexual relations with a client with whom he or she was not already involved sexually at the time the representation commenced.	
Y-2016-15	Mills, Robert (01-09-17)	N	D		I am deeply opposed to this proposed Rule. I believe it is unwarranted, demeaning to both attorneys and their clients, and is so overbroad and indiscriminate	The Commission disagrees with the commenter's assessment. In particular, the Commission disagrees that the proposed rule, which has been

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					that it is likely to result in all sorts of unintended and inequitable consequences, including among other things, blackmail and extortion.	tailored to address potential constitutional infirmities, is "overbroad and indiscriminate."
Y-2016-27e	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	D		Rule 3-120 is nuanced and balanced, with an understanding of the nature of human relations. The new Rule prohibits sexual relations with a current client who is not the spouse or domestic partner of the attorney unless the consensual sexual relationship existed at the time that the lawyer-client relationship commenced. The new Rule might be easier to enforce, but it is unrealistic in the real world. The existing Rule correctly recognizes that sex does occur, and the Rule prohibits sex that is non-consensual, is coerced, is a condition of representation, or results in incompetent representation. The Commission's real complaint is not that lawyer's and clients are engaging in sexual relations, it is that the current Rule is too difficult to enforce without proof of harm or misconduct. The only evidence the Commission can muster that the current Rule is ineffective in the executive summary is anecdotal. We	

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

TOTAL = 4 *A = 0* *D = 3* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					oppose this revision.	
Y-2016-21j	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC supports this rule and the Comments. 2. The second sentence of Comment 3, however, is unclear as to its meaning because it does not specify what the obligations are.	1. No response required. 2. The Commission disagrees that the second sentence is unclear. It provides a cross-reference to the statute, where a lawyer can determine what the obligations are. It is not an appropriate function of a rule comment to describe or explain a statute.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.11
(No Current Rule)
Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: Model 1.7 (current client conflicts) [rule 3-310(B) and (C); 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

As part of its study of conflicts of interest rules, the Commission also evaluated Model Rule 1.8, which compiles in a single rule 10 unrelated conflicts of interest concepts. In addition, where applicable the Commission has studied the current California rules that correspond to each of the conflicts concepts in Model Rule 1.8. The Model Rule 1.8 provisions and their California counterparts are:

Model Rule	California Rule Counterpart [new number]
1.8(a)	3-300 (Business Transactions With Client) [1.8.1]
1.8(b)	No California Rule Counterpart [but see proposed Rule 1.8.2]
1.8(c)	4-400 (Gifts From Clients) [1.8.3]
1.8(d)	No California Rule (none recommended)
1.8(e)	4-210 (Payment of Client's Personal or Business Expenses) [1.8.5]
1.8(f)	3-310)(F) (Third Party Payments) [1.8.6]
1.8(g)	3-310(D) (Aggregate Settlements) [1.8.7]
1.8(h)	3-400 (Limiting Liability to a Client) [1.8.8]
1.8(i)	No California Rule (none recommended)
	4-300 (Purchasing Client Property at a Foreclosure) [1.8.9]
1.8(j)	3-120 (Sex with Client) [1.8.10]

The result of the Commission's evaluation is a three-fold recommendation that the State Bar adopt, and the Supreme Court approve:

(1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements), and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in California case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

(2) the rejection of the Model Rule 1.8 framework pursuant to which 10 unrelated conflicts of interest concepts are compiled in a single rule. Instead, the Commission has recommended that those concepts, most of which are already found in the current California Rules of Professional Conduct as separately numbered rules, be carried forward as separate rules with their own rule number that corresponds to the counterpart concept in Model Rule 1.8. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1 [current rule 3-300]; the rule corresponding to Model Rule 1.8(c) is numbered 1.8.3 [current rule 4-400], and so forth. Each of these rules is addressed in separate executive summaries.

(3) proposed Rule 1.8.11 (imputation of prohibitions in the 1.8 series of rules), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest that arise from the 1.8 series of rules. Because conflicts that these rules are intended to prevent are not necessarily cured by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts.

Proposed rule 1.8.11 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Conflicts of Interest Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.[1]

2. ***Recommendation that the Model Rule 1.8 compilation framework approach be rejected in favor of separately numbered rules as in the current California Rules***. The Commission recommends that California not follow the Model Rules' approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the Commission recommends that the rules in the 1.8 series, which are unrelated to one another

[1] Every other jurisdiction besides California has adopted the aforementioned ABA conflicts rules' framework.

except to the extent they involve potential conflict of interest situations, be given separate numbers. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the model rule counterpart should achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide. Aside from this ease of access rationale, the Commission also determined that the different concepts reflected in the rules, each of which imposes important duties critical to the maintenance of an effective lawyer-client relationship founded in trust, deserved the prominence of a separate, standalone rule.

3. ***Recommendation of separate imputation rule for the 1.8 series of rules***. As noted, because the conflicts that these rules are intended to prevent cannot be cured by either the client's consent or by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts. Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the ABA Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The ABA Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

> 1. Treat imputation under Rule 1.8 rather than 1.10
>
> The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k) [counterpart to proposed Rule 1.8.11], an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

The first Commission also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of Rules. Similar to the Ethics 2000 Commission, the first Commission concluded that a separate imputation rule was warranted.

Text of Rule 1.8.11. Proposed rule 1.8.11 carries forward the rule proposed by the first Commission. The first Commission made no substantive changes to the Model Rule. Rather, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.[2]

[2] Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

Comment. The Commission recommends including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when the rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the Commission concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

National Background – Adoption of Model Rule 1.8(k)

Aside from California, every jurisdiction except five have adopted some version of Model Rule 1.8(k). The five jurisdictions are Georgia, Michigan, Mississippi, New York and Texas. Of those five jurisdictions, four have either not completed their review of the Ethics 2000 changes to the Model Rules (Georgia and Texas) or have made only piecemeal changes to their Rules since the ABA adopted the Ethics 2000 revisions (Michigan and Mississippi).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.11

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Judge Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.8(k), from which proposed Rule 1.8.11 is derived.]

Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules

* * * * *

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

* * * * *

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.8.11
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.8.11
Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 1.8.11 (CLEAN)

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm,* a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

IV. COMMISSION'S PROPOSED RULE 1.8.11 (REDLINE TO ABA MODEL RULE 1.8(K))

Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

* * * * *

~~(k)~~ While lawyers are associated in a law firm,* a prohibition in ~~the foregoing paragraphs (a)~~Rules 1.8.1 through ~~(i)~~1.8.9 that applies to any one of them shall apply to all of them.

Comment

* * * * *

~~*Imputation of Prohibitions*~~

~~[20]~~ ~~Under paragraph (k), a~~A prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~Rules 1.8.1 through ~~(i)~~1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another ~~member of~~lawyer associated in the law firm* without complying with ~~paragraph (a)~~Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ This Rule does not apply to Rule 1.8.10 since the prohibition ~~set forth in paragraph (j)~~in that Rule is personal and is not applied to associated lawyers.

V. RULE HISTORY

There is no California rule that corresponds to Model Rule 1.8(k). The ABA did not adopt Model Rule 1.8(k) until 2002 as part of its Ethics 2000 comprehensive study and revision of the Model Rules. Prior to 2002, imputation of conflicts arising under Model

Rule 1.8 were handled by reference to Model Rule 1.10. However, the Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

> 1. Treat imputation under Rule 1.8 rather than 1.10
>
> The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k), an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission Response: No response required.

  2. The Commission should strike the Comment to this rule, except for the last sentence in the Comment. The Comment just repeats the rule, which is clear on its face.

     Commission Response: The Commission did not make the suggested change. It believes that the first and second sentences of the Comment present an important example that explains the application of the rule. This is an appropriate function of a comment.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments, including the above-referenced comment from OCTC, were received. Two agreed with the proposed rule, one disagreed, and one agreed only if the proposed rule were modified. A public comment synopsis table, with the Commission's responses to the comments received, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTION

A. Related California Law

As noted in rule 3-100, comment [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

a. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

b. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business & Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and lawyer for the purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179). Even information in the public record that is not easily discoverable is protected by the duty. (*Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

Duty of Confidentiality and Lawyer-Client Privilege Compared. The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily defined concept of a "confidential communication" (see Evid. Code sec. 952 for the definition of a "confidential communication" between a "lawyer" (see Evid. Code sec. 950 for the definition of "lawyer") and a "client" (see Evid. Code sec. 951 for the definition of "client"). For example, the duty encompasses information acquired by virtue of the lawyer–client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is

preparing advertising material may not use information protected by the duty without the client's consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see, Evid. Code § 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code sec. 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

c. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." § 2018.030(a). Any other work product of an attorney "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." § 2018.030(b).

Duty of Confidentiality and Work-Product Compared. There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Civ. Proc. § 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. sec. 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

B. ABA Model Rule Adoptions

- **Maine Rule 1.8(k)** is identical to Maine Rule 1.8(k):

  Rule 1.8(k) Conflict of Interest: Current Clients: Specific Rules

  (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

The ABA State Adoption Chart for the ABA Model Rule 1.8(k), from which proposed rule 1.8.11 is derived, revised December 1, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/6/17]

- Thirty-five jurisdictions have adopted Model Rule 1.8(k) verbatim (AL, AZ, AR, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MN, MO, MT, NE, NH, NM, NC, OH, OK, OR, PA, RI, SC, SD, UT, VT, WV, and WY); seven jurisdictions have adopted a rule that is similar to 1.8(k) (AK, CO, DC, NV, VA, WA, and WI); and nine jurisdictions have not adopted a rule derived from Model Rule 1.8(k) (CA, GA, MI, MS, NJ, NY, ND, TN, and TX).

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

A. Concepts Accepted (Pros and Cons):

1. Adopting a rule separate from the general imputation rule (proposed rule 1.10) that imputes prohibitions in the 1.8 series of rules to lawyers within the prohibited lawyer's firm.

    - Pros: As noted in secton V, above, the ABA Ethics 2000 Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. Because conflicts that the 1.8 series of rules are intended to prevent are not necessarily cured by obtaining the client's consent or by the erection of an ethical screen within the law firm, this specific rule, which does permit either, is necessary to protect the client's interests. Further, by adopting this rule, where client consent is appropriate, (e.g., proposed rule 1.8.1 [3-300]), it will be available on a rule-by-rule basis in the 1.8 series.

    - Cons: At present, California has addresses imputation of conflicts of interest and other prohibited representations in case law. See, e.g., *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776. There appears to be no evidence that client or public protection has been diminished by that approach. If anything,

2. Adopting a single comment, derived from Model Rule 1.8, cmt. [20], as revised.

    - Pros: The comment provides an important example of how rule 1.8.11 would be applied when a rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the drafting concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule,

proposed rule 1.8.10, because that rule is personal to the lawyer involved.

- Cons: See "Cons" to paragraph A.1, above.

B. Concepts Rejected (Pros and Cons):

None. This section identifies concepts the Commission considered before the rule was circulated for public comment. There may be concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Proposed rule 1.8.11 is a substantive change to the current California rules and thus would appear to be a change in a lawyer's duties as there is no counterpart in the current rules, because imputation has largely been addressed in California by case law, there arguably is no change in duties.[1]

D. Non-Substantive Changes to the Current Rule:

1. References to subparagaphs (a) – (i) of Rule 1.8 have been replaced with the stand alone numbering of the proposed rules 1.8.1 – 1.8.9.

   All other changes, including the designation of proposed rule 1.8.11 and the other rules in the 1.8 series as separate, standalone rules rather than as paragraphs in a single rule as in the ABA Model Rules, are non-substantive.

E. Alternatives Considered:

The only alternative considered was not to recommend adoption of the proposed rule.

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[1] There is one mention of imputation in the current California Rules. The sixth Discussion paragraph to Rule 3-310 provides:

> "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

However, that provision would not apply to the prohibitions in the 1.8 series. The 1.8 series of rules are largely derived from other provisions of the current California rules. Proposed rule 1.8.1 is derived from rule 3-300; 1.8.3 from rule 4-400, 1.8.5 from rule 4-210, 1.8.6 and 1.8.7 from rules 3-310(F) and (D), respectively, 1.8.8 from rule 3-400, 1.8.9 from rule 4-300, and 1.8.10 from rule 3-120.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.11 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.11 in the form attached to this Report and Recommendation.

Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
Synopsis of Public Comments

TOTAL = 4 ***A = 2*** ***D = 1*** ***M = 1*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bb	Committee on Professional Responsibility and Conduct (COPRAC) (09-08-16)	Y	A		COPRAC has reviewed the provisions of proposed Rule 1.8.11 – Imputation of Prohibitions. COPRAC generally supports the adoption of Rule 1.8.11. However, to avoid possible ambiguity about the impact of this Rule, COPRAC suggests that the Commission add a comment stating that no attorney will be subject to discipline for a violation of Rules 1.8.1 – 1.8.9 committed by another attorney merely because they are both members of the same law firm, that is, without participation in the misconduct that constitutes the violation.	The Commission did not make the suggested change. Neither the rule nor the comment suggests that *liability* for a violation by another lawyer in a firm will be imputed to any other lawyer simply by the other lawyer being a partner or associate in the firm. The plain language of the rule only imputes the *prohibition* on engaging in the conduct, not liability should another firm lawyer engages in the conduct.
X-2016-82g	Polish, James (09-27-16)	N	M		This rule imputes one lawyer's disqualification to all lawyers in the law firm in nearly all cases, including where one lawyer happens to have a personal interest. The corresponding ABA Model Rule (no. 1.10(a)) does not require disqualification if the personal interest of the disqualified lawyer does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. That is a prudent limitation that	The commenter is mistaken. This provision is not the counterpart to Model Rule 1.10(a), but rather is the counterpart of Model Rule 1.8(k). The proposed rule is a nearly verbatim statement of the Model Rule.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					should be adopted. I may have a personal interest in the subject matter of a representation because my political, religious, environmental or other personal views are strongly opposed to the relief a client of the firm is seeking or a position it is taking in a matter. That should not have any influence on the ability of another lawyer in the firm to represent the client effectively.	
X-2016-75c	Kerins, Steve (09-25-16)	N	D		In my opinion, the proposed rule is too stringent for the realities of a modern law practice, and is particularly onerous in contexts where lawyers move from one firm or employer to another.	The rule is not onerous. It simply clarifies that certain situations that involve a conflict between a lawyer and a client cannot be resolved by the client's consent to allow another lawyer in the lawyer's firm handle the matter.
X-2016-104w	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. Supports adoption of proposed Rule 1.8.11. 2. Comment should be stricken except for the last sentence. The remainder of the comment restates the rule.	1. No response required. 2. The Commission did not make the suggested. It believes that the first and second sentences provide an important example that explains the application of the rule, which is a proper function of a comment.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.9
(Current Rule 3-310(E))
Duties to Former Clients

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having separate rules that regulate different conflicts interest situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

(2) proposed Rule 1.9 (duties to former clients), which regulates conflicts situations that are currently regulated under rule 3-310(E). Proposed rule 1.9 largely adheres to the internal framework of Model Rule 1.9, which addresses duties to former client in three separate provisions, MR 1.9(a) through (c), rather than the current rule's approach to address those duties in a single provision, 3-310(E).

Proposed rule 1.9 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. The Model Rule Framework has (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).[1]

[1] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees).

2. ***Recommendation of addressing duties to former clients in three separate provisions that track the organization of Model Rule 1.9***. There are three separate provisions, each of which addresses a different aspect of duties owed a former client or recognizes the different ways in which a lawyer can incur duties to a client that survive the lawyer-client relationship. The Commission determined that implementing Rule 1.9 will help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule. This is particularly important in the context of former clients. Although the principal value at issue in conflicts of interest involving former clients is confidentiality, there is a residual duty of loyalty that the Supreme Court has recognized. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811.) The proposed rule affirms that duty. (See paragraph (c)(3) and Comment [1].)

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and delimit the lawyer's precise duties in protecting that information once acquired, (paragraph (c)). Second, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary contexts (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735).)

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.9 recognizes that a lawyer who has participated in the same or a substantially related matter in which the lawyer's new client has interests adverse to the former client, the lawyer will have acquired confidential information material to the new matter and will be prohibited from representing the new client unless the former client gives informed written consent.

Paragraph (b) incorporates Model Rule 1.9(b), which was adopted as the law of California by the court in *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324. In effect, Rule 1.9(b) will codify the *Adams v. Aerojet* case. The concept recognized by *Adams* and MR 1.9(b) is that a lawyer in a law firm may become privy to the confidential information of a firm client even if the lawyer did not personally represent the client in the same or a substantially related matter. This is sometimes referred to as the "water cooler" phenomenon, the lawyer having acquired the information by consulting with another firm lawyer who actually worked on the case. Incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client.

The Commission is also recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (c) has three subparagraphs. Subparagraph (c)(1) prohibits a lawyer from "using" a former client's information to the client's disadvantage except as permitted under the Rules or the State Bar Act, or if the information has become generally known. This is the former client counterpart to proposed Rule 1.8.2, which prohibits a lawyer from "using" a current client's confidential information to the client's disadvantage. Subparagraph (c)(2) prohibits a lawyer from "revealing" a former client's confidential information except to the extent such disclosure is permitted by the Rules or the State Bar Act. Subparagraph (c)(3) has no counterpart in Model Rule 1.9. It carries forward current rule 3-310(E), modified to conform to the Commission's format and style requirements. The intent of including this subparagraph is to ensure that the concept of residual loyalty recognized in the *Wutchumna* and *Oasis West* cases cited above is incorporated into the Rule. This provision is somewhat controversial as a minority of the Commission takes the position that the concept addressed in subparagraph (c)(3) is already adequately addressed in paragraph (a) and subparagraphs (c)(1) and (c)(2), and the inclusion of (c)(3) might cause confusion without adding any public protection.

There are four comments to proposed Rule 1.9, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] clarifies that there is a residual duty of loyalty owed former clients so that a lawyer is prohibited from attacking the very legal services that the lawyer has provided the former client, and provides two examples of prohibited representations. Comment [2] explains how paragraph (b), which codifies *Adams v. Aerojet-General*, should be applied, and provides additional clarification on how the rule should be applied when a lawyer moves laterally from one firm to another. Comment [3] draws an important distinction between information that is in the public record (e.g., a former client's criminal record) and information that is "generally known," and cites to *In the Matter of Johnson*, a Review Department case that imposed discipline on a lawyer for revealing public record information of a former client's criminal history. Comment [4] provides cross-references to related rules that govern other situations involving former clients, for example, when the former client is a governmental agency.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted paragraph (c)(3). The determined that the concept contained in (c)(3) would be adequately addressed in paragraphs (a) and (b), coupled with the prohibitions on use and disclosure of confidential information as contained in (c)(1) and (c)(2). The Commission also added two new comments. A new Comment [2] provided a cross reference to Rule 1.7, Comment [2] for the definition of the term "matter." A new Comment [3] explained when two matters should be regarded as "the same or substantially related."

With these changes, the proposed rule was submitted to the Board of Trustees (Board) for authorization for an additional 45-day public comment period.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

The proposed rule was considered by the Board at its meeting on November 17, 2016. The Board revised the rule to address two potential ambiguities.

First, in Comment [4], the Board revised the third and fourth sentences to add the phrase "lawyers in" before the references to a law firm. This was done to make clear that it is the lawyers in a firm and not a firm itself as an entity that are subject to the rule.

Second, in Comment [6], the Board revised the second sentence to delete a reference to the "disqualification of a firm" and substitute the phrase "imputation of conflicts to lawyers in a firm." This was done to clarify that the attorney conduct standards set by the rules are not intended to be standards of law firm disqualification in non-disciplinary proceedings.

The redline strikeout text below shows the changes made by the Board:

* * * * *

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

* * * * *

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in ~~disqualification of~~ a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made one non-substantive change to the proposed rule. At the start of the second sentence of Comment [3], the Commission substituted the phrase "For example, this" for the word "This" to read: "For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer . . . ."

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310(E) Avoiding the Representation of Adverse Interests

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Discussion

* * * * *

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complimentary provisions.

* * * * *

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.9 [3-310(E)]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.9 [3-310(E)]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.9 [3-310(E)] Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*

(2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a

client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial* risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-310(E))

Rule 1.9 [3-310(E)] ~~Avoiding the Representation of Adverse Interests~~Duties To Former Clients

(~~E~~a) A ~~member shall not, without the~~lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent~~ of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former~~

~~client, the member has obtained confidential information material to the employment.~~.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*

(2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

~~Discussion~~Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial* risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.9)

Rule 1.9 [3-310(E)] Duties ~~to~~To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that ~~person's~~person's interests are materially adverse to the interests of the

former client unless the former client gives informed written consent~~, confirmed in writing.~~.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent~~, confirmed in writing.~~.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client, or when the information has become generally known; ~~or~~*

(2) reveal information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules ~~would~~or the State Bar Act permit ~~or require~~ with respect to a current client.

Comment

[1] After termination of a ~~client-lawyer~~lawyer-client relationship, ~~a~~the lawyer ~~has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for~~owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client~~. So also~~ and (ii) a lawyer who has prosecuted an accused person* could not ~~properly~~ represent the accused in a subsequent civil action against the government concerning the same ~~transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~matter. See also

Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

~~[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial* risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

~~[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior~~

~~representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.~~

~~*Lawyers Moving Between Firms*~~

~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~

[~~5~~4] Paragraph (b) ~~operates to disqualify the lawyer~~addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm ~~is disqualified from~~* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

VI. RULE HISTORY

The predecessor to current rule 3-310, former 5-102, originally approved and made operative on January 1, 1975, was entitled "Avoiding the Representation of Adverse Interests." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 was the rule that governed conflicts. The text of rule 5-102 was identical to the text of the previous rule 7.

A. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.[1]

Paragraph (E) was new and adopted from ABA Model Rule 1.8(f). It was intended to regulate those situations in which an attorney is paid by someone other than the client.

> (E) A member shall not accept compensation for representing a client from one other than the client unless:
>
> (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
>
> (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and
>
> (3) The client consents after disclosure, provided that no disclosure is required if;
>
> (a) such nondisclosure is otherwise authorized by law, or
>
> (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

B. Summary of 1992 Proposed Amendments

Proposed amendments to rule 3-310 were substantive and substantial. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and so on throughout the rule.

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[1] See page 34 of Bar Misc. No. 5626, Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation, December 1987.

Proposed amendment to subparagraph (F)(3) created a stricter standard than the one found in current subparagraph (E)(3) by requiring the member to obtain the client's consent in writing following disclosure. The proposed amendment made the consent requirement consistent throughout the rule.

Proposed amendment to subparagraph (F)(3)(b) deleted the words “members of.” No substantive change was intended.

(~~E~~F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of ~~a~~ the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent~~s after disclosure~~, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law~~,~~; or

(b) The member is r en de ring legal services on behalf of any public agency which provides legal services to other public agencies or ~~members of~~ the public.

C. Summary of 2002 Proposed Amendments

An amendment to rule 3-310 was adopted by the Boart on May 4, 2002. The proposed amendments were developed in response to Business and Professions Code § 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff’s bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the decision of the California Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20].

The proposed new Discussion section paragraph clarified that subparagraph (C)(3) of rule 3-310 is not intended to subject an attorney to discipline when the lawyer-client relationship with an insurance company client arises from the handling of a defense matter for a policyholder of the insurance company such that the insurance company client’s only interests is an indemnity provider and not as a direct party to the action. This proposed Discussion section was to appear between paragraphs eight and nine.

In *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit

was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to action.

The first sentence of the proposed new Discussion section paragraph was intended to make clear that the *State Farm* holding on subparagraph (C)(3) of rule 3-310 occurred in a specific and narrow fact setting. It identified that the fact setting involved a member's direct action against an insurer client without having first obtained the insurer's informed consent. Nothing in the State Bar's proposal was intended to suggest that *State Farm* was wrongly decided given the specific facts of the case.

The second sentence of the proposed new Discussion section paragraph was intended to clarify that the rationale of the *State Farm* holding should not be construed to mean that subparagraph (C)(3) of rule 3-310 was violated in an identified fact setting that was similar but not identical to the fact setting in *State Farm*. Specifically, that fact setting was one where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.

Finally, this new proposed language clarified the application of the rule to an insurance defense setting. That language was the last paragraph of the Discussion section which, in part, states: "Paragraph (F) [regarding fees paid by a person other than the client] is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interests." Like the State Bar's present proposal, this language addressed a specific relationship in the insurance defense context and clarified the intended limited applicability of the rule.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC generally supports this rule. It is concerned, however, about the use of the term "knowingly" in subsection (b). By using the term "knowingly'" in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness. For example, this rule appears to exclude an attorney who either does not have a program to check conflicts or does not actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [finding attorney did not have actual knowledge of his suspension, but his willful blindness is tantamount to having actual knowledge that he was ineligible to practice law. That finding was based on statutes that did

not require actual knowledge.]) The rules should not permit an attorney to escape culpability by not having a conflict check procedure or by failing to check for conflicts. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness is a basis for discipline. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 ["It has been held that 'Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.' (Citations.)"] Requiring actual knowledge in this rule will lessen the current standards governing attorney conduct and is contrary to well established standards for when attorney conduct is disciplinable. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence, recklessness, or willful blindness. See also OCTC's comments in the General Discussion section of this letter about the proposal to use the term "knowingly" in several of the proposed rules.

2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the rule and law. Moreover, while the term "materially adverse" is in the ABA Model Rules, neither the subparagraph nor proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

   Commission Response for Comment #1 and #2, above: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge of a conflict situation.

3. OCTC supports the Commission's inclusion of Business & Professions Code § 6068(e) in subparagraph (b)(2).

   Commission Response: No response required.

4. OCTC has concerns about Comments [1] and [2]. They do not elucidate the rule but, instead, give a philosophical basis for the rule.

   Commission Response: The Commission has not made the suggested change. It believes that both comments, by providing an explanation of the duties and policy rationale underlying the rule, afford important interpretative guidance in applying the rule.

5. OCTC supports Comment [3].

   Commission Response: No response required.

6. OCTC has no position on Comment [4]'s discussion of advanced waivers.

   Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. OCTC generally supports this rule. It is concerned, however, about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit a conflict violation by recklessness, gross negligence, or willful blindness. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 424-425 [attorney was grossly negligent in failing to investigate and declare conflicts, in violation of the conflict rules and amounting to moral turpitude]. As previously discussed, a rule violation generally only requires that it was done willfully, i.e. purposely, not with bad faith or evil intent. This rule appears to exclude an attorney who either does not have a program to check conflicts or does not actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [finding attorney did not have actual knowledge of his suspension, but his willful blindness is tantamount to having actual knowledge that he was ineligible to practice law. That finding was based on statutes that did not require actual knowledge.]) The rules should not permit an attorney to escape culpability by not having a conflict check procedure or by failing to check for conflicts. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness is a basis for discipline. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 ["It has been held that 'Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.' (Citations.)"] Requiring actual knowledge in this rule will lessen the current standards governing conflicts of interest and is contrary to well established standards for when such attorney conduct is disciplinable. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the failure to obtain conflict waivers is the result of excusable negligence or gross negligence, recklessness, or willful blindness. See also OCTC's comments in the General Discussion section of OCTC September 27, 2016 letter about the proposal to use the term "knowingly" in several of the proposed rules.

Commission Response: The definition of "knowingly" in the proposed terminology rule (rule 1.0.1(f)) includes the concept that a person's knowledge can be inferred from circumstances. Thus, as used in the Rules, a requirement of knowing is consistent with the concept of recklessness, gross negligence or willful blindness.

2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9, because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This is a significant change in the rule and law, making it far more difficult to enforce the rule and prosecute violations, and far less protective of clients, than the current law. While the term "materially adverse" is in the ABA Model Rules, neither the proposed subparagraph nor proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

   Commission Response: The Commission disagrees with this concern because both the current rule's term "adverse" and the proposed rule's term "materially adverse" are subject to the State Bar Court's and the Supreme Court's practice of looking to the state of the law involving conflicts in civil proceedings (see *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602) and in doing so, the Commission believes that the term "materially adverse" is more descriptive of the actual standard in this area of the law.

3. OCTC supports the Commission's inclusion of Business & Professions Code § 6068(e) in subparagraph (b)(2).

   Commission Response: No response required.

4. OCTC has concerns about Comments [1] and [2]. They do not elucidate the rule but, instead, give a philosophical basis for the rule.

   Commission Response: These comments are more than just a philosophical basis for they rule because they explain the scope of the duty owed to a former client by citation to case law and statutory law.

5. OCTC supports Comments [3] and [5].

   Commission Response: No response required.

6. OCTC is concerned with Comment [4] for the same reasons it is concerned with the use of "knowingly" in paragraph (b) of the proposed rule. Further, this Comment implies it will be the State Bar's burden to prove that the person had actual knowledge of the confidential information, even though the law has long held that, for public protection, knowledge of confidential information is imputed to all the attorneys in a firm. (See *Adams v. Aerojet-General Corp* (2001) 86 Cal.App.4th 1324, ["'The imputed knowledge theory holds that knowledge by any member of a law firm is knowledge by all of the attorneys in the firm, partners as

well as associates.' "]; *City and Counsel of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848 ["Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale "that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information."]). There are reasons to hold that the normal imputation to a member of the law firm should not strictly apply in discipline matters if the attorney can establish they did not have knowledge of the information, but, given the difficulty of establishing who in a law firm had confidential information, public protection requires that the attorney show that he or she did not have access to the confidential information. Likewise, as discussed, an attorney should not be rewarded for failing to establish adequate conflict procedures or failing to utilize them to determine if there is a potential conflict issue. Whether this constitutes gross negligence should be determined on a case-by-case basis.

Commission Response: See Response to #1, above. Further, imputation is a separate concept involving constructive knowledge. It should not be conflated with this knowledge standard. The case law on imputation is not intended to be altered by the Commission's knowledge standard.

7. OCTC has no position on Comment [6]'s discussion of advanced waivers.

Commission Response: No response required.

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

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, thirteen public comments were received. One comment agreed with the proposed Rule and twelve comments agreed only if modified. During the 45-day public comment period, four public comments were received. All four comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

Two speakers appeared at the public hearing whose testimonies were in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Unlike Model Rule 1.9(a) or (b), rule 3-310(E) does not expressly state that the former matter the lawyer represented an adverse party must be the same as, or substantially related to the current matter to result in a prohibition against a lawyer representing a current client against the adverse party. Instead, the rule identifies the unethical conduct that is proscribed, which in the case of opposing a former client who is now adverse to a

current client, is a lawyer representing the new client when the lawyer is in possession of confidential information of the former client that is material to the new matter.

"Where the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.

1. Substantial Relationship Test.

Given that the standard in rule 3-310(E) is the "materiality" of the information to the current matter, it has been left to the courts to craft a test to determine whether information a lawyer likely acquired from a former client is "material." The courts have accomplished this by creating a substantial relationship test that is applied in civil actions to determine whether a lawyer should be disqualified. See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.*, 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (1991) (To establish substantial relationship of matters, inquire re: (1) factual similarity of the cases; (2) their legal similarity; and (3) the extent of the lawyer's involvement in the cases). See also *Adams v. Aerojet-General Corp*., 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); *City National Bank v. Adams*, 96 Cal.App.4th 315, 117 Cal.Rptr.2d 125 (Cal.App. 2002). Conversely, unlike rule 3-310(E), Model Rule 1.9(a) does not explain why the substantial relationship inquiry is made: to determine whether the lawyer acquired confidential information material to the present matter.

In *Jessen v. Hartford General Casualty Co.*, 3 Cal.Rptr.3d 877, 884-885 (Cal.App. 2003), the court stated that the test for determining whether a substantial relationship exists between the current matter and the former matter "turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." See also *Farris v. Fireman's Fund Ins. Co.*, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004) (Figure 17); *Brand v. 20th Century Ins. Co.,* 124 Cal.App.4th 594, 21 Cal.Rptr.3d 380 (2004) (Figure 18). In effect, *Jessen* conflates the first two factors of the H.F. Ahmanson test (similarity of factual and legal issues) into one. Although *Jessen*, *Farris* and *Brand* provide a test that arguably is broader and more likely to result in disqualification than the test originally set out in *H.F. Ahmanson*, more recent decisions have held that mere conclusory allegations by the moving party of the migrating lawyer's alleged relationship to the former client will not be sufficient to meet the moving party's burden to prove the matters are substantially related. See, e.g., *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (moving party's heavy reliance on inferences and failure to submit direct evidence that pointed to specific confidential information to which attorney could have had access required denial of disqualification motion)

2. Modified Substantial Relationship Test.

Model Rule 1.9(a) applies only if the lawyer whose prohibition or disqualification is sought actually represented the former client.[2] Similarly, California apply the substantial relationship test only if the lawyer had actually been involved in representing the client in the previous matter. Both the Ahmanson (the extent of the lawyer's involvement in the cases) and Jessen ("the relationship between the attorney and the former client with respect to the legal problem involved in the former representation") versions of the test demonstrate this. When lawyers are in the same firm, however, there is a presumption that every lawyer in a firm discusses his or her client matters with every other lawyer in the law firm. (See, e.g., Model Rule 1.6, cmt. [5].) This is sometimes referred to as the "water cooler" effect.

Model Rule 1.9(b) addresses this assumption regarding lawyers practicing together in a law firm and provides that even if a lawyer did not previously represent the former client, the lawyer may nevertheless have acquired a former firm client's confidential information that is material to the present matter.[3] In *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324 (2001), the court adopted the concept in Model Rule 1.9(b), which subsequent courts have referred to as the "modified substantial relationship test." Under that test, there is a rebuttable presumption that a firm-switching lawyer (i.e., a lawyer who moves laterally from one firm to another) has obtained material confidential information when the moving party makes an adequate showing that the firm-switching lawyer was in a position while at the former law firm that the lawyer was likely to have acquired confidential information material to the current representation.[4] If the moving

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[2] Model Rule 1.9(a) provides:

> (a) A lawyer *who has formerly represented a client in a matter* shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. (Emphasis added).

[3] Model Rule 1.9(b) provides:

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter *in which a firm with which the lawyer formerly was associated had previously represented a client*
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client gives informed consent, confirmed in writing. (Emphasis added).

[4] Factors relevant to such a showing include: (i) Length of time lawyer worked for former client. (ii) Lawyer's exposure to formulation of strategy and policy. (iii) Geographic location of lawyer relative to other lawyers involved in the previous representation. (iv) Lawyer's management or administrative responsibilities. See *Adams v. Aerojet*, 86 Cal.App.4th at 1340. For example, the lawyer might have been exposed to the strategy contemplated in the new matter during a departmental lunch at which the matter was discussed, or the lawyer might have an office next to the lead lawyer on the new matter with whom the lawyer is known to discuss

party makes this showing, the firm-switching lawyer and new law firm must make an affirmative and substantive showing that the lawyer had no actual exposure to confidential information relevant to the current action while the lawyer was a member of the former law firm. Subsequent courts have noted that although an affirmative showing by the moving lawyer and the new firm of no exposure to confidential information is required, mere access to, or opportunity to acquire, confidential information does not provide a sufficient basis to find that confidential information material to the current representation would normally have been imparted to the attorney during that attorney's tenure at the old law firm. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007). See also *Faughn v. Perez*, 145 Cal.App.4th 592 (2006).

In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] (duty to avoid using confidential information to a client's detriment even with respect to action the attorney takes on his or her own behalf)
- *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] (duties of loyalty and confidentiality continue after representation ends)
- *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614] (an attorney's possession of confidential information is presumed when "a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney.")
- *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732] (when an attorney hires a former employee of opposing counsel who possesses confidential information materially related to pending litigation, the hiring attorney should obtain the informed written consent of the former employer)
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185] (the ethical prohibition against adverse representation of a former client includes both the actual, and potential, use of previously acquired confidential information)
- *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 (duty to protect information in public record that is not easily accessible).
- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771] (City Attorney and his entire office disqualified from pursuing fraud a statutory claims on behalf of the city against the City Attorney's former client)

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client matters. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898 (2007). In addition, the lawyer might be shown to have accessed the electronic file database of the files in the new matter. (*id*.)

B. ABA Model Rule Adoptions

Model Rule 1.9. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.9: Duties to Former Client," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_9.authcheckdam.pdf (Last accessed on 2/7/17)

- Twenty-two jurisdictions have adopted Model Rule 1.9 verbatim.[5] Twenty-seven jurisdictions have adopted a slightly modified version of Model Rule 1.9.[6] Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.9.[7]

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

A. Concepts Accepted (Pros and Cons):

1. **General Concepts**. The Commission is recommending that the conflict rules move to the ABA Model Rule structure of separate rules addressing current clients (1.7), certain specific types of conflicts (the 1.8 series), former clients (1.9), imputation of conflicts (1.10), conflicts for former and current government employees (1.11), and conflicts for former judges, arbitrators, mediators, or other third-party neutrals (1.12). Consistent with this approach, the Commission recommends proposed Rule 1.9, which uses as its starting point ABA Model Rule 1.9 in an attempt to more clearly capture the principles that are largely hidden in current rule 3-310(E). Current rule 3-310 prohibits a lawyer without a client's informed written consent from accepting employment adverse to the client or former client "where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." The Commission recommends dividing the current rule's single paragraph into three separate paragraphs, as the ABA Model Rule does, to help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule and consistency with national standards.

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[5] The twenty-two jurisdictions are: Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Washington.

[6] The twenty-seven jurisdictions are: Alabama, Alaska, Arizona, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin, West Virginia, and Wyoming.

[7] The two jurisdictions are: California and Texas.

- Pros: Adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and setting out the lawyer's precise duties in protecting that information once acquired. In addition, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735) contexts.

- Cons: Over twenty years of California jurisprudence has been developed under current rule 3-310(E). The case law properly addresses what duties California attorneys owe to their former clients.

2. Recommend adoption of Model Rule 1.9(a), with substitution of the requirement that the lawyer obtain the client's informed written consent to the lawyer's adverse representation, as opposed to the Model Rule's less client-protective "informed consent, confirmed in writing." This paragraph incorporates the limited duty of loyalty owed to former clients, which prohibits an attorney from attacking the very work he or she provided to a former client, as has been recognized by the California Supreme Court. (see, *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811).

   - Pros: Requiring the former client's informed written consent to the lawyer's adverse representation affords more client protection and is consistent with California's requirement of informed written consent in other conflict situations. The "substantially related" concept of Model Rule 1.9(a) reflects how current rule 3-310(E) has been interpreted and applied in both civil and disciplinary contexts to cover the limited duty of loyalty owed to former clients. See also discussion of Comment [1].

   - Cons: There is no evidence that any change is necessary to current rule 3-310(E), which has been in place for more than 20 years and is the subject of extensive interpreting case law.

3. Recommend adoption of Model Rule 1.9(b) as modified, with substitution of the requirement that the lawyer obtain the client's informed written consent, as opposed to the Model Rule's less client-protective "informed consent, confirmed in writing."__. Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. By its terms, paragraph (a) requires that the lawyer have represented the former client. Paragraph (b), on the other hand, addresses the circumstance where a lawyer's former law firm, but not the lawyer, represented a client, but the lawyer nevertheless "actually acquired" confidential information material to a present matter.

- Pros: Paragraph (b) recognizes that a lawyer in a law firm might have actually acquired confidential information about a former client of the firm even without having ever represented that former client – e.g. during a litigation section lunch. As noted above, incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client. (See, *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324 [applying Model Rule 1.9]; *Ochoa v. Fordel* (2007) 146 Cal.App.4th 898 [same].)

  Proposed paragraph (b)(2) adds the reference to Business and Professions Code § 6068(e) which is consistent to how the duty of confidentiality has been referenced in the other proposed rules. Paragraph (b) also requires the former client's informed written consent to the lawyer's adverse representation which, as stated above, affords more client protection and is consistent with California's approach in other conflict situations.

- Cons: None identified.

4. Recommend adoption of Model Rule 1.9(c) as modified. Proposed paragraph (c) addresses a lawyer's duty with respect to both use and disclosure of a former client's confidential information. Paragraphs (c)(1) and (c)(2) have been revised to add reference to Business and Professions Code § 6068(e), Rule 1.6, and the State Bar Act and replaces the phrase "relating to the representation" with "acquired by virtue of the representation." The proposed paragraphs also delete the concept that a lawyer might be "required" to disclose a client's confidential information. The Model Rules contain some mandatory disclosure requirements but there is no such requirement in either the California Rules or in the State Bar Act.

   - Pros: The use of the phrase "acquired by virtue of the representation" in place of the Model Rule's "relating to the representation of the former client" is intended to eliminate the possibility of a narrow reading that the duty applies only to information that relates to the subject matter of a former representation. A lawyer's continuing duty of confidentiality under § 6068(e) and Rule 1.6 applies to all information obtained by a lawyer by virtue of a lawyer-client relationship if the use or disclosure of the information likely would be harmful or embarrassing to the client or if the client has directed the lawyer to not use or disclose the information. The phrase "by virtue of" is derived from the *Wutchumna Water* case.

     The proposed paragraph also adds reference to a "current" client. Because this rule is concerned with duties owed to former clients, adding reference to "current" client where the rule expressly analogizes to duties owed to *current* clients should help to avoid misunderstanding by clarifying the intended meaning.

- Cons: Paragraph (c)(1) retains the reference from the ABA Rule permitting use of information that has become generally known. Stating a specific example may imply this is the only exception that applies. Further, there is no bright-line definition as to when information has become "generally known."

5. Recommend adoption of Comment [1], which is derived from the first Commission's Comment [1], and which more fully explains how and why proposed Rule 1.9 protects former clients. In addition, Comment [1] is intended to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients.

   - Pros: The Supreme Court's opinion in *Wutchumna Water Co. v. Bailey* (cited in proposed Comment [1]), and other authority such as *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 159, and *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, emphasize that a lawyer has two duties to former clients. Both of these duties underlie and are implemented by the proposed Rule. A Comment explaining the duties underlying the Rule provides interpretive guidance that will assist lawyers in understanding application of the proposed Rule.

   - Cons: The Comment provides only the philosophical basis for the Rule, which does not provide meaningful guidance for its application.

6. Recommend adoption of Comment [2], which cross-references to proposed Comment [2] in proposed Rule 1.7, which provides examples of what constitutes a "matte," those examples being derived from ABA Model Rule 1.11(e)(1).

   - Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraphs (a) and (b) should be applied, thus enhancing both compliance and client protection. In particular, the examples in the cross-referenced Comment make clear that the Rule may apply in the context of litigation, transactions, and investigations.

   - Cons: The Comment amounts to a definition of the term "matter" that should more properly be in the text of the rule as it is in ABA Model Rule 1.11(e). The addition of the Comment is an unnecessary departure from national uniformity since ABA Model Rules 1.7 and 1.9 have no similar Comment.

7. Recommend adoption of Comment [3], which provides guidance and examples regarding when two matters are "the same or substantially related." The first sentence of the Comment refers back to the two duties to former clients discussed in proposed Comment [1]. The second sentence of the Comment provides two general examples derived from the first sentence of Model Rule 1.9, Comment [3].

   - Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraphs (a) and (b) should be applied, thus enhancing both compliance and client protection. The cross-reference to the

duties discussed in proposed Comment [1] is consistent with California case law citing these duties as a basis for current rule 3-310(E).

- Cons: The first sentence of the Comment provides only the philosophical basis for the Rule, which does not provide meaningful guidance for its application. The examples in the second sentence do not add meaningfully to what is already stated in the Rule.

8. Recommend adoption of Comment [4], which is derived from the first Commission's Comment [8], which in turn is derived from Model Rule 1.9, Comment [5].

   - Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraph (b) should be applied, thus enhancing both compliance and client protection.

   - Cons: None identified.

9. Recommend adoption of Comment [5], which is derived from the first Commission's Comment [11], which in turn is based on Model Rule 1.9, Comment [8].

   - Pros: This Comment provides important interpretative guidance with respect to paragraph (c) by referring the lawyer to Rule 1.6 for information the lawyer is obligated to protect with respect to a former client, as opposed to non-confidential information that a lawyer might have learned in the course of representing a former client. Further, the citation to *Matter of Johnson* clarifies a lawyer's obligation with respect to information that is in the public record. This reflects the understanding that information in the public record that is not easily accessible should not be considered generally known.

   - Cons: None identified.

10. Recommend adoption of Comment [6], which is derived from the last two sentences of Model Rule 1.9, Comment [9], and cross references to Rule 1.7 for the effectiveness of an advance consent, to Rule 1.10 for imputation of conflicts within a firm, and to Rule 1.11 for when former government lawyers are required to comply with the Rule.

    - Pros: These cross-references provide important notice to lawyers that other Rules may apply.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Add a subparagraph (d) to define the phrases "the same or substantially related," and "materially adverse" for purposes of the Rule. The Commission considered defining these terms in the blackletter of the rule by drawing from the appropriate

the first Commission's Comments. The Commission decided not to define either phrase in the text, but to include guidance and examples regarding when matters are "the same or substantially related" in proposed Comment [3], which is discussed in Section X.A, above.

- Pros: Providing a definition of these terms would promote understanding and compliance with the rule by informing attorneys what these terms mean when applying the various sections of the rule.

- Cons: Including a general definition of these terms might inappropriately limit the circumstances when either a substantial relationship, or materially adverse interests, may be found. The Commission believes these conclusions are best left for either the State Bar Court, or a civil court, where the particular facts and circumstances can be weighed to make an appropriate determination. The Commission's approach is consistent with the ABA Model Rule, which provides general guidance as to when matters are "substantially related" in a Comment, and otherwise leaves these conclusions for disciplinary authorities and courts based on particular facts.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. Although the proposed rule would change the current rule's single paragraph into four separate paragraphs, none of these provisions would be a substantive change in the current law of California regarding the duties owed to former clients.

2. The reference in paragraph (c)(1) of the clause from the Model Rule that permits an attorney to use information of a former client "when the information has become generally known" is a substantive change.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

1. The Commission also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310's provisions amended to incorporate the global changes the Commission has agreed to ("lawyer" for "member," etc.) and the standalone rule corresponding to the ABA numbering. The Commission abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached to the Report & Recommendation for Rule 1.7.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.9 [3-310(E)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.9 [3-310(E)] in the form attached to this Report and Recommendation.

Proposed Rule 1.9 [3-310(E)] Duties to Former Clients
Synopsis of Public Comments

TOTAL = 4 *A = 0* *D = 0* *M = 4* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-18c	Lamport, Stanley (01-09-17)	N	M	(a)	1. Paragraph (a) should be revised to state the language in current Rule 3-310(E). Rule 3-310(E) eloquently and correctly states the duty.	1. The Commission has not made the suggested change. The Commission believes that Comment [3] resolves the concerns raised by the commenter because that comment in part states that rule 1.9(a)'s use of "substantially related" is co-extensive with the cases that have applied 3-310(E). Case law, in turn, covers situations where a lawyer acquires confidential information regardless of whether the previous and present matter line up factually and legally. (See Jessen v. Hartford Casualty Ins. Co. (2003) 111 Cal.App.4th 698, 712-713.)
				(c)(1) & (2)	2. Paragraph (c)(1) & (2) should be revised to clarify that a lawyer is required to comply with Rule 1.9(c) with respect to information acquired by the lawyer's former firm when the lawyer acquired the information when associated with that former law firm. This concept is in paragraph (b), which related specifically to representational conflicts	2. The Commission has not made the suggested change. The Commission disagrees with the commenter's interpretation of paragraph (c). The concept in 1.9(b) is already in 1.9(c). The phrase "acquired by virtue of the representation of the former client" is correctly used both (c)(1) and (c)(2).

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					governed by paragraph (a). The language in paragraph (b) does not related to the language in paragraph (c), but it should.	For example, in (c)(1), the lawyer is prohibited from using protected information that has been "acquired by virtue of the representation". The representation could refer to either the lawyer's personal representation of the former client or the former law firm's representation of the former client. It doesn't matter which it is, because the prohibition is on the individual lawyer who has acquired the information. To apply the commenter's interpretation to paragraph (c) would be unreasonable. A lawyer can neither use nor disclose information unless the lawyer has actually acquired it. The commenter's interpretation cannot stand because to apply it would promote disqualification for double imputation, which the courts have roundly rejected.
Y-2016-23b	Sall, Spencer, Callas & Krueger (Sall) (01-09-17)	Yes	M	(c)	1. The elimination of subdivision (c)(3) leaves a gap in the coverage of the rule in comparison to existing Rule 3-310 in that proposed Rule 1.9 fails to prohibit the representation of a client adverse to a former client, without informed written consent from the former client,	1. See above response to Mr. Lamport's point no. 1.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					where the attorney actually received confidential information material to the representation but where the prior and current representation are not substantially related. See, *Costello v. Buckley* (2016) 245 Cal.App.4th 748.	
				Comment [3]	2. Comment [3] is ambiguous and is contrary to the Commission's Charter not to legislate through Comments.	2. The Commission disagrees. Comment [3] is not ambiguous and is an appropriate comment because it explains when two matters might be treated as the same or substantially the same matter. This is a key element for complying with the rule.
				Comment [4] (c)(1)	3. Comment [4] is likewise contrary to the Commission's Charter not to legislate through Comment and inconsistent with existing law.	3. The Commission disagrees. Comment [4] addresses knowledge standard in paragraph (b), which is not found explicitly in the current rule, but which has been explained by and is consistent with case law. See, e.g., *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006). The

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						comment simply explains the application of that blackletter knowledge standard. 4. The Commission does not construe the concept of "generally known" information as an affirmative exception to California's broad duty of confidentiality. Instead, the Commission believes the concept is consistent with principle that generally known information cannot become confidential by conveying such information to a lawyer. In addition, taken to its logical extreme, the commenter's position and proposed change to paragraph (c)(1) would impose a duty of loyalty to a former client that is coextensive with the duty of loyalty owed to a current client and that result would be contrary to existing law.
					4. The phrase "or when the information has become generally known" in subsection (c)(1) is inconsistent with the State Bar Act and California law.	
Y-2016-21j	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	M		1. OCTC generally supports this rule. 2. However, we are concerned about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit	1. No response required. 2. The definition of "knowingly" in the proposed terminology rule (rule 1.0.1(f)) includes the concept that a person's knowledge can be inferred from circumstances. Thus, as

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					a conflict violation by recklessness, gross negligence, or willful blindness.	used in the Rules, a requirement of knowing is consistent with the concept of recklessness, gross negligence or willful blindness.
					3. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9, because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This is a significant change in the rule and law, making it far more difficult to enforce the rule and prosecute violations, and far less protective of clients, than the current law.	3. The Commission disagrees with this concern because both the current rule's term "adverse" and the proposed rule's term "materially adverse" are subject to the State Bar Court's and the Supreme Court's practice of looking to the state of the law involving conflicts in civil proceedings (see *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602) and in doing so, the Commission believes that the term "materially adverse" is more descriptive of the actual standard in this area of the law.
					4. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2).	4. No response required.
					5. OCTC has concerns about Comments [1] and [2] because they do not elucidate the rule but, instead, give a philosophical	5. These comments are more than just a philosophical basis for they rule because they explain the scope of the duty

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					basis for the rule.	owed to a former client by citation to case law and statutory law.
					6. OCTC supports Comments [3] and [5].	6. No response required.
					7. OCTC is concerned with Comment [4] for the same reasons it is concerned with the use of "knowingly" in paragraph (b) of the proposed rule. Further, this comment implies it will be the State Bar's burden to prove that the person had actual knowledge of the confidential information, even though the law has long held that, for public protection, knowledge of confidential information is imputed to all the attorneys in a firm.	7. See Response to 1, above. Further, imputation is a separate concept involving constructive knowledge. It should not be conflated with this knowledge standard. The case law on imputation is not intended to be altered by the Commission's knowledge standard.
Y-2016-7q	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Yes	M	Comment [3]	1. COPRAC repeats its support for Rule 1.9 and agrees with all changes reflected in the revised Rule, except for Comment [3], defining "the same or substantially related."	1. No response required.
					2. The Committee believes that while the proposed definition is adequate for disciplinary purposes, it may be too narrow for other purposes in which the courts may look to this rule, for example, in a disqualification	2. The Commission has not made the suggested change. The Commission disagrees that the concept of "the same or substantially related" matter as used in the rule will cause confusion. See also Response #1 to Lamport, Y-2016-18c,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					context. To avoid potential confusion or inconsistency, the Committee recommends that a final sentence should be added to Comment [3] reading as follows: "The definition in this Comment is intended for disciplinary purposes, and may not exhaust all situations in which a court could conclude that two matters are 'the same or substantially related' in other contexts."	above. Regardless of any perceived limiting language in the rule, a court retains the inherent authority to control the conduct of attorneys who appear before a court.

Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on January 20, 2017 – Redline to Public Comment Draft Version)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*

(2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial* risk of a violation of one of the two duties to a former client described above in Comment [1]. ~~This~~For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.10
(No Current Rule)
Imputation Of Conflicts Of Interest: General Rule

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: 1.7 (current client conflicts) [rule 3-310(B) and (C)]; 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. The Model Rules also include Model Rule 1.8, which compiles in a single rule 10 separate conflicts of interest concepts,[1] and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

(2) proposed Rule 1.10 (imputation and ethical screening), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest, a concept that is currently addressed only in California case law, and also would permit the erection of an ethical screen in narrowly defined circumstances to avoid the imposition of such imputations. Proposed rule 1.10 largely adheres to the structure and substance of Model Rule 1.10 but significantly differs in the extent to which a private firm is permitted to erect an ethical screen around a lawyer who has moved laterally from another private firm. Unlike the Model Rule, which broadly permits screening, i.e., it would permit the principal lawyer in the same matter to be screened, the proposed rule would permit screening only in limited situations, i.e., if the prohibited lawyer did "not substantially participate" in the matter at issue.

[1] Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed Rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules is addressed in separate executive summaries.

Proposed rule 1.10 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.[2]

2. ***Recommendation of addressing the concepts of imputation and screening in a rule that tracks the organization of Model Rule 1.10***. There are four separate provisions in the proposed rule, two of which set forth the rules regarding imputation as it has been developed in case law in California (paragraphs (a) and (b)), one which provides that a client can waive the rule's application (paragraph (c)), and one which excludes government lawyers from the application of the rule (they are governed by Rule 1.11).

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing in paragraph (a) that imputation is the default situation that can be avoided only if the conflict is personal to the prohibited lawyer, the lawyer is screened under narrowly specified conditions, or the client waives the rule's application. *Second*, permitting the exception for screening a lawyer who "did not substantially participate" in the contested matter will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential information about the former clients is now in the opposing party's law firm. *Third*, adopting a limited screening provision will place in a rule of professional conduct an approach to screening that was sanctioned in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010). *Fourth*, including paragraph (c) regarding waiver will expressly permit what is already implied in current rule 3-310, i.e., that the client can consent to a conflicted representation.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules,

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[2] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of a separate executive summary.

on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed rule 1.10 sets forth the default rule in the introductory clause: any prohibition on representation under rules 1.7 (current client conflict) or 1.9 (former client conflict) will be imputed to all lawyers in the firm unless either subparagraph (a)(1) or (2) applies.

Subparagraph (a)(1) provides that a prohibition based on a lawyer's "personal interest" (e.g., close personal or professional relationship) is not imputed to other lawyers in the firm so long as that interest does not create a significant risk of materially limiting the representation of the firm's client.

Subparagraph (a)(2), the screening provision, is derived from the corresponding paragraph in Model Rule 1.10 but has been modified to reflect that the rule is a disciplinary rule rather than a civil standard for disqualification (substitution of "prohibited" for "disqualified"). In addition, unlike the Model Rule, which broadly permits screening,[3] subparagraph (a)(2) provides for screening only in limited circumstances.[4] Under subparagraph (a)(2), a prohibited lawyer's conflict will not be imputed to other lawyer's in the firm so long as the prohibited lawyer did not substantially participate in the contested matter, is timely screened, and written notice is provided to any affected former client to enable the latter to ascertain compliance with the rule. Specifics on what constitutes an effective screen are provided in Rule 1.0.1(k) and associated comments.

The phrase "arises out of the personally prohibited lawyer's association with a prior firm" further limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government lawyers (Rule 1.11) and former judicial personnel (Rule 1.12) only when such lawyers move to new employment.

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[3] The term **"broadly permits screening"** is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client's case, and even if the former and current clients' cases were "substantially related." A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who "personally and substantially participated" in the relevant matter can be screened.

Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming. Nevertheless, there are 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

[4] The term **"limited screen"** is used to describe a screening provision that permits screening only if a lawyer did not "substantially participate," or was not "substantially involved," did not have a "substantial role," did not have "primary responsibility," etc., in the former client's matter, or when any confidential information that the lawyer might have obtained is deemed "not material" to the current representation, or "is not likely to be significant."

Fourteen jurisdictions permit screening in limited situations: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

Paragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116]. The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm.

Paragraph (c) expressly states what is already implied in current rule 3-310, which provides that a client can give informed written consent to a conflicted representation. If a client can consent to such a representation, then it should follow that a client can waive the imputation of one lawyer's conflict to other lawyers in the firm.

Paragraph (d) excludes government lawyers from the application of this Rule and directs such lawyers to Rule 1.11, which incorporates its own imputation provisions for conflicts involving current and former government lawyers.

There are five comments to proposed Rule 1.10, all of which provide interpretative guidance or clarify how the proposed rule, which identifies several situations under which imputation can be avoided or does not apply, should be applied. Comment [1] notes that the rule does not apply when the prohibited person is a nonlawyer, for example, a secretary, or a person who acquired confidential information as a nonlawyer, e.g., a law student, but cautions that such a person should be screened. Comment [2] clarifies the application of paragraph (a)(2)(ii) to partnership shares. Comment [3] clarifies that Rule 1.8.11, not rule 1.10, applies to conflicts that arise under the 1.8 series of rules. Comment [4] refers lawyers to the 5 series of rules involving supervisory duties within a law firm so that such lawyers can better comprehend their duties vis-à-vis screens. Comment [5] notes that this disciplinary rule does not necessarily govern disqualification motions in the courts.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [1] which provides guidance in determining whether a lawyer participated substantially in a matter under paragraph (a)(2)(i). The new Comment [1] lists non-exhaustive factors for evaluation and does not change a lawyer's obligations. The Commission also added a citation to *Kirk v. First American Title Ins. Co.* to the cases listed in Comment [6]. The Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.10

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.10, from which proposed Rule 1.10 is derived.]

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer,

for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or

used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.10
Vote: 13 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.10
Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (b) or (c)(3) and arises out of the prohibited lawyer's association with a prior firm, and

(i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;

(ii) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.

(c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.

(d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

[1] In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[2] Paragraph (a) does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter. See Rules 1.0.1(k) and 5.3.

[3] Paragraph (a)(2)(ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[4] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[5] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[6] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm or (2) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.10)

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the ~~disqualified~~ prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) ~~or~~, (b) or (c)(3) and arises out of the ~~disqualified~~ prohibited lawyer's association with a prior firm, and

(i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;

(~~i~~ii) the ~~disqualified~~ prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(~~ii~~iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; ~~a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal;~~ and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures~~; and~~.

~~(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former~~

~~client's written request and upon termination of the screening procedures.~~

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.

(c) A ~~disqualification prescribed by this rule~~ prohibition under this Rule may be waived by ~~the~~each affected client under the conditions stated in Rule 1.7.

(d) The ~~disqualification of~~ imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

~~*Definition of "Firm"*~~

~~[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].~~

~~Principles of Imputed Disqualification~~

~~[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).~~

~~[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm~~

~~should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.~~

[1] In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[~~4~~2] ~~The rule in paragraph~~ Paragraph (a) ~~also~~ does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter ~~to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect~~. See Rules ~~1.0~~1.0.1(k) and 5.3.

~~[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).~~

~~[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).~~

~~[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.~~

[~~8~~3] Paragraph (a)(2)(~~i~~ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is ~~disqualified~~prohibited.

~~[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.~~

~~[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.~~

~~[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.~~

[~~12~~4] Where a lawyer is prohibited from engaging in certain transactions under ~~Rule 1.8, paragraph (k) of that Rule,~~Rules 1.8.1 through 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[5] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[6] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm or (2) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

V. RULE HISTORY

Although the origin and history of Model Rule 1.10 was not the primary factor in the Commission's consideration of proposed Rule 1.10, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 249 - 276, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a) for the same reasons expressed regarding that term in proposed Rule 1.9 and the General Comments of this letter.

   Commission Response: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that another lawyer in the lawyer's firm is prohibited from representing the client because of Rules 1.7 or 1.9. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule.

2. OCTC supports Comments [1] and [2]. If the Commission adopts proposed rules 5.1 and 5.3 OCTC supports Comment [4]. If the Commission does not, this Comment should be rewritten.

   Commission Response: As the Commission has not changed its view on Rules 5.1 and 5.3, no response required.

3. The Commission may want to reconsider whether Comment [3] is necessary in light of the clear language of subsection (a) of this proposed rule.

   Commission Response: The Commission did not make the suggested change. Although the Commission agrees that paragraph (a) clearly states that it applies only if the prohibition is based on Rules 1.7 and 1.9, the public comment received on 1.8.11 suggests that there remains some confusion regarding the application of this Rule. Consequently, it has retained Comment [3] (renumbered [4] in the revised Rule).

4. Comment [5] does not address this rule for discipline purposes and, therefore, does not belong in the proposed rules.

   Commission Response: The Commission has not made the suggested change. Although the Rules are intended for discipline, courts and lawyers still regularly consult the rules and cited to them in deciding disqualification motions. Comment [5] recognizes this. It clarifies that a rule of discipline does not necessarily override a court's inherent power to control the proceedings before it.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, ten public comments were received. Six comments agreed with the proposed Rule, three comments agreed only if modified, and one comment did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Model Rule 1.10(a).

Although California does not have a rule similar to Model Rule 1.10(a) concerning imputation of conflicts, there is abundant case law that recognizes that when one lawyer in a law firm is disqualified, that disqualification is extended to every other lawyer in the firm, i.e., the other lawyers are vicariously disqualified. See, e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th at 283 [36 Cal. Rptr.2d 537]; *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]; *Kirk v. First American Title Ins. Co.* (2010)183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], *review denied* (6/23/2010); *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575 [286 Cal. Rptr. 609]; *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109, 117 [14 Cal. Rptr.2d 184]. See also State Bar Formal Ethics Op. 1998-152.

2. Model Rule 1.10(b).

Model Rule 1.10(b) provides that the presumption of shared confidences does not apply once a tainted (prohibited/disqualified) lawyer leaves the firm and there is no evidence that the lawyer shared confidential information with any lawyer remaining in the firm. California has no similar rule but has case law on point. See *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116.

MR 1.10(a)(2), which broadly permits ethical screens in private to private lateral movement between firms, is not included.

In addition to the exception in subparagraph (a)(1), California generally does not impute disqualifications when there is a family or other close personal relationship between a disqualified lawyer and an opposing lawyer. See, e.g., *Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268 [14 Cal.Rptr.3d 329]; *Addam v. Superior Court* (2004) 116 Cal.App.4th 368 [10 Cal.Rptr.3d 39]; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829 [115 Cal. Rptr.2d 847].

3. Lateral Movement Between Private Law Firms (Model Rule 1.10(a)(2).

Thirty-two jurisdictions permit screening in the private to private firm context to rebut the presumption of shared confidences. California has no rule that permits screening in that

context. However, there is case law that indicates an ethical screen may be appropriate in some circumstances involving private to private lateral movement. See also cases cited in Section XIII.A.1, above.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.10, from which proposed Rule 1.10 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.pdf [Last visited 2/6/17]

- Every jurisdiction except California and Texas has adopted a rule of professional conduct derived from Model Rule 1.10 that imputes conflicts of interest based on Rules 1.7 and 1.9 to other lawyers in the firm. Texas, however, incorporates an imputation provision into its counterparts to Model Rules 1.7 and 1.9. (See Texas Rules 1.06(f) and 1.09(b).

The ABA's State Adoption of Lateral Screening Rule Chart is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.pdf

There are eighteen jurisdictions that broadly permit screening. The term "broadly permits screening" is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client's case, and even if the former and current clients' cases are "substantially related." A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who "personally and substantially participated" in the relevant matter can be screened.

Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim.[1] There are also 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule.[2]

There are an additional fourteen jurisdictions that permit limited screens.[3] The term "limited screen" is used to describe a screening provision that permits screening only if a lawyer did not "substantially participate," or was not "substantially involved," did not

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[1] The four jurisdictions are: Connecticut, Idaho, Iowa and Wyoming

[2] The fourteen jurisdictions are: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

[3] The fourteen jurisdictions that permit screening in limited situations are: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

have a "substantial role," did not have "primary responsibility," etc., in the former client's matter, or when any confidential information that the lawyer might have obtained is deemed "not material" to the current representation, or "is not likely to be significant."

In addition, South Carolina permits screening of a lawyer who represents "a client of a public defender office, legal services association, or similar program serving indigent clients …."

Although the origin and history of Model Rule 1.10 was not the primary factor in the Commission's consideration of proposed Rule 1.10, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 249 - 276, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of the Model Rules' framework of having:

   (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

   (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

   - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules as other jurisdiction in the country has adopted the ABA conflicts rules framework.

   - Cons: There is no evidence that the current rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.10, which would (i) incorporate into a rule of professional conduct the concept of imputation within a private law firm of conflicts of interest and (ii) permit unconsented ethical screens

to be erected to rebut the presumption of shared confidences within the firm and avoid the imputation to, and consequent prohibition of, all firm lawyers when a personally prohibited lawyer laterally moves into the firm.

- Pros:

(1) Regarding the **imputation** aspects of the proposed rule:

(a) adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing in paragraph (a) that imputation is the default situation that can be avoided only if the conflict is personal to the prohibited lawyer, the lawyer is screened under narrowly specified conditions, or the client waives the rule's application.

(b) adopting a rule that incorporates imputation will promote a national standard as every other jurisdiction has incorporated the concept of imputation within a private firm into their rules of professional conduct. (See Section VII, above.)

(2) Regarding the **ethical screening** aspects of the proposed rule:

(a) Permitting an exception for unconsented screening in the limited situation where a lawyer "did not substantially participate" in the contested matter will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential information about the former client's is now in the opposing party's law firm.

(b) Adopting a limited screening standard will concomitantly provide assurance that only those lawyers who were unlikely to have material acquired confidential information can be screened, thus promoting respect for the legal profession and the administration of justice.

(c) Adopting a limited screening provision that requires strict adherence to specific factors intended to assure the effectiveness of the screen will place in a rule of professional conduct an approach to screening that was sanctioned in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010). These clear standards would enhance compliance and facilitate enforcement of the rules.

(d) Under the rule, imputation will be available only for lawyers who move laterally from one firm to another. That is because the phrase "arises out of the personally prohibited lawyer's association *with a prior firm*" limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client. This is an appropriate limitation on

screening and parallels the availability of screening for current and former government lawyers (Rule 1.11) and former judicial personnel (Rule 1.12) only when such lawyers move to new employment. This limitation operates to ensure the rule will not implicate a lawyer's duty of loyalty to the former client.

(e) Adopting a rule that permits ethical screening will recognize the current realities of legal job market and promote a national standard as thirty-two jurisdiction have incorporated into their rules of professional conduct the concept screening for lawyers moving laterally between private firms. (See Section VII, above.)

- Cons:

(1) With respect to imputation, there is no evidence that the current California regulatory framework has been ineffective in applying the doctrine of imputation to a private law firm.

(2) With respect to screening, the policy of promoting lateral movement of lawyers between or among different law firms should not take precedence over the duty of confidentiality, which in California is stricter than in any other jurisdiction. A client should be assured that the client's former lawyer will not be resident in a lawyer firm representing a client with interests adverse to the former client. This assurance should continue to promote candor by clients in lawyer-client consultations.

3. Substitute the terms "prohibited" and "prohibition" for "disqualified" and "disqualification" throughout the rule.

   - Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.

   - Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.

4. Recommend adoption of paragraph (a), which sets forth the default rule in the introductory clause: any prohibition on representation under rules 1.7 (current client conflict) or 1.9 (former client conflict) will be imputed to all lawyers in the firm unless either subparagraph (a)(1) [personal interest conflict] or subparagraph (a)(2) [screening] applies, with screening available only in situations where a lawyer has moved laterally.

   - Pros: Favoring adoption of paragraph (a):

(1) Regarding subparagraph (a)(1), personal interest conflicts of a lawyer traditionally have not been imputed to a law firm in California. See, e.g., *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829 [115 Cal. Rptr.2d

847]. There is no reason why this approach should not continue to be recognized.

(2) Regarding subparagraph (a)(2), see Section IX.A.2, Pros.

- Cons: See Section IX.A.2, Cons.

5. Recommend rejection of two requirements in Model Rule 1.10(a)(ii) for erecting a screen: that the written notice to the former client include (i) a statement of the firm's and of the screened lawyer's compliance with these Rules; (ii) a statement that review may be available before a tribunal.

   - Pros: Neither requirement provides any meaningful assurance to the former client of the screen's effectiveness.

   - Cons: There is no reason not to require those statements. Failure to include these Model Rule provisions in a rule that is expressly patterned on the model rule will likely operate to undermine confidence in the legal profession and the administration of justice.

6. Recommend adoption of paragraph (b), which is a codification of *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116].

   - Pros: Paragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg v. Warner/Chappell Music, Inc.*, above. The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm.

   - Cons: None identified.

7. Recommend adoption of paragraph (c), which provides that each affected client (current and former clients) can waive the imputation of conflicts under the rule.

   - Pros: Paragraph (c) expressly states what is already implied in current rule 3-310, which provides that a client can give informed written consent to a conflicted representation. If a client can consent to such a representation, then it should follow that a client can waive the imputation of one lawyer's conflict to other lawyers in the firm. Clarifying this concept in the rule should enhance compliance and facilitate enforcement.

   - Cons: There is no need to "clarify" the concept, which logically follows from the informed written consent provision in current rule 3-310(E).

8. Recommend adoption of paragraph (d), which excludes government lawyers from the application of Rule 1.10.

   - Pros: By directing government lawyers to Rule 1.11, which incorporates its own imputation provisions for conflicts involving current and former government lawyers, compliance with the mandated procedures in the government lawyer context will be enhanced and their enforcement facilitated.

   - Cons: None identified.

9. Recommend adoption of the Comments to the proposed Rule:

   - Pros: There are six Comments to proposed Rule 1.10, all of which provide interpretative guidance or clarify how the proposed rule, which identifies several situations under which imputation can be avoided or does not apply, should be applied.

     Comment [1], derived in part from Model Rule 1.12, Cmt. [1], explains the concept of substantial participation and provides factors to consider.

     Comment [2] notes that the rule does not apply when the prohibited person is a nonlawyer, for example, a secretary, or a person who acquired confidential information as a nonlawyer, e.g., a law student, but cautions that such a person should be screened.

     Comment [3] clarifies the application of paragraph (a)(2)(ii) to partnership shares.

     Comment [4] clarifies that Rule 1.8.11, not Rule 1.10, applies to conflicts that arise under the 1.8 series of rules. This is an important clarification and reference. Conflicts in the 1.8 series typically are not cured by a client's consent to permit a different lawyer in the firm handle the matter and so should not be subject to the consent provisions in Rule 1.10.

     Comment [5] refers lawyers to the 5 series of rules involving supervisory duties within a law firm so that such lawyers can better comprehend their duties vis-à-vis screens.

     Comment [6] notes that this disciplinary rule does not necessarily govern disqualification motions in the courts.

   - Cons: The rule is sufficiently transparent so as to not to require further clarification in Comments.

B. Concepts Rejected (Pros and Cons):

1. Recommend the adoption of a screening provision that would broadly permit unconsented screening in the private firm to private firm lateral movement context.

   - Pros: There are several reasons to broadly permit screening and not limit its availability to a lawyer who "did not substantially participate in the same or a substantially related matter":

     (1) Broadly-permitted screening is allowed for lawyers who move to a private firm and "personally and substantially participated" in a matter while a government lawyer. Such lawyers can be screened under both proposed Rule 1.11 [and Model Rule 1.11] and under California case law. However, there is no principled reason to distinguish government from private lawyers in this situation. See *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 806 n.25, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010) ("The law cannot possibly be that [the law firm] could effectively screen [the tainted lawyer] if he was tainted from information obtained when he worked for the Department of Insurance, but cannot effectively screen him if he was tainted from information obtained when he worked for Fireman's Fund.")

     (2) It is questionable whether the reasons for distinguishing government and private lawyers still hold. See *Kirk*, *supra,* 183 Cal.App.4th at 806 n.24, 108 Cal.Rptr.3d 620.[4]

     (3) Lawyers, whether government or private, take the same oath and are subject to the same duties of confidentiality; there is no reason to view one group as more honest or ethical than the other.

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[4] The court stated:

In cases of a tainted attorney working in a government office, the courts have concluded the following policy considerations justify the use of only a rebuttable presumption of imputed knowledge: (1) public sector attorneys do not have a financial interest in the matters on which they work, so have less of an incentive than private attorneys to breach client confidences; (2) public sector attorneys do not recruit clients or accept fees, so have no financial incentive to favor one client over another; (3) disqualification increases the costs for public entities, raising the possibility that litigation decisions will be driven by financial considerations rather than the public interest; and (4) automatic vicarious disqualification will restrict the government's ability to hire attorneys with relevant private sector experience. (*City of Santa Barbara v. Superior Court, supra*, 122 Cal.App.4th at pp. 24-25, 18 Cal.Rptr.3d 403.) We note that, except for the last consideration, none of the other three could possibly apply in the context of a former government attorney working in a private law firm. Nonetheless, courts have not hesitated to apply only a rebuttable presumption of imputed knowledge in those cases as well. (*Chambers v. Superior Court, supra*, 121 Cal.App.3d at pp. 898-901, 175 Cal.Rptr. 575.)

(4) The concerns expressed regarding loyalty in a "side-switching" case, below, apply equally to current government lawyers who have moved from private practice to government employment, yet unrestricted screening is permitted in those situations. (See, e.g., *City of Santa Barbara v. Superior Court, supra*, 122 Cal.App.4th at pp. 24-25, 18 Cal.Rptr.3d 403.)

(5) Despite not being subject to the same duty of confidentiality, nonlawyer employees and former law students are allowed to be screened regardless of the extent of their exposure to a former client's confidential information.

- Cons: There are several reasons not to broadly permit screening:

  (1) Screening has not, nor should it, be permitted in "side-switching" cases in the private sector. The court in *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 800, 814 conceded that imputation of the "tainted" lawyer's conflict remains "automatic" when the "tainted" lawyer was actually involved in the former client's representation and "switches sides" in the same case.

  (2) The duty of loyalty is implicated in a side-switching case. It is doubtful our Supreme Court would approve screening as a means of satisfying a lawyer's duty of loyalty under *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] and more recent cases.

  (3) It is not certain whether "broad screening" would or should put private lawyers on equal footing with government lawyers. There are many public policy reasons for permitting screening in the public sector that do not apply in the private sector. (See, e.g., *Chambers v. Superior Court* (1981), 121 Cal. App. 3d 893, 902 (1981); but cf. Kirk, 183 Cal.App.4th at 806 n.24.)

2. Recommend adoption of Model Rule 1.10(a)(2)(iii), which requires that the screened lawyer and a partner of the firm certify that the screen complies with the requirements under the Rules.

   - Pros: A former client is entitled not only to be notified of the existence of the screen, but also to be assured that the steps taken to protect that client's information are effective.

   - Cons: The required "certifications" do not necessarily provide any assurance to the former client that the screen is indeed effective, and provides the client with no meaningful recourse for investigating its effectiveness.

3. Recommend adoption of a provision in place of Model Rule 1.10(a)(2)(iii), based on Colorado Rule 1.10(d)(4), which would have required that:

   "the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material

information will be effective in preventing material information from being disclosed to the firm and its client."

- Pros: This clause provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It provides a better test of the an ethical screen's effectiveness than does MR 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with Rule 5.2(b) as posited in the "Cons," below.

- Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

4. Substitute California's heightened requirement of "informed written consent" for the "written notice" standard in paragraph (a)(2)(iii).

   - Pros: It is a more client-protective requirement that a lawyer obtain "informed written consent" from any affected former client. Model Rule 1.10, on the other hand, employs a more lenient and less-protective requirement of requiring only "written notice."

   - Cons: Requiring informed written consent is a function of the underlying conflicts rule (e.g., Rule 1.7 or 1.9) and is not justified in the limited circumstance of screening. Giving written notice is appropriate in the screening setting because it provides the former client the relevant information to protect their interest. If informed written consent is used then that person would be

given an effective veto power. The proposed rule, like Model Rule 1.10, strikes the right balance between a client's right to counsel of choice and duties owed to former clients.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Although the concept of imputation in proposed Rule 1.10 exists in current law, e.g., *Flatt v. Superior Court*, 9 Cal.4th at 283; *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.* (1999) 20 Cal.4th 1135, 1151-1152 [86 Cal.Rptr.2d 816]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], *review denied* (6/23/2010); *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575 [286 Cal. Rptr. 609]; *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109, 117 [14 Cal. Rptr.2d 184]; State Bar Formal Ethics Op. 1998-152, the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.10 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.10 in the form attached to this Report and Recommendation.

Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule
Synopsis of Public Comments

TOTAL = 10 *A = 6* *D = 0* *M = 3* *NI = 1*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
2016-32e	Law Professors (Zitrin) (07-25-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010).	No response required.
2016-52e	Law Professors (Zitrin) (08-24-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010).	No response required.
X-2016-43bc	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	A		COPRAC supports this rule in general. However, COPRAC believes that the rule should provide more guidance to lawyers with respect to the meaning of the term "substantially participate." 1. The screening allowed under proposed Rule 1.10 is limited to "the same or substantially related" matters in which the conflicted lawyer did not "substantially participate." COPRAC believes that it is important to provide guidance on what the term "substantially participate" means in subparagraph (a)(2)(i). This is not a term that appears elsewhere in the proposed rules and does not	1. The Commission agrees and has added Comment [1] to the proposed Rule.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					exist in the current California rules or case law concerning ethical screens. Given that fact, COPRAC believes that the Commission should include a comment that provides guidance on the meaning and application of the term. Ohio has a similar limitation in its Rule 1.10, although it uses the term "substantial responsibility" and applies that limitation only to situations where that lawyer's new firm is on the other side of the same matter for which the lawyer had substantial responsibility at his or her former firm. In such an instance, Ohio Rule 1.10 will not allow screening. Ohio's Rule 1.10 contains a comment that explains what "substantial responsibility" means: "A lawyer who was the sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer's role in representing the former client was substantial in other circumstances involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter." Ohio Rule 1.10, Comment [5B] COPRAC recommends that a similar comment be included in proposed Rule 1.10, particularly since a similar term ("participated substantially") is employed in proposed Rule 1.11, and is used there for a different purpose. 2. COPRAC further recommends that Comment [5] include a citation to *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010). While the other cases cited in the comment provide useful guidance in non-civil litigation contexts, the citation to *Kirk*, which applies in the civil litigation context, would provide additional useful guidance.	2. The Commission agrees and has added the reference to *Kirk*.
X-2016-66j	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We commend and support the Commission's adoption of this proposed rule that permits "screening" of lawyers who have	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					moved from one firm to another, such that the whole firm—arguably including lawyers in different offices or practices—is not tainted with the conflict, while at the same time protecting the client's interests by requiring prompt written notice to the affected former client, arguably giving that affected former client not only the opportunity to object but also to challenge the current representation.	
X-2016-67e	Orange County Bar Association (Friedland) (09-16-16)	Y	M		We generally agree with the approach taken by the Commission regarding imputation of conflicts, but we have a few suggestions. 1. First, Section (a)(2)(i) of the proposed rule introduces the concept of "substantially participate," which is not a concept used in Model Rule 1.9. We disagree that a lawyer cannot be screened if he or she substantially participated in a matter for his or her previous firm. If a screen is effective, then it is effective no matter the lawyer's previous level of participation. At a minimum, if the Commission keeps the requirement, we believe it would be helpful to define or at least explain this term in the	1. The Commission has added Comment [1]. See response 1 to COPRAC, X-2016-43bc, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					comments, as ti is not obvious what level of participation in a matter would be considered substantial.	
					2. Second, the proposed rule for the first time includes the possibility of screening to address a conflict of interest. We suggest adding the word "appropriately" to the phrase "timely screened" such that Section (a)(2)(ii) would read, "the prohibited lawyer is timely <u>and appropriately</u> screened. . . ."	2. The Commission did not make the suggested change. A "screen" is defined in proposed Rule 1.0.1(k). That provision requires that the screening procedures be "adequate under the circumstances." To add a further requirement in an individual rule that the lawyer be "appropriately" screened would be redundant.
					3. Third, Section (a)(2)(ii) and Comment [2] provide that a screened lawyer may not be apportioned any of the fees from the screened matter. We believe this concept – which has been part of the Model Rule – is not clear, and is often misunderstood by attorneys. We suggest adding an explanation, and even an example or two, in the comments as to what is meant by this phrase.	3. The Commission has not made the suggested change. It believes that Comment [2] (renumbered [3] in the revised draft) is clear and requires no further clarification.
					4. Finally, we believe a reference to the *Kirk* case would be helpful in one of the comments, as that case provides a good and	4. The Commission agrees and has added the reference to *Kirk*.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					thorough description of what constitutes an adequate screen.	
X-2016-68e	Law Professors (Zitrin) (09-21-16)	Y	A		Although Rule 1.10 was not addressed by the first commission or in the first ethics professors' letter, the second commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in *dicta* in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010). While we have concerns that *Kirk* itself may provide too broad a path towards screening, your proposed rule follows the thoughtful memorandum of commission member Mark Tuft on this issue, as well as the recommendation of principal letter author Richard Zitrin, made individually to the commission on June 2, 1016. As such, the commission has happily resisted the temptation, argued by some on the commission, to use a broader screening rule that do a disservice to the public and to clients.	No response required.
X-2016-104y	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a) for the same reasons expressed regarding that term in proposed Rule 1.9 and the General Comments of this letter.	1. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						circumstances. A lawyer may not engage in willful blindness to avoid knowledge that another lawyer in the lawyer's firm is prohibited from representing the client because of Rules 1.7 or 1.9. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule.
					2. OCTC supports Comments 1 and 2. If the Commission adopts proposed rules 5.1 and 5.3 OCTC supports Comment 4. If the Commission does not, this Comment should be rewritten.	2. As the Commission has not changed its view on Rules 5.1 and 5.3, no response required.
					3. The Commission may want to reconsider whether Comment 3 is necessary in light of the clear language of subsection (a) of this proposed rule.	3. The Commission did not make the suggested change. Although the Commission agrees that paragraph (a) clearly states that it applies only if the prohibition is based on Rules 1.7 and 1.9, the public comment received on 1.8.11 suggests that there remains some confusion regarding the application of this Rule. Consequently, it has retained Comment [3] (renumbered [4] in the revised Rule),
					4. Comment 5 does not address this rule for discipline purposes	4. The Commission has not made the suggested change.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					and, therefore, does not belong in the proposed rules.	Although the Rules are intended for discipline, courts and lawyers still regularly consult the rules and cited to them in deciding disqualification motions. Comment [5] recognizes this. It clarifies that a rule of discipline does not necessarily override a court's inherent power to control the proceedings before it.
X-2016-115d	Lamport, Stanley (09-29-16)	N	M		Proposed Rule 1.10 should be revised as shown on the attached redline. The Suggested Revision addresses two issues: (i) eliminating unconsented screening, and (ii) making clear in paragraph (b) that a firm can never be adverse to a former client when it retains the former client's confidential information that is material to the matter.	The Commission has not made the suggested changes. It continues to believe that in appropriate circumstances an timely screen can effectively provide assurance that a former client's confidential information will not be compromised.
X-2016-120l	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		Supports the adoption of proposed Rule 1.10.	No response required.
	Treat, Hon. Charles, Judge of Contra Costa Superior Court (10-06-2016).	N	NI		Concerning comments [9] and [10]: I assume this has already been debated at length, and the ship has sailed on this point. I nevertheless comment that it's disappointing that the Rules will	No response is possible. There are no comments [9] and [10] to the Rule. The commenter's submission appears to be addressed to the first Commission's

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					not provide a reliable source of law and guidance on disqualification issues, nor on the viability of screens.	proposed Rule.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.11
(No Current Rule)
Special Conflicts of Interest for Former and Current Government Officials and Employees

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: 1.7 (current client conflicts) [rule 3-310(B) and (C)]; 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. The Model Rules also include Model Rule 1.8, which compiles in a single rule 10 separate conflicts of interest concepts,[1] and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

(2) proposed Rule 1.11 (conflicts of interest involving government lawyers), which would incorporate into a rule of professional conduct the well-settled case law on imputation of conflicts of interest and the screening of personally prohibited lawyers to avoid the imputation of their conflicts to other lawyers in the government agency or private firm to which they have laterally moved. Proposed rule 1.11 largely adheres to the structure and substance of Model Rule 1.11.

Proposed rule 1.10 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

[1] Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules are addressed in separate executive summaries.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.[2]

2. ***Recommendation of addressing imputation and screening in the governmental context in a rule that tracks the organization of Model Rule 1.11***. There are five separate provisions in the proposed rule, two of which set forth the basic prohibition on representation of clients by former government lawyers, (paragraphs (a) [substantial participation in the contested matter] and (c) [acquisition of "confidential government information," e.g., tax information]), and two of which provide that such prohibitions are imputed to the former government lawyer's firm unless the lawyer is screened (paragraphs (b) and (c).) Another provision addresses the situation where a lawyer who has represented private clients moves to government service (paragraph (d)), and the last provision, paragraph (e), provides a definition of the term "matter" as used in the proposed rule.

There are several reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing that imputation is the default situation that can be avoided only if the prohibited lawyer is screened as provided in the rule, or the former government agency waives the rule's application. *Second*, the addition of paragraph (c), the prohibition on a former government lawyer's use of confidential government information (e.g., tax information), clarifies that a prohibition on representation can arise from information the former government employee might have acquired in situations other than in representation of the government employer, and emphasizes that the lawyer owes a duty of confidentiality to third persons. Such duties might not be readily apparent under current case law. *Third*, the description of such prohibitions on representation in a rule of professional conduct will provide clear guidance to both former and current government lawyers regarding their professional duties, thus enhancing compliance and facilitating discipline.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules,

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[2] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of a separate executive summary.

on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) sets out the basic prohibitions on representation of a private client by a former government official or employee. It provides that such a lawyer is subject to Rule 1.9(c) (confidentiality duties owed to former clients) and may not represent a private client in a matter in which the lawyer substantially participated as a government employee or official. It is similar to MR 1.11(a) except that (i) the reference to "personally" participated has been deleted as redundant, as case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation; (ii) "public official" is substituted for "public officer" to conform the rule to the term used in proposed rule 4.2 (communication with a represented person), (iii) California's historical heightened "informed written consent" requirement is incorporated; and (iv) a sentence from the first Commission's proposed rule 1.11 has been added to clarify that although judges and judicial employees are government employees and so would otherwise be presumed governed by rule 1.11, their conduct after leaving government employment is governed by rule 1.12.

Paragraph (b) sets out the basic rule of imputation for lawyers who are former government employees in its introductory clause and provides that a prohibited former government lawyer can be screened to avoid the imputation of the conflict to other lawyers in the firm with which the former government employee is now associated. It is similar to Model Rule 1.11(b) except that it has been modified to reflect that the proposed rule is a disciplinary rule rather than a civil standard for disqualification (substitution of the term "prohibited" for "disqualified").

Paragraph (c) prohibits a lawyer who has acquired confidential government information (e.g., tax information) about a person from representing another private individual with interests adverse to that person "in a matter in which the information could be used to the material disadvantage of that person." It is derived from Model Rule 1.11(c) but the syntax has been reordered for purposes of clarification. Paragraph (c) also provides that the personally prohibited lawyer can be screened.

Paragraph (d) sets forth requirements for a current government employee or one who moves from private practice into government employment. See also proposed Comment [8]. The paragraph is nearly identical to Model Rule 1.11(d), but makes the following changes: (i) substitution of "official" for "officer," (see discussion of paragraph (a)); (ii) incorporation of California's heightened "informed written consent" standard; and (iii) clarifies that a government lawyer is prohibited from negotiating not only with a lawyer or party involved in a matter in which the government employee is substantially participating, but also with anyone from a law firm of a lawyer involved in the matter.

Paragraph (e), which defines "matter" for the purposes of proposed rule 1.11, is identical to Model Rule 1.11(e). The first Commission similarly recommended adoption of Model Rule 1.11(e) verbatim.

There are nine comments to proposed rule 1.11, all of which provide guidance in interpreting or applying the rule. Comment [1] clarifies that proposed rule 1.10 does not apply to conflicts in the governmental context. Comment [2] clarifies that the prohibitions in paragraphs (a)(2) and (d)(2) apply regardless of whether the lawyer is adverse to a former client. Comments [3] and [4], derived from the first Commission's proposed rule 1.11, cmt. [4A] and New York Rule 1.11, cmt. [4A], have no counterpart in the Model Rule. The first Commission's Comment [4A] has been

divided into two comments to clarify the purposes of proposed rule 1.11(a)(1) and (c), respectively, and to provide guidance on when those provisions apply. This is particularly important for paragraph (c), which is intended to protect confidential government information regardless of whether the now private lawyer acquired the information when acting as a lawyer (paragraph (c) refers to the now private lawyer having acquired the information as a "public official or employee of the government"). Comment [5], which is similar to proposed rule 1.13, cmt. [6], explains that determining who or what is the client when more than one government agency is involved is beyond the scope of the Rules of Professional Conduct. Comment [6] includes an important clarification of how the screening requirement regarding fees in subparagraphs (b)(1) and (c)(1) is applied. Comment [7] explains that joint representation of the government and a private person may be permitted. Comment [8] provides a critical explanation that under paragraph (d), a former government lawyer's personal involvement in the representation of the government in the contested matter requires consent not only from the government agency to which the lawyer has moved, but also from the former client. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to proposed rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. Finally, Comment [9] has been added to clarify that proposed rule 1.11 is primarily intended for purposes of discipline, and whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule.

National Background – Adoption of Model Rule 1.11

Every jurisdiction except California has adopted some version of Model Rule 1.11. Twenty-two jurisdictions have adopted Model Rule 1.11 verbatim.[3] Most of the remaining jurisdictions largely track the Model Rule language, with only non-substantive changes. However, there are ten jurisdictions that have departed substantially from the language of the Model Rule,[4] including jurisdictions that address the issue of part-time government employment.[5]

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission changed the phrase "participated substantially" to "participated personally and substantially" in paragraphs (a)(2) and (d)(2). The change was made to provide uniformity with the ABA Model Rule, as well as with government statutes and regulations that use the same phrase. In addition, Comment [2] was amended to provide guidance as to when participation is personal and substantial.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

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[3] The jurisdictions are: Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

[4] The jurisdictions are: Arizona, District of Columbia, Georgia, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Virginia.

[5] See, e.g., Missouri Rule 1.11(e).

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.11

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.11, from which proposed Rule 1.11 is derived.]

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.11
Vote: 13 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.11
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public official or employee, unless the appropriate government agency gives its informed written consent* to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule

(c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent;* or

(ii) negotiate for private employment with any person* who is involved as a party, or as a lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

Comment

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation. Substantial participation requires that the lawyer's involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[4] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

[5] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[6] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[7] Paragraphs (b) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[8] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent* as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent* as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

[10] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. *See City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th at 847, 851-54 [43 Cal.Rptr.3d 776] and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.11)

Rule 1.11 Special Conflicts of Interest for Former and Current Government ~~Officers~~ Officials and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public ~~officer~~official or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public ~~officer~~official or employee, unless the appropriate government agency gives its informed written consent~~, confirmed in writing,~~* to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is ~~disqualified~~prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:

(1) the ~~disqualified~~personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~rule.~~Rule

(c) Except as law may otherwise expressly permit, a lawyer ~~having~~who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person ~~acquired when the lawyer was a public officer or employee~~,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this Rule, the term ~~"~~"confidential government information"~~"~~ means information that has been obtained under governmental authority ~~and which~~, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and ~~which~~that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the ~~disqualified~~personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public ~~officer~~official or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent~~, confirmed in writing~~;* or

(ii) negotiate for private employment with any person* who is involved as a party, or as a lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

~~(e) As used in this Rule, the term "matter" includes:~~

~~(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and~~

~~(2) any other matter covered by the conflict of interest rules of the appropriate government agency.~~

Comment

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

~~[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.~~

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

~~[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.~~

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client~~ and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.~~. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation. Substantial participation requires that the lawyer's involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for

example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[4] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

[5] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

~~[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.~~

[~~5~~6] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. ~~However, because the conflict~~ Because conflicts of interest ~~is~~are governed by ~~paragraph (d~~paragraphs (a) and (b), the latter agency is ~~not~~ required to screen the lawyer ~~as paragraph (b) requires a law firm to do. The question of whether~~. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [~~9~~6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[~~6~~7] Paragraphs (b) and (c) ~~contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs~~ do not prohibit a lawyer from receiving a salary or partnership share established by prior independent

agreement, but that lawyer may not receive compensation directly relating the ~~lawyer's~~lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

~~[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.~~

~~[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.~~

[~~9~~8] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent* as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent* as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

[10] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. *See City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th at 847, 851-54 [43 Cal.Rptr.3d 776] and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

~~[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.11 was not the primary factor in the Commission's consideration of proposed Rule 1.11, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct,

1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 277 – 298 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments of this letter.

     Commission Response: The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in paragraph (b), which addresses when a lawyer associated with the former government employee may undertake or continue representation. This is consistent with the ABA Model Rule and so furthers national uniformity.

  2. OCTC supports Comments [1], [2], [5], [6], [7], [8], and [9].

     Commission Response: No response required.

  3. OCTC is concerned about Comment [3]. It does not clarify the rule, but, instead, gives a philosophical basis for the rule.

     Commission Response: The Commission believes this comment provides important guidance regarding paragraph (a)(1)'s incorporation of Rule 1.9(c) as applicable to government employees.

  4. OCTC is concerned about Comment [4] for the same reasons it is concerned about the use of the word "knowingly" in subsection (b) of the rule.

     Commission Response: The Comment's use of the term "actual knowledge" as defined in Rule 1.1.1(f), is consistent with the intended reach of paragraph (c) of the Rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Three comments agreed with the proposed Rule and two comments agreed only if modified. During the 45-day public comment period, three public comments were received. All three comments agreed with the Proposed Rule only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

California has no rule similar to Model Rule 1.11, which permits an ethical screen to rebut the presumption of shared confidences in a law firm when a former government lawyer/employee possesses material confidential information by virtue of his or her former government employment, or when a former private lawyer is employed by the government. However, there is abundant case law that permits ethical screening in such circumstances. See, for example:

- *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]
- *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]
- *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]
- *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]
- See also cases discussed in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], review denied (6/23/2010).

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.11, from which proposed Rule 1.11 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_11.pdf [Last visited 2/6/17]

- Twenty-two jurisdictions have adopted Model Rule 1.11 verbatim.[1] Most of the remaining jurisdictions largely track the Model Rule language, with only non-substantive changes. However, there are ten jurisdictions that have departed

[1] The jurisdictions are Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

substantially from the language of the Model Rule,[2] including jurisdictions that address the issue of part-time government employment.[3]

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of the Model Rules' framework of having:

   (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

   (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed Rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

   - Pros: Such an approach should enhance compliance with and facilitate enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules as every other jurisdiction in the country has adopted the ABA conflicts rules framework.

   - Cons: There is no evidence that the current conflicts rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.11, patterned on Model Rule 1.11, which would regulate conflicts of interest in the governmental context.

   - Pros: There are several reasons favoring the Commission's recommendation:

     (1) adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing that imputation is the default situation that can be avoided only if the prohibited lawyer is screened as

[2] The jurisdictions are: Arizona, District of Columbia, Georgia, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Virginia.

[3] See, e.g., Missouri Rule 1.11(e).

provided in the rule, or the former government agency waives the rule's application.

(2) the addition of paragraph (c), the prohibition on a former government lawyers use of confidential government information (e.g., tax information), clarifies that a prohibition on representation can arise from information the former government employee might have acquired in situations other than in representation of the government employer, and emphasizes that the lawyer owes a duty of confidentiality to third persons. Such duties might not be readily apparent under current case law.

(3) the description of such prohibitions on representation in a rule of professional conduct will provide clear guidance to both former and current government employees regarding their professional duties, thus enhancing compliance and facilitating discipline.

- Cons: There is no evidence that the current abundant case law does not adequately regulate conflicts of interest in the governmental context.

3. Substitute the terms "prohibited" and "prohibition" for "disqualified" and "disqualification" throughout the rule.

   - Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.

   - Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.

4. Recommend carrying forward California's heightened requirement of "informed written consent."

   - Pros: It is a more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires *written* disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a more lenient and less-protective requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict and does not require written disclosure of the potential adverse consequences.

   - Cons: None identified.

5. Recommend adoption of paragraph (a), derived from Model Rule 1.11(a), which sets out the basic prohibitions on representation of a private client by a former government official or employee.

    - Pros: The rule is derived from Model Rule 1.11(a) but is revised for clarity while at the same time promoting a national standard. Changes include: (i) "public official" is substituted for "public officer" to conform the rule to the term used in proposed Rule 4.2 (communication with a represented person), (ii) California's historical heightened "informed written consent" requirement is incorporated (see Section IX.A.4); and (iii) a sentence from the first Commission's proposed Rule 1.11 has been added to clarify that although judges and judicial employees are government employees and so would otherwise be presumed governed by Rule 1.11, their conduct after leaving government employment is governed by Rule 1.12.

    - Cons: See Section IX.A.2, Cons.

6. Recommend adoption of paragraph (b), derived from Model Rule 1.11(b), which sets out the basic rule of imputation for lawyers who are former government employees in its introductory clause and provides that a prohibited former government lawyer can be screened to avoid imputation.

    - Pros: See Section IX.A.2, Pros.

    - Cons: See Section IX.A.2, Cons.

7. Recommend adoption of paragraph (c), derived from Model Rule 1.11(c), which prohibits a lawyer who has acquired confidential government information (e.g., tax information) about a person from representing another private individual with interests adverse to that person "in a matter in which the information could be used to the material disadvantage of that person."

    - Pros: This is an important provision that should enhance respect for the legal profession and the administration of justice. It prohibits a lawyer who has acquired confidential information of a person, usually under compulsion by the government, from later using that information to the material disadvantage of that person. The information is not otherwise privileged or subject to the duty of confidentiality because the person was not a former client of the former government employee. Although a former government employee may already be subject to a similar prohibition under regulations that govern their conduct, it is appropriate to include the prohibition in a disciplinary rule to highlight this important duty owed to persons who have disclosed sensitive information to the government.

    - Cons: Government employees are already prohibited from using such information under government regulations. There is no need for a further prohibition.

8. Recommend adoption of paragraph (d), derived from Model Rule 1.11(d), which identifies limitations on the conduct of a current government employee, including one who moves from private practice into government employment.

    - Pros: The provision states a clear standard for governing: (i) a government lawyer's representation of the government in a matter in which the lawyer participated personally and substantially while in private practice; and (ii) a government lawyer's ability to negotiate for private employment while still serving in government. With respect to the former, the government employee is precluded from such representation absent the consent of both the government agency and the former client (as the lawyer is subject to Rule 1.9).

      With respect to the latter, the proposed rule as revised clarifies that a government lawyer is prohibited from negotiating not only with a lawyer or party involved in a matter in which the government employee is substantially participating, but also with anyone from a law firm of a lawyer involved in the matter.

    - Cons: Government employees are already prohibited from engaging in representations adverse to a former private client, see *City of Santa Barbara v. Superior Court, supra*, 122 Cal.App.4th 17, 18 Cal.Rptr.3d 403 (2004), and are subject to government regulation regarding employment negotiations.

9. Recommend adoption of proposed Comment [2], which cross-references to Comment [2] of proposed Rule 1.7, which provides examples of what constitutes a "matter" derived from Model Rule 1.11(e). Comment [2] has been included rather than Model Rule 1.11(e), which provides a text definition of "matter" for purposes of Model Rule 1.11.

    - Pros: Because Model Rule 1.11(e) does not provide an exclusive definition of the term "matter," but instead provides examples of what is included in the term "matter," it is more appropriately included as a Comment. Further, the broad set of examples of what constitutes a "matter" is more appropriately included in Rule 1.7, and cross-referenced in Rules 1.9 and 1.11, because the examples apply to the term "matter" as used in all three Rules.

    - Cons: The deviation from the national standard is not justified. Although "matter" within the context of representation of private clients is typically limited to representations of a client in a legal proceeding or transaction, the ways in which a government employee, acting either as a lawyer or as a government official, provides services to the governmental client, is much broader. Further, Model Rule 1.11(e) is an attempt to capture the broader range of services that government lawyers often are called upon to provide and should be limited to Model Rule 1.11.

10. Recommend adoption of the Comments to the proposed Rule.

- Pros: There are ten Comments to Rule 1.11, all of which provide guidance in interpreting or applying the rule.

  Comment [1] clarifies that Rule 1.10 does not apply to conflicts in the governmental context.

  Comment [2] is discussed in paragraph 9 above.

  Comment [3] clarifies that the prohibitions in paragraphs (a)(2) and (d)(2) apply regardless of whether the lawyer is adverse to a former client. The Comment also provides guidance and examples with respect to when participation is "personal and substantial.

  Comments [4] and [5], derived from the first Commission's Rule 1.11, Cmt. [4A] and NY Rule 1.11, Cmt. [4A], have no counterpart in the Model Rule. The first Commission's Comment [4A] has been divided into two Comments to clarify the purposes of Rule 1.11(a)(1) and (c), respectively, and provide guidance on when those provisions apply. This is particularly true of paragraph (a)(1), which, through its recognition that the former government lawyer is subject to Rule 1.9(c) is intended to protect confidential government information regardless of whether the now private lawyer learned of the information when acting as a lawyer.

  Comment [6], which is similar to proposed Rule 1.13, Cmt. [6], explains that determining who or what is the client when more than one government agency is involved is beyond the scope of the rules.

  Comment [7] includes an important clarification of how the screening requirement regarding fees in subparagraphs (b)(1) and (c)(1) is applied.

  Comment [8] explains that joint representation of the government and a private person may be permitted.

  Comment [9] provides a critical explanation of the requirements under paragraph (d) for obtaining consent not only from the government agency but also from the former client.

  Comment [10] has been added to clarify that Rule 1.11 is not intended to address imputation and screening within government agencies, and that these areas are left to be addressed by existing California case law and its development, as well as any applicable statutes.

- Cons: With the possible exception of paragraph (d) and Comment [9], the rule is sufficiently transparent so as to not to require further clarification in Comments.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption in paragraphs (b) and (c) of a provision based on Colorado Rule 1.10(d)(4), which would have required that:

   "the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client."

   - Pros: This clause provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It provides a better test of an ethical screen's effectiveness than does Model Rule 1.10(a)(2)(iii)'s requirement that the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with Rule 5.2(b) as posited in the "Cons," below.

   - Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

11. Recommend adoption of Model Rule 1.11(e), which provides a definition of "matter" for purposes of Model Rule 1.11, rather than include proposed Comment [2], which cross-references to Comment [2] of proposed Rule 1.7, which provides examples of what constitutes a "matter" derived from Model Rule 1.11(e).

- Pros: Proposed Comment [2], which is a deviation from the national standard that places the definition of "matter" in the blackletter text, is not justified. Although "matter" within the context of representation of private clients is typically limited to representations of a client in a legal proceeding or transaction, the ways in which a government employee, acting either as a lawyer or as a government official, provides services to the governmental client, is much broader. Model Rule Paragraph (e) is an attempt to capture the broader range of services that government lawyers often are called upon to provide and should be limited to Model Rule 1.11.

- Cons: Because Model Rule 1.11(e) does not provide an exclusive definition of the term "matter," but instead provides examples of what is included in the term "matter," it is more appropriately included as a Comment. Further, the broad set of examples of what constitutes a "matter" is more appropriately included in Rule 1.7, and cross-referenced in Rules 1.9 and 1.11, because the examples apply to the term "matter" as used in all three Rules.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Although the concepts of imputation and screening in proposed Rule 1.11 exist in current law, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 776]*; City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]*; Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]*; Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864], the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.11 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.11 in the form attached to this Report and Recommendation.

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
Synopsis of Public Comments

TOTAL = 3 *A = 0* *D = 0* *M = 3* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-4	League of California Cities (Leary) (09-27-16)	Y	M		Proposed Rule 1.11 establishes specific conflict of interest rules for former and current government attorneys. Because this rule provides clear and necessary guidance to both former and current government lawyers regarding their professional duties, the League fully supports its adoption by the California State Bar's Board of Trustees ("Board"). However, the League urges the Board to modify Proposed Rule 1.11 by substituting "public officer" for "public official." This modification would clarify the scope of the rule, by utilizing terminology that is already well defined in California public agency law, as explained at length in the League's comments to Proposed Rule 4.2.	1. The Commission has not made the suggested change. The use of "public official" rather than "public officer" in this rule is consistent with the similar use in Rule 4.2. Moreover, consistent with the ABA Model Rule, this rule extends more broadly to lawyers who are or were public "employees." Given this breadth, the Commission does not believe that use of the term "public official" will result in confusion.
Y-2016-21I	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (b) of this rule as it has for proposed Rule 1.9. This rule appears to exclude an attorney who either does not have a program to check conflicts, or does not	1. The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					actually check to determine whether there is a conflict. 2. OCTC supports Comments [1], [2], [5], [6], [7], [8], [9], and [10]. While OCTC generally believes that there are too many unnecessary comments in the rules, the complexity of the conflict rules does require several comments. 3. Comment [3] does not clarify the rule, but, instead, gives a philosophical basis for the rule. 4. Comment [4]'s use of the word "knowingly" in subsection (b) of the rule is problematic for the reasons already discussed about the use of the word "knowingly."	proposed Rule 1.0.1(f) provides: "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. The second sentence of that definition prohibits "willful blindness." Nevertheless, the Commission has added a new comment similar to proposed rule 1.10, cmt. [5], to alert managerial and supervisory lawyers to their duties under rules 5.1 and 5.3 regarding ethical screens. 2. No response necessary. 3. The Commission continues to believe that Comment [3] provides useful guidance, including in particular guidance and examples as to when participation in a matter is personal and substantial. 4. See response in (1) above.
Y-2016-7r	State Bar Standing Committee on Professional Responsibility and	Y	M	Cmt. [2]	We recommend Comment [2] be deleted. As we stated in our comment letter to proposed rule	1. The Commission continues to believe that as a non-exclusive list of examples of

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
Synopsis of Public Comments

TOTAL = 3 *A = 0* *D = 0* *M = 3* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
	Conduct (COPRAC) (Spencer) (1-9-17)				1.7, the definition of "matter" is clearly too narrow in its application to many common situations, such as mediation prior to the filing of a lawsuit or administrative or legislative lobbying. The definition also appears to fall into the category of law-making by Comment that the Supreme Court has disapproved. This definition appears to be a departure from prior law that is not required for national uniformity, since the ABA Model Rules do not contain such a definition.	what is included within the term matter, Comment [2] to Rule 1.7 (cross-referenced by Comment [2] to Rule 1.11) is an appropriate comment. However, the Commission has modified Comment [2] to Rule 1.7 so that the list of examples is not only closer to that contained in current ABA Model Rule 1.11(e), but also is appropriate for use with respect to Rule 1.11 as well.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.12
(No Current Rule)
Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: 1.7 (current client conflicts) [rule 3-310(B) and (C)]; 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. The Model Rules also include Model Rule 1.8, which compiles in a single rule 10 separate conflicts of interest concepts,[1] and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

(2) proposed Rule 1.12 (conflicts of interest involving former judges, third party neutrals and their staffs), which provides for imputation and screening when judges or other third party neutrals, or their staffs, move into private practice. Proposed rule 1.12 largely adheres to the structure and substance of Model Rule 1.12 but makes changes to the black letter text to clarify the limitations on negotiations for employment (paragraph (b) and specific limitations in California case law on the ability of a law firm to screen a former judge who has acted as a mediator or settlement judge after the judge has moved into private practice with the firm.

Proposed rule 1.12 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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[1] Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed Rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules will be addressed in separate executive summaries.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).[2]

2. ***Recommendation of addressing duties of former judges, third party neutrals, and their staffs in a rule that tracks the organization of Model Rule 1.9***. There are four provisions in the proposed Rule, one which states the basic prohibition on representations of private clients after leaving service as a judge or third party neutral, or as legal staff thereto (paragraph (a), one which sets forth the limitations on employment negotiations when still a sitting judge, third party neutral or staff (paragraph (b)), one that provides for imputation of the paragraph (a) prohibition to other lawyers in the firm to which the former judge, third party neutral or staff person has moved, and for the availability of screening to avoid the imputation (paragraph (c)), and a fourth provision that excepts from the rule a party arbitrator (paragraph (d).)

Proposed Rule 1.12 is the final piece in the trio of rules intended to regulate the lateral movement of lawyers between private firms (Rule 1.10), between government service and private practice (Rule 1.11), and between service in the judicial branch or as a third party neutral and practice in the private sector (Rule 1.12). If the first two rules are adopted, then Rule 1.12 should also be adopted in light of special concerns relating to the integrity of the judicial process and the critical need for clear guidance on precisely what conduct is permitted in negotiating for employment as a judicial employee and the necessary restrictions on the availability of an ethical screen to rebut the presumption of shared confidences by a former judicial employee in a private firm.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

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[2] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (a) states the general prohibition on a former judge, arbitrator, or other third party neutral, and members of their respective staffs, from participating in a case in which they were substantially involved as a judicial employee. It is identical to MR 1.12(a) except for (i) California's heightened consent requirement being substituted; (ii) the addition of the term "judicial staff attorney" to the introductory clause of paragraph (a) to accurately reflect the title of most lawyers who work in the California courts; and (iii) the deletion of the reference to "personally" participated as redundant, as case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation.

Paragraph (b) prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral. The Commission has recommended replacing the phrase "negotiate for" with the phrase "participate in discussions regarding prospective." This replacement language is taken from the first Commission's proposed rule 1.12. The language is consistent with the Model Rule in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as "employment negotiations." In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

Paragraph (c). The introductory clause of paragraph (c) is derived from the first Commission's Rule 1.12(c) and differs substantially from the Model Rule. The provision excludes from the availability of screening lawyers who previously served as mediators or settlement judges. This change was made because permitting screening of settlement judges and mediators, who not only receive confidential information from the parties but actively seek such information, would reduce confidence in the administration of justice. See *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863] (no amount of screening of a settlement judge who had received confidential information could assuage concerns of the parties to the settlement discussions). Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

Paragraph (d) is identical to Model Rule 1.12(d) and provides that a partisan party arbitrator does not raise the same administrative of justice concerns as an impartial judge or third party neutral, and so is not subject to the prohibitions of Rule 1.12.

There are three comments to Rule 1.12, all of which provide guidance in interpreting or applying the rule. Comment [1] is derived largely from the first Commission's modification of the Model Rule comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. This is similar to proposed Rule 1.9(b). Comment [2] alerts lawyers to the possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule. Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied. It corresponds to similar provisions in proposed Rules 1.10 and 1.11.

National Background – Adoption of Model Rule 1.12

Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.[3] The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission changed the phrase "participated substantially," in paragraph (a), and "participating substantially" in paragraph (b), to "participated personally and substantially" and "participating personally and substantially", respectfully. The change was made to provide uniformity with the ABA Model Rule, as well as with government statutes and regulations that use the same phrase. This change also conforms to similar revisions made to proposed Rule 1.11.

In paragraph (c), a phrase was removed and edited as a new subparagraph (c)(1). The change was made to improve the awkward syntax of the paragraph as originally drafted and no change in the application of the rule is intended.

Comment [1] was amended to provide guidance as to when participation is personal and substantial. Comment [3] was amended to update an internal reference to paragraph (c)(2) of the Rule.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

[3] The jurisdictions are: Arizona, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, and Vermont.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.12

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout,

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.12, from which proposed Rule 1.12 is derived.]

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact

that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.12
Vote: 13 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.12
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.*

(b) A lawyer shall not participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third*party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm* for a party, in a matter in which the staff attorney or clerk is participating substantially, but only with the approval of the court.

(c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(2) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not

only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term "adjudicative officer" includes such officials as judges pro tempore, referees and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Paragraph (c)(2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.12)

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent~~, confirmed in writing~~.*

(b) A lawyer shall not ~~negotiate for~~participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other ~~third-party~~third*party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may ~~negotiate for~~participate in discussions regarding prospective employment with a party, or with a lawyer ~~involved~~or a law firm* for a party, in a matter in which the staff attorney or clerk is participating ~~personally and~~ substantially, but only ~~after the lawyer has notified the judge or other adjudicative officer~~with the approval of the court.

(c) If a lawyer is ~~disqualified~~prohibited from representation by paragraph (a), ~~no lawyer~~other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter ~~unless~~only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(~~1~~2) the ~~disqualified~~prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(~~2~~3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this ~~rule~~Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] ~~This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that~~ Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate~~. So also the~~, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits~~. Compare the Comment to Rule 1.11. The term "~~, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term "adjudicative officer~~"~~" includes such officials as judges pro tempore, referees~~,~~ and special masters~~, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.~~.

[2] ~~Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b).~~ Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

~~[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.~~

[43] ~~Requirements for screening procedures are stated in Rule 1.0(k).~~ Paragraph (c)(~~1~~2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

~~[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.12 was not the primary factor in the Commission's consideration of proposed Rule 1.12, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 299 – 308, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (c) of this rule as it has for proposed Rule 1.9 and the General Comments section of this letter.

   Commission Response: The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides:

   > "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

The second sentence of that definition prohibits "willful blindness."

2. OCTC supports the Comments.

   Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Three comments agreed with the proposed Rule and two comments agreed only if modified. During the 45-day public comment period, two public comments, including the above comment from OCTC, were received. One commenter agreed with the proposed rule and on agreed if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

California has no rule similar to Model Rule 1.12, which permits an ethical screen to rebut the presumption of shared confidences in a law firm when a former judge or judicial employee possesses material confidential information by virtue of his or her former government employment. However, there is a California case, *Cho v. Superior Court* (1995) 39 Cal.App.4th 113 [45 Cal. Rptr.2d 863], which held that an ethical screen could not rebut the presumption of shared confidences, at least where the former judge had obtained confidential client information during a settlement conference:

> No amount of assurances or screening procedures, no "cone of silence," could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm-which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent. (39 Cal.App.4th at 125.)

The court did not opine on whether a former judicial officer's law firm should be disqualified because the judge had presided over the same or substantially similar matter now being handled by the law firm but had actually received confidential information of any party as in a settlement conference.[1]

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.12, from which proposed Rule 1.12 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_12.pdf [Last visited 2/6/17]

- Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.[2] The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed Rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

    - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with

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[1] Compare Model Rule 1.12, Cmt. [3]:

> [3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[2] The jurisdictions are Arizona, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, and Vermont.

quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules as other jurisdiction in the country has adopted the ABA conflicts rules framework.

- Cons: There is no evidence that the current rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.12, patterned on Model Rule 1.12, which would regulate the lateral movement of judges, third party neutrals, and their staffs into private practice.

   - Pros: Proposed Rule 1.12 is the final piece in the trio of rules intended to regulate the lateral movement of lawyers between private firms (Rule 1.10), between government service and private practice (Rule 1.11), and between service in the judicial branch or as a third party neutral and practice in the private sector (Rule 1.12). If the first two rules are adopted, then Rule 1.12 should also be adopted in light of special concerns relating to maintaining the integrity of the judicial process and the critical need for clear guidance on precisely what conduct is permitted in negotiating for employment as a judicial employee and the necessary restrictions on the availability of an ethical screen to rebut the presumption of shared confidences by a former judicial employee in a private firm.

   - Cons: None identified.

3. Substitute the term "prohibited" for "disqualified" throughout the rule.

   - Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.

   - Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.

4. Recommend carrying forward California's heightened requirement of "informed written consent."

   - Pros: It is a more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires *written* disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a more lenient and less-protective requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict and does not require written disclosure of the potential adverse consequences.

- Cons: None identified.

5. Recommend adoption of paragraph (a), derived from Model Rule 1.12(a), which states the general prohibition on a former judge, arbitrator, or other third party neutral, and members of their respective staffs, from participating in a case in which they were substantially involved as a judicial employee.

   - Pros: As noted, the integrity of the judicial process requires that clear guidelines be set forth regarding appropriate conduct after leaving service as a judge, third party neutral, or a member of their staff. The Model Rule provision has been revised to further those objectives: (i) California's heightened consent requirement has been substituted for the Model Rule's more lenient "consent, confirmed in writing"; (ii) the term "judicial staff attorney" has been added to the introductory clause of paragraph (a) to accurately reflect the title of most lawyers who work in the California courts; and (iii) the reference to "personally" participated has been deleted as redundant because case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation.

   - Cons: None identified.

6. Recommend adoption of paragraph (b), derived from Model Rule 1.12(b), which generally prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral.

   - Pros: This provision is an added piece in maintaining the integrity of the judicial process. The Model Rule provision has been revised to further that objective:

     (1) The phrase "negotiate for" has been replaced with the phrase "participate in discussions regarding prospective." This replacement language is taken from the first Commission's proposed Rule 1.12. The language is consistent with the Model Rule in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as "employment negotiations." In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

     (2) The provision clarifies that a government lawyer is prohibited from negotiating not only with a lawyer or party involved in a matter in which the government employee is substantially participating, but also with anyone from a law firm of a lawyer involved in the matter.

     (3) Although the provision permits a law clerk or judicial staff attorney to negotiate for employment, such lawyer may do so only with the judge's approval, rather than just having to "notify" the judge as in the Model Rule.

   - Cons: None identified.

7. Recommend adoption of paragraph (c), derived from Model Rule 1.12(c), which sets forth the requirements for screening a former judge, third party neutral or member of their staffs. It differs substantially from the Model Rule in excluding from the availability of screening lawyers who previously served as mediators or settlement judges.

    - Pros: The change is warranted because permitting screening of settlement judges and mediators, who not only receive confidential information from the parties but actively seek such information, would reduce confidence in the administration of justice. See *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863] (no amount of screening of a settlement judge who had received confidential information could assuage concerns of the parties to the settlement discussions).

      On the other hand, not permitting screening of judicial staff attorneys and law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

    - Cons: None identified.

8. Recommend adoption of paragraph (d), identical to Model Rule 1.12(d), which provides that a partisan party arbitrator does not raise the same administrative of justice concerns as an impartial judge or third party neutral, and so is not subject to the prohibitions of Rule 1.12.

    - Pros: The adoption of this provision will further the development of a national standard. The same concerns regarding the integrity of the judicial system that are apparent when an impartial decision-maker goes into private practice are not present when a party arbitrator later is involved in the same matter.

    - Cons: None identified.

9. Recommend adoption of the Comments to the proposed Rule.

    - Pros: There are three Comments to Rule 1.12, all of which provide guidance in interpreting or applying the rule:

      Comment [1] is derived largely from the first Commission's modification of the Model Rule Comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. This is similar to proposed Rule 1.9(b). This Comment also defines what constitutes personal and substantial participation in the matter.

Comment [2] alerts lawyers to the possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule.

Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied. It corresponds to similar provisions in proposed Rules 1.10 and 1.11.

- Cons: The rule is sufficiently transparent, particularly given the revisions made to the corresponding model rule, so as to not to require further clarification in Comments.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption in paragraphs (b) and (c) of a provision based on Colorado Rule 1.10(d)(4), which would have required that:

   "the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client."

   - Pros: This clause provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It provides a better test of the an ethical screen's effectiveness than does Model Rule 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with Rule 5.2(b) as posited in the "Cons," below.

   - Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a

supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Although the concepts of imputation and screening in proposed Rule 1.12 exists in current law, e.g., *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.12 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.12 in the form attached to this Report and Recommendation.

Proposed Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Synopsis of Public Comments

TOTAL = 2 *A = 1* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21m	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (c) of this rule as it has for proposed Rule 1.9 and the General Comments section of OCTC's September 27, 2016 letter. 2. OCTC supports the Comments.	1. The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides: "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. The second sentence of that definition prohibits "willful blindness." Nevertheless, the Commission has added a new comment similar to proposed rule 1.10, cmt. [5], to alert managerial and supervisory lawyers to their duties under rules 5.1 and 5.3 regarding ethical screens. 2. No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Synopsis of Public Comments

TOTAL = 2 *A = 1* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-7g	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	A		COPRAC supports the adoption of proposed Rule 1.12 as revised.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.13
(Current Rule 3-600)
Organization as Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-600 (Organization as Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.13 (Organization as Client). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.13 (Organization as Client).

Rule As Issued For 90-day Public Comment

Proposed rule 1.13 carries forward the basic concept of current rule 3-600 but with four specific changes. First, proposed rule 1.13 now mandates "reporting up" in certain circumstances. Second, a two-part test with different scienter requirements is applied to determine whether a constituent's action amounts to an enumerated violation and whether the violation is likely to result in harm to the organization. Third, a lawyer's "reporting up" requirement is triggered only when both parts of the test have been satisfied. Finally, a lawyer is now required to notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw as a result of his or her "reporting up" requirements.

Paragraph (a) carries forward the concept in current rule 3-600 which provides that when a lawyer represents an organization, the organization is the client acting through its constituents. By substituting the clause, "A lawyer employed or retained by an organization," for "in representing an organization" in current rule 3-600, paragraph (a) clarifies that the rule applies to both in-house and outside counsel.

Paragraph (b) requires a lawyer to report certain enumerated conduct by a constituent "up the corporate ladder." This mandate is consistent with the national trend but diverges from current rule 3-600 which permits, but does not require, a lawyer to take such action. A lawyer's duty to report is triggered by two separate scienter standards: (1) a subjective standard that requires actual knowledge that a constituent is, has, or plans to act and; (2) an objective standard that asks whether a reasonable lawyer would conclude that the constituent's course of action is a violation of law or a legal duty and likely to result in substantial injury to the organization. Unlike current rule 3-600 which permits a lawyer to take corrective action if there is either a violation of law or likely substantial injury to the organization, paragraph (b) requires that both be present before a lawyer's duty to report up is triggered.

Paragraph (c) provides that a lawyer must maintain his or her duty of confidentiality when taking action pursuant to paragraph (b).

Paragraph (d) carries forward the concept in current rule 3-600 that if the highest authority in the organization insists on a course of conduct discussed in paragraph (b), the lawyer's response may include discussion of the lawyer's duties regarding terminating representation.

Paragraph (e) imposes a duty on a lawyer who is discharged or withdraws in accordance with paragraphs (b) or (d) to notify the organization's highest authority of the lawyer's discharge or withdrawal.

Paragraph (f) carries forward the duty imposed by current Rule 3-600(D) requiring a lawyer for the organization to explain who the client is when it is apparent that the organization's interests are or may become adverse to those of a constituent with whom the lawyer is dealing.

Paragraph (g) carries forward the concept in current Rule 3-600(E) which expressly recognizes that a lawyer may jointly represent the organization and a constituent so long as the requirements of the rules addressing actual or potential conflicts of interest are satisfied.

Comment [1] explains the scope of the rule's application to different organizations, including governmental organizations. The comment also clarifies that the identity of the constituents themselves will depend on the organization's form, structure, and chosen terminology.

Comment [2] discusses a lawyer's duty to defer to constituents' decisions on behalf of the organization. The comment likewise discusses a lawyer's duty to communicate significant developments. Finally, the comment provides that a lawyer may refer to an organization's highest authority even when not mandated by paragraph (b).

Comment [3] explains that paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of the conduct.

Comment [4] provides that it is appropriate, before taking action pursuant to paragraph (b), to urge reconsideration of a constituent's proposed course of action.

Comment [5] explains that a lawyer should not generally substitute the lawyer's judgment for that of the organization's highest authority.

Comment [6] expressly recognizes the difficultly inherent in attempts to generalize the duties of lawyers representing government organizations. This comment clarifies that each government lawyer's situation is different and needs to be assessed within its own structure.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised paragraph (c) for clarity, and also revised the last sentence of Comment [1] to limit the breadth of the statement "[f]or purposes of this Rule." Finally, the Commission deleted the first sentence of Comment [5].

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

After making revisions in response to public comment, the Commission submitted its proposed rule to the Board of Trustees for consideration at the Board's meeting on November 17, 2016. The Board revised the rule to address two issues.

First, in the second sentence of paragraph (g), the Board added the word "constituent" to the list of appropriate persons who may give consent on behalf of the organization to a dual representation of the organization and another person. This was done to retain language used in the current rule.

Second, in the last sentence of Comment [1], the phrase "for purposes of the authorized matter" was deleted as confusing and unnecessary.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

* * * * *

(g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

Comment

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization ~~for purposes of the authorized matter~~.

* * * * *

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.13 [3-600]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild
Co-Drafters: Danny Chou, Robert Kehr, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 3-600 Organization As Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.13 [3-600]
Vote: 12 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.13 [3-600]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.13 [3-600] Organization as Client

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

(b) If a lawyer representing an organization knows* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, the lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

(e) A lawyer who reasonably believes* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows* or reasonably should know* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent

shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows* or reasonably should know* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the

lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-600)

Rule 1.13 [3-600] Organization as Client

(~~A~~a) ~~In representing~~A lawyer employed or retained by an organization~~, a member~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~highest~~duly authorized ~~officer, employee, body, or constituent~~directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

(~~B~~b) If a ~~member acting on behalf of~~lawyer representing an organization knows* that ~~an actual or apparent agent of the organization acts or~~a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that ~~is or may be~~the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, ~~or in a manner which is~~and (ii) likely to result in substantial* injury to the organization, the ~~member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be~~lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. ~~Such actions may include among others:~~

Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer ~~(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or~~

~~(2)~~ ~~Referring~~ the matter to ~~the next~~ higher authority in the organization, including, if warranted by the ~~seriousness of the matter, referral~~circumstances, to the highest ~~internal~~ authority that can act on behalf of the organization as determined by applicable law.

(c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e).

(~~C~~d) If, despite the ~~member's~~lawyer's actions in accordance with paragraph (~~B~~b), the highest authority that can act on behalf of the organization insists upon action, or ~~a refusal~~fails to act, in a manner that is a violation of ~~law~~a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, the ~~member's response is limited to the member's~~lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right~~,~~ and, where appropriate, duty to resign or withdraw in accordance with ~~rule 3-700~~Rule 1.16.

(e) A lawyer who reasonably believes* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes* necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(~~D~~f) In dealing with an organization's ~~directors, officers, employees, members, shareholders, or other~~ constituents, a ~~member~~lawyer representing the organization shall explain the identity of the lawyer's client ~~for whom the member acts,~~ whenever ~~it is or becomes apparent~~the lawyer knows* or reasonably should know* that the organization's interests are ~~or may become~~ adverse to those of the constituent(s) with whom the ~~member~~lawyer is dealing. ~~The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.~~

(~~E~~g) A ~~member~~lawyer representing an organization may also represent any of its ~~directors, officers, employees, members, shareholders, or other~~ constituents, subject to the provisions of ~~rule 3-310~~Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by ~~rule 3-310~~any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual ~~or constituent~~ who is to be represented, or by the ~~shareholder(s) or organization members~~shareholders.

Comment~~Discussion~~

The Entity as the Client

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this Rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code § 6068(m) and Rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code § 6068(e) and Rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows* or reasonably should know* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

~~Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.~~

~~Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

~~Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.~~

V. RULE HISTORY

Current rule 3-600 was adopted in 1987 and was based on ABA Model Rule 1.13.[1] Although as discussed below, there was an attempt to amend the rule, and two legislative attempts to permit government lawyers to report misconduct outside their agency, there have been no changes to rule 3-600 since it originally became operative.

The rule provides that, where a lawyer provides legal services to an organization, the organization itself is the only client, acting through an individual authorized to instruct the lawyer ("constituent"). (Rule 3-600(A).) The rule is intended to clarify that the lawyer owes duties to the organization itself and must maintain a confidential relationship with the organization. If the lawyer believes that the constituent is operating unlawfully or in a manner likely to result in substantial injury to the organization, rule 3-600 provides that the lawyer *may* take action to protect the organization, including referring the matter to a higher authority within the organization. (Rule 3-600(B).) In taking action, however, the rule emphasizes that the lawyer must protect the confidential information of the client organization. (*Id*.) Thus, if the highest authority of the organization (e.g., the Board of Directors) continues to operate unlawfully or in a manner likely to result in substantial injury, rule 3-600 provides that the lawyer's response is limited to the lawyer's right, and perhaps duty, to withdraw. (Rule 3-600(C).) Additionally, the rule describes situations where it is necessary for the lawyer to warn individuals of the organization, who may be exposed to personal liability, that the lawyer's duties are solely to the organization and not the individual. (Rule 3-600(D).) Rule 3-600 also specifies that the lawyer may represent individuals of the organization so long as the lawyer complies with the conflicts rules. (Rule 3-600(E).)

In 2002, the State Bar Board of Governors adopted proposed amended rule 3-600. The amended rule would have permitted government lawyers, in limited circumstances, to report governmental misconduct to an oversight or law enforcement agency (whistle-blower provisions). The California Supreme Court did not approve the proposed amended rule. In a May 10, 2002 letter, the Court stated:

> "The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e)."

Following the California Supreme Court's rejection of the amendments, AB 363 was proposed to codify language similar to the whistleblower language from proposed amended rule 3-600. On September 30, 2002, AB 363 was vetoed by Governor Davis. In his veto message, Governor Davis stated that the bill "chips away at the attorney-client relationship which is intended to foster candor between an attorney and client."

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[1] Model Rule 1.13 was amended in 2003. Current rule 3-600 now substantially diverges from Model Rule 1.13 See discussion at Section VII.B.

Subsequent to the Davis veto, AB2713, which provided for similar whistleblower provisions, was proposed. That bill was similarly vetoed. In his September 28, 2004, veto message, Governor Schwarzenegger stated:

> "I am returning Assembly Bill 2713 without my signature.
>
> This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.
>
> Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.
>
> For the reasons stated I am unable to support this measure."

No further attempts to create a whistleblower exception for lawyers in an organizational context, whether limited to government lawyers or not, have been made.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowing" in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments section of this letter, i.e., By using the term "knowingly'" in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness.

   Commission Response: The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides: "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. The second sentence of that definition prohibits "willful blindness."

2. OCTC supports Comments [1], [2], [4], and [6], except Comment [2] may need to be rewritten if the Commission revises its proposals to have a single rule for competence, diligence, and supervision.

Commission Response: The Commission has not made the suggested change because it continues to believe that competence, diligence, and supervision should be set forth in separate rules.

3. OCTC has the same concerns regarding use of the term "knowing" in Comment [3] for the same reasons it has concerns about subsection (b) of this rule, as well as proposed Rule 1.9 and the General Comments section of this letter.

   Commission Response: See response to comment 1.

4. Comment [5] appears to cover the same issues as Comment [2] and, thus, is unnecessary and should be stricken.

   Commission Response: The Commission disagrees that all of Comment [5] covers the same issues as Comment [2] but has retained only the last sentence of that comment, which provides important interpretative guidance on the meaning and application of the term, "best lawful interests."

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed Rule and two comments agreed only if modified. During the 45-day public comment period, three public comments were received. One comment agreed with the proposed Rule, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Duty of Confidentiality. A California lawyer's duty of confidentiality is provided in Business and Professions Code § 6068(e):

It is the duty of an attorney to do all of the following:

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

While current rule 3-600 clarifies the duties of a lawyer representing an organizational client, it reinforces a lawyer's duty to protect the confidences of the client (the organization), even when faced with a client's potential violation of law.

1. Federal SEC Standards of Professional Conduct

Pursuant to the Sarbanes-Oxley Act and effective in 2002, the SEC Standards of Professional Conduct require lawyers representing securities issuers to report SEC violations to the client-issuer's chief legal officer. (15 U.S.C. § 7245.) These rules also permit lawyers to disclose confidences of the client-issuer to the SEC. (17 C.F.R. § 205.3(d)(2).) These provisions potentially create a conflict for California lawyers whose statutory duty under Business and Professions Code section 6068(e) prohibits disclosure of a client's confidential information. As noted above, the only exception to the duty falls under section (e)(2), where the disclosure would be necessary to prevent death or substantial bodily harm. However, because the SEC regulations *permit* disclosure of confidences to the SEC, but do not require it, California lawyers should be able to fulfill their duties under §6068(e). (See *Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality*, Spring 2004, available at: http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-SEC_Ethics_Alert-Spring_04.pdf.)

B. ABA Model Rule Adoptions

- **Background of Model Rule 1.13**. ABA Model Rule 1.13 is the Model Rules counterpart to current rule 3-600, with several key differences. In 2002, the ABA's President appointed a Corporate Responsibility Task Force to study whether, in light of the financial debacles involving Enron and Worldcom, amendments to the Model Rules – specifically Model Rules 1.6 and 1.13 – were warranted. In 2003, the ABA House of Delegates adopted the Task Force's recommended modifications to both rules. The two major amendments to Model Rule 1.13 were to (i) mandate ("shall") going "up the ladder" within the organization, i.e., reporting violations of law or legal obligations to a higher authority within the client entity and (ii) permit, in limited circumstances, disclosure of confidential information outside the client entity (whistleblowing). The changes to Model Rule 1.13 complemented the changes to Model Rule 1.6, i.e., the addition of paragraph (b)(2) and (b)(3), which provide express exceptions to a lawyer's duty of confidentiality to prevent, rectify or mitigate

substantial financial injury to a person that results from a client's crime or fraud for which the lawyer's services were employed.

The modifications to Model Rule 1.13 represent a significant departure from current rule 3-600 which, like the pre-2003 version of the Model Rule, provides only for permissive ("may") reporting to a higher authority within the client entity. Unlike the pre-2003 Model Rule 1.13, current rule 3-600 also reinforces a lawyer's duty to protect a client's confidential information as required by Business and Professions Code § 6068(e) first, by preceding the permissive language of paragraph (B) with a plain statement that the lawyer "shall" comply with the duties imposed by § 6068(e) and second, by not permitting disclosure of confidences outside the client entity, limiting a lawyer's response to resignation or withdrawal, (see rule 3-600(C)).

- **Model Rule 1.13**. The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2," revised September 15, 2016, is available at:

  - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_13.authcheckdam.pdf (Last accessed on 2/7/17.)

  - Eighteen jurisdictions have adopted Model Rule 1.13 verbatim, including the 2003 Task Force changes.[2] Fifteen jurisdictions have adopted a modified version of the Model Rule, two of which include the 2003 changes,[3] twelve of which included modified versions of the 2003 changes,[4] and seven of which did not adopt any of the 2003 changes.[5] Twelve jurisdictions have a rule that is substantially different from the Model Rule in that they do not include the 2003 changes.[6]

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[2] The eighteen jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, West Virginia, Wyoming.

[3] The two jurisdictions are: Washington, Wisconsin.

[4] The twelve jurisdictions are: Alaska, Hawaii, Illinois, Michigan, Minnesota, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont.

[5] The seven jurisdictions are: Alabama, Delaware, Georgia, Mississippi, Pennsylvania, South Dakota, Virginia.

[6] The twelve jurisdictions are: California, District of Columbia, Florida, Kansas, Maine, Maryland, Missouri, Montana, New Jersey, New York, Ohio, Texas.

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of paragraph (a), which carries forward the concept in current rule 3-600(A) that when a lawyer represents an organization, the organization is the client, which acts through its constituents.

    - Pros: Continues the rule that the client is the organization, not the constituent.

    - Cons: None identified.

2. Recommend that the rule clarify that it is applicable to both in-house and outside counsel by substituting the clause, "A lawyer employed or retained by an organization" for current rule 3-600(A)'s clause, "In representing an organization."

    - Pros: The change is an important clarification of the rule's scope. It conforms to a request from OCTC in 2010 to the prior Commission.

    - Cons: Application to in-house attorneys raises issues around withdrawal. However, this is true of the current rule and was an issue during the legislative consideration of statutory whistleblower reforms for government attorneys.

3. Recommend that the Rule ***require*** that a lawyer report ongoing or intended illegal or fraudulent conduct by a constituent "up the corporate ladder" to a higher authority within the organization, including the highest authority that can act on behalf of the organization. (See paragraph (b). Compare current rule 3-600(B), which permits but does not require that the lawyer take such steps.)

    - Pros: This is consistent with the national trend. Requiring reporting up assures that the client organization is fully informed in its decision making. In addition, there is an exception to this requirement where the lawyer reasonably believes that a report is "not necessary in the best lawful interest of the organization."

    - Cons: Mandatory reporting up is difficult to enforce.

4. Recommend that the trigger for imposing the duty to go up the ladder be: (1) that the lawyer ***knows*** that a constituent is acting, has acted, or intends to act in a way (2) that the lawyer ***knows or reasonably should*** know is (i) a violation of a legal duty to the organization or a violation of law, ***and*** (ii) likely to result in substantial injury to the organization. Under this approach:

    a. There are two scienter standards: (1) a subjective standard, i.e., actual knowledge that a constituent is acting, has acted, or plans to act; and (2) an

objective standard, i.e., a reasonable lawyer would conclude that the constituent's actions (i) violate the law or his/her legal duty; and (ii) likely result in substantial injury to the organization. (See also Comment [3].)

b. In addition, unlike current rule 3-600, which *permits* a lawyer to take corrective action if there is either a violation of law/legal duty or likely substantial injury to the organization, the proposed rule imposes a duty on the lawyer only if both are present. However, see discussion of Comment [2], below.

- Pros: An objective standard for the knowledge factor would impose a duty to investigate on the lawyer, which may not be appropriate in many situations. On the other hand, assessing a known situation for the violation and substantial injury factors is part of the duty of lawyers. However, there is no need to require reporting up if only one of the two factors is met (but see Comment [2] which explains that this Rule does not preclude a lawyer from reporting up if only one of the factors is met.)

- Cons: Current law is covered by other provisions.

5. Recommend carrying forward in a separate paragraph the concept in current rule 3-600(B) that any action a lawyer might take under this Rule is subject to the duty to protect client confidential information contained in Bus. & Prof. Code § 6068(e)(1). (See paragraph (c).)

   - Pros: This reminds counsel that, with the exception of a threat of death or substantial bodily harm, there is no exception to Bus. & Prof. Code § 6068(e)(1) that would permit a lawyer to report misconduct outside of the organization client in this context, unlike ABA Model Rule 1.13.

   - Cons: Bus. & Prof. Code § 6068(e) has no exception for organizational clients, so the reminder is not necessary.

6. Recommend carrying forward the concept in current rule 3-600(C) that if the highest authority in the organization insists on a course of conduct that violates law/legal duty and is likely to result in substantial injury to the organization, the lawyer's response may include the right and, where appropriate the duty, to resign or withdraw in compliance with Rule 1.16 [3-700]. (See paragraph (d).)

   - Pros: There is no reason to change the current California rule regarding withdrawal. Given the statutory constraints of Bus. & Prof. § 6068(e), California does not have the option of following the ABA rule permitting reporting out. (Compare ABA Model Rule 1.13(c).)

   - Cons: None identified.

7. Recommend adoption of a provision similar to Model Rule 1.13(e), which requires a lawyer discharged because of the lawyer's attempt to take steps to assure that the highest authority in the organization is informed of the lawyer's discharge. (See paragraph (e).)

    - Pros: It is important for the highest authority in the organization to be made aware that a lawyer has been retaliated against because the lawyer attempted to perform the lawyer's duty of protecting the client from substantial injury as a result of improper conduct by a constituent. Such retaliation may constitute a further violation of law.

    - Cons: Once the attorney is terminated, he has no further duty to the client.

8. Recommend carrying forward the concept in current rule 3-600(D) requiring a lawyer for the organization to explain who is the client when it is apparent that the organization's interest are or may become adverse to those of a constituent with whom the lawyer is dealing. Also recommend deleting the second sentence of rule 3-600(D) because that concept of not misleading a constituent is already in proposed Rule 4.3 (Communicating with Unrepresented Persons). (See paragraph (f).)

    - Pros: There is no reason to change the current rule regarding notifying a constituent of the nature of the representation. This is a frequent area of misunderstanding. The second sentence is not necessary in light of Rule 4.3.

    - Cons: Although possibly unnecessary, retaining the second sentence of rule 3-600(D) would make clear that this duty is not intended to be altered.

9. Recommend carrying forward the concept in current rule 3-600(E) which expressly recognizes that a lawyer may jointly represent the organization and a constituent so long as the requirements of rules addressing actual or potential conflicts of interest are satisfied. (See paragraph (g).)

    - Pros: This is a common situation which should be acknowledged in the Rule, as it is under the current rule.

    - Cons: None identified.

10. Recommend adoption of a comment that explains the scope of the Rule's application to different organizations, as well as to governmental organizations. (See Comment [1].)

    - Pros: It is useful to have a comment that explains that the Rule applies to a wide variety of organizations, clarifying its application.

    - Cons: This comment doesn't add anything to explain the Rule's application and could be deleted.

11. Recommend adoption of comments that clarify a lawyer's responsibilities under paragraph (b), including: (i) explaining the different scienter requirements in paragraph (b); (ii) clarifying that in appropriate circumstances, a lawyer ***may*** go up the ladder within an organization even if the requirements for imposing a duty to do so are not present, i.e., both a violation of law/legal duty ***and*** likely substantial injury to the organization and (iii) explaining that a lawyer should not generally substitute the lawyer's judgment for that of the highest authority in the organization. (See Comments [2], [3], [4] and [5].)

    - Pros: These Comments clarify various aspects of the Rule, clarifying, for example, that although the change from the current California Rule *requiring* up-the-ladder reporting applies only if both prongs of the standard are met, up-the-ladder reporting is still permitted even if only one prong of the test is met.

    - Cons: None identified.

12. Recommend adoption of a comment that clarifies it is appropriate, before taking action under paragraph (b), to urge reconsideration of the constituent's proposed course of action that is a violation of law/legal duty. (See Comment [4].)

    - Pros: This comment is comparable to the comments to Rule 1.6 (3-100) regarding the steps the lawyer should take to consult with a client before taking extraordinary action. In this situation, the lawyer is encouraged to remonstrate with the constituent to reconsider before bringing the lawyer's position to a higher authority in the organization.

    - Cons: Since nothing in the Rules expressly prohibits up-the-ladder reporting, this comment is not necessary.

13. Recommend adoption of comment that expressly recognizes the difficulty inherent in attempting to generalize about duties of lawyers representing governmental organizations. (See Comment [6].)

    - Pros: Lawyers for government agencies are in a unique position. The diverse structures of local, state, and federal government agencies make giving specific guidance difficult. This Comment clarifies that each government lawyer's situation is different and needs to be assessed within its own structure.

    - Cons: This doesn't add anything to the Rule and is unnecessary. The subject matter covered is more appropriate for an ethics opinion that is anchored to specific facts.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of Model Rule 1.13(c), which would permit a lawyer to disclose information protected by Bus. & Prof. Code § 6068(e)(1) outside of the organization to the extent necessary to prevent substantial injury to the organization.

    - Pros: Reporting out, under Model Rule 1.13, may protect the client from harm. It also adds to uniformity of the Rules.

    - Cons: This concept is inimical to California's strong duty of confidentiality. Bus. & Prof. Code § 6068(e) prohibits reporting out. Both the California Supreme Court and the legislature have repeatedly rejected this approach in the government lawyer context. The most grave situations, involving threats of death or great bodily harm, are covered by existing law.

2. Related to the adoption of Model Rule 1.13(c), recommend the adoption of Model Rule 1.13(d), which expressly provides that MR 1.13(c) does not apply to lawyers retained to investigate possible misconduct in the organization or to defend the organization or constituent against an allegation that they have violated the law.

    - Pros: A lawyer should not be required to report if the risk of harm is the reason he or she was retained.

    - Cons: This provision would only apply were a provision permitting reporting out be adopted, which, as noted, cannot be accomplished in California without a statutory change.

3. Carry forward the second sentence in current rule 3-600(D), which prohibits a lawyer from misleading a constituent into believing the lawyer represents the constituent when that is not true.

    - Pros: It is misconduct for a lawyer to engage in deceptive conduct. The provision expressly prohibits such conduct in the context of an organization.

    - Cons: The concept is already more generally addressed in proposed Rule 4.3 (Communicating with Unrepresented Person)

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

1. Mandating that a lawyer go up the corporate ladder when the lawyer knows of action by a constituent that is a violation of law/legal duty and likely to result in substantial injury to the organization. (See Section IX.A.3, above.)

2. Apply a subjective standard to knowledge of the conduct but an objective standard regarding knowledge of the probable consequences of the conduct. (See Section IX.A.4.a, above.)

3. Require that there be both (i) a violation of law/legal duty and (ii) likely substantial injury to the organization before a lawyer's duty to go up the ladder is triggered. (See Section IX.A.4.b, above.)

4. Require that a lawyer discharged because the lawyer complied with paragraph (b) to take steps to assure that the highest authority in the organization is aware of the discharge. (See Section IX.A.7, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member."

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Clarifying that the Rule applies to both in-house and outside lawyers by substituting the clause, ""A lawyer employed or retained by an organization" for current rule 3-600(A)'s clause, "In representing an organization." (See Section IX.A.2, above.)

E. Alternatives Considered:

See section V above. The main alternative considered was whether this rule could include a provision authorizing a lawyer to make a report to a person or entity outside of the client organization. The Commission concluded that the overlapping regulation of the statutory duty of confidentiality and the statutory lawyer-client privilege rendered it difficult for the Commission to consider any such provisions because the Commission's Charter is restricted to proposing amendments to the Rules of Professional Conduct.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.13 [3-600] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.13 [3-600] in the form attached to this Report and Recommendation.

Proposed Rule 1.13 [3-600] Organization as Client
Synopsis of Public Comments

TOTAL = 3 *A = 1* *D = 0* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-23d	Sall Spencer Callas & Krueger (Sall) (01-09-17)	Y	M	(c)	As drafted, subdivision (c) reads as an absolute bar to revealing information protected by Business and Professions Code section 6068(e) to anyone, including higher authorities within an organization. This would apparently then prohibit the exact course of conduct prescribed by subdivision (b). Proposes the following language for paragraph (c): In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e) except to those authorities within the organization authorized to receive such information.	The Commission disagrees with the commenter's assessment and has not made the suggested change. The course of conduct paragraph (b) provides for reporting only within the organization, which is the client. Thus, no violation of § 6068(e) would occur if the lawyer complies with paragraph (b).
Y-2016-21n	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowing" in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments section of OCTC's September 27, 2016 letter.	1. The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f)

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						provides: "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. The second sentence of that definition prohibits "willful blindness."
					2. OCTC supports Comments 1, 2, 4, and 6, except Comment 2 may need to be rewritten, if the Commission revises its proposals to have a single rule for competence and diligence. OCTC also remains concerned about having separate rules for supervision, as discussed in OCTC's September 27, 2016 letter.	2. The Commission has not made the suggested change because it continues to believe that competence, diligence, and supervision should be set forth in separate rules.
					3. OCTC has the same concerns regarding use of the term "knowing" in Comment 3 for the same reasons it has concerns about subsection (b) of this rule, as well as proposed Rule 1.9 and the General Comments section of this letter.	3. See response to comment 1.
					4. Comment 5 covers the same issues as Comment 2 and, thus,	4. The Commission disagrees that all of Comment [5] covers

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					is unnecessary and should be deleted.	the same issues as Comment [2] but has retained only the last sentence of that comment, which provides important interpretative guidance on the meaning and application of the term, "best lawful interests."
Y-2016-7I	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-6-17)	Y	A		Supports proposed rule 1.13 as revised following 90-day public comment period.	No response required

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.14
(No Current Rule)
Client With Diminished Capacity

EXECUTIVE SUMMARY

The Commission proposed the adoption of Rule 1.14, a new rule that has no counterpart in the current Rules of Professional Conduct. In developing the proposed rule, the Commission reviewed and evaluated ABA Model Rule 1.14 (Client With Diminished Capacity), the Restatement of the Law of Lawyering, section 24 (A Client With Diminished Capacity), current California statutory and rule sections, including Business & Professions Code § 6068(e)(1) and Probate Code §§ 810-813, and California case law relating to issues addressed by the proposed rule.. Nevertheless, the Commission was also guided by a deep appreciation, assisted in part by contributions to its deliberations by representatives from the Trusts and Estates Section of the State Bar, that developing a rule addressing the issue of a significantly diminished capacity client is a matter of critical importance in assuring protection for some of the most vulnerable individuals who come within the justice system. Notwithstanding that consideration, however, the Commission also recognized that California's strict duty of confidentiality, as reflected in Business & Professions Code § 6068(e)(1) and current rule 3-100, does not permit a rule as broadly sweeping as Model Rule 1.14, which authorizes the unconsented disclosure of client confidential information to take action to protect the client interests, or even to take action adverse to the client's interests, such as seeking the appointment of a conservator. The result of the evaluation is proposed rule 1.14 (Client With Diminished Capacity).

Rule As Issued For 90-day Public Comment

The starting point for considering proposed Rule 1.14 is Business & Professions Code § 6068(e)(1), which is the statement of a lawyer's duty of confidentiality in California. It provides it is the duty of an attorney:

> (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

The only express exception to § 6068(e)(1) is in § 6068(e)(2), which permits – but does not require – a lawyer to disclose confidential client information to prevent a life-threatening criminal act. Current rule 3-100(A) also recognizes that a client can provide informed consent to disclosure of confidential information. However, unlike the Model Rule on confidentiality, neither section 6068(e) nor current rule 3-100 recognizes that a lawyer might be impliedly authorized to take actions to advance the client's interests. Given the foregoing *statutory* and rule constraints, a rule as broadly sweeping and permissive as Model Rule 1.14 is not possible absent conforming changes to existing California law. In recognition of that limitation, and with the understanding that a client can consent to disclosures, the Commission determined that any rule addressing the diminished capacity client must hew to two fundamental principles: First, client autonomy must be acknowledged and vindicated by maintaining to the extent possible a normal lawyer-client relationship. Second, any protective action a lawyer might take under the rule requires the client's consent. In addition to these two basic principles, the Commission decided that, unlike the Model Rule, any action that the lawyer might take under the Rule to protect the client's interests must be expressly limited to a specific course of conduct.

Paragraph (a) sets forth the principle underlying the Rule: Notwithstanding that a client might suffer from diminished capacity, a lawyer shall to the extent reasonably possible maintain a normal lawyer-client relationship with the client. At its heart, this requires that the lawyer to recognize client autonomy and obtain the client's consent to take any action that will affect the client's substantial rights. See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

Paragraph (b) establishes the parameters for a lawyer taking protective action on behalf of the client. Subparagraph (b)(1) identifies three threshold conditions that must be satisfied before a lawyer can even embark on a course of conduct to seek a client's consent to take protective action: (i) a significant risk that the client will suffer substantial physical, psychological or financial harm if no protective action is taken, (ii) the client has significantly diminished capacity; and (iii) the client cannot adequately act in the client's own interest. Subparagraph (b)(2) emphasizes that regardless of what action the lawyer may take with the client's consent, such action must be in the client's best interest *and* in taking such action, the lawyer may reveal no more confidential information than is necessary to protect the client.

Unlike paragraph (a), which imposes a disciplinable duty on the lawyer, paragraph (b) is emphatically permissive, i.e., the lawyer "may, but is not required to" take steps to obtain the client's consent to take protective action.

Paragraph (c) provides a roadmap for a lawyer who determines it is in the client's best interest to seek the client's consent to take protective action. Subparagraph (1) identifies the minimal steps the lawyer must take in obtaining the client's consent. Subparagraph (2) notes that the lawyer may obtain assistance from an appropriate person, e.g., a trained professional, to communicate with the client and take the minimal steps, but cautions that the lawyer must take precautions to maintain the confidentiality of any communications.

Because the lawyer may seek the client's consent only in circumstances where the client has significantly diminished capacity, it might appear that such a client could never provide that consent. However, the Commission has been assured by experts in the disability rights field that such consent can be obtained. See also Probate Code §§ 810-813 and refer to discussion of Comment [2], below.

Paragraph (d) is also permissive and permits a lawyer to obtain a client's advance consent to the lawyer taking protective action in the future should the circumstances identified in (b)(i) to (iii) later arise. Subparagraph (d)(1) includes the important caveat that this consent is revocable at any time by the client. This is a potentially controversial provision. "Advance consents" in the arena of conflicts of interest have created substantial and pointed disagreement among lawyers and judges. The concern generally is whether the lawyer's original disclosure to the client was sufficient to support the breadth of the conflicts situations to which the client has allegedly consented. Some advance consents are very narrow and even identify the specific conflict to which the client is being asked to consent. Others are very broad and can be read to permit the lawyer or more often, the law firm, to represent a future client with interests adverse to the consenting client in situations that the consenting client might never have contemplated. The advance consent in paragraph (d), on the other hand, is drafted in such a way to permit an advanced consent limited to future protective action in the same narrowly constrained circumstances under which a lawyer might act under paragraph (b).

Paragraph (e) places further limitations on a lawyer's ability to proceed under paragraphs (c) and (d) of the rule, prohibiting a lawyer from taking actions adverse to the client (e.g., seeking a conservatorship), actions that would create a conflict under the conflicts rules, or any actions that would violate the client's Constitutional right to due process.

Paragraph (f) defines the term "protective action," a term used throughout the Rule, as being limited to notifying an individual or organization that has the ability to take action to protect the client or seeking to have a guardian ad litem appointed.

Paragraph (g). Neither paragraph (c) nor (d) mandates that a lawyer do anything. As noted, they are emphatically permissive. Paragraph (g) is a safe harbor for lawyers, whether they take protective action as authorized by the Rule, or choose not to take such action. A similar provision is found in current rule 3-100(E), which provides a discipline safe harbor concerning inaction under rule 3-100's provision permitting disclosure of confidential information to prevent life-threatening bodily injury.

Finally, non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the model rule numbering system and the substitution of the term "lawyer" for "member."

There are six comments to the Rule, all of which provide interpretative guidance or clarify how the rule should be applied. Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved objective of a comment. Comment [2] addresses the conundrum, discussed in relation to paragraph (c), regarding how a client with significantly diminished capacity could provide consent. Importantly, it provides a reference to the Probate Code sections that emphasize the importance of respecting a client's autonomy and recognize the ability of severely compromised individuals to understand, deliberate and express preferences when provided with alternative courses of conduct. Comment [3] provides guidance on how to determine whether the client has significantly diminished capacity, including seeking the assistance of a diagnostician, and Comment [4] provides guidance on how to proceed when it is reasonably foreseeable that the client might suffer from significantly diminished capacity in the future. Comment [5] provides critical clarification of the lawyer's duty to protect confidentiality when the lawyer employs the assistance of an appropriate person, e.g., trained professional or family member, to communicate with the client. Finally, Comment [6] provides cross-references to the statutes that regulate those situations that are excepted from the rule's application, i.e., where the lawyer represents a minor, a client in a criminal matter, a client subject to a conservatorship proceeding, or a client who has a guardian ad litem.

National Background – Adoption of Model Rule 1.14

As California does not presently have a direct counterpart to Model Rule 1.14, this section reports on the adoption of the Model Rule in United States' jurisdictions. The ABA State Adoption Chart reports that twenty-seven jurisdictions have adopted Model Rule 1.14 verbatim. Nineteen jurisdictions have adopted a variation of Model Rule 1.14, and five jurisdictions have no rule at all or an entirely different rule from the Model Rule.

Post Public Comment Revisions

Text. After consideration of comments received in response to the initial 90-day public comment period, the Commission made two changes to the black letter text of Rule 1.14. It

added to paragraph (d) the following clause: “must be in a separate writing* signed by the client and” to clarify that an advance consent permitted under the Rule must be set forth in a separate writing. The Commission also revised the safe harbor paragraph (g) to more closely conform to the grammatical and substantive structure of current rule 3-100(E) [proposed Rule 1.6(e)].

Comment. Following consideration of public comment, the Commission made several changes or additions to the comment to Rule 1.14. In Comment [2], it substituted “may have” for “often has” to more closely track the language of Probate Code § 810. It also changed the citation to “§ 810” to provide a more accurate citation for the concept stated.

In Comment [3], the Commission added the clause “a lawyer should consider the factors in Probate Code §§ 811 and 812.” This provides a more accurate citation to the guidance provided in the Probate Code. The Commission also changed the positions of “Rule 1.6” and “Business and Professions Code § 6068(e)(2) to conform to Rule citation style. The Commission made a similar change in Comment [6].

The Commission added new Comment [5] to provide interpretative guidance on the meaning of the “client’s best interests.” The Commission also made two changes to Comment [7]. First, it substituted “Paragraph (b)” for “This Rule” in the first sentence. Second, it corrected a mistaken citation by replacing “Welfare and Institutions Code § 1368 et seq.” with “Penal Code § 1368 et seq.”

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.14

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: Lee Harris, Tobi Inlender, Hon. Dean Stout, Dean Zipser

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.14, from which proposed Rule 1.14 is derived.]

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial

property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as

possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.14
Vote: 13 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.14
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.14 Client with Diminished Capacity

(a) Duties Owed Client with Diminished Capacity. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably* possible, maintain a normal lawyer-client relationship with the client.

(b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.

(1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person* legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes* that:

(i) there is a significant risk that the client will suffer substantial* physical, psychological, or financial harm unless protective action is taken,

(ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and

(iii) the client cannot adequately act in the client's own interest.

(2) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. In taking protective action as authorized by this paragraph, the lawyer must:

(i) act in the client's best interest, and

(ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure.

(c) Obtaining Consent To Take Protective Action.

(1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably* necessary to preserve client confidentiality and decision-making authority, which includes:

(i) explaining to the client the need to take protective action, and

(ii) obtaining the client's consent to take the protective action.

(2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person* to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:

(i) act in the client's best interest;

(ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure; and

(iii) take all reasonable* steps to ensure that the information disclosed remains confidential.

(d) Obtaining Advance Informed Written Consent* to Take Protective Action. A lawyer may obtain a client's advance informed written consent* to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must be in a separate writing* signed by the client and must include the following written* disclosures:

(1) the authorization to take protective action is valid only when the lawyer reasonably believes* that the circumstances set forth in (b)(1)(i) – (iii) are present; and

(2) the client retains the right to revoke or modify the advance consent at any time.

(e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:

(1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;

(2) any action on behalf of a person* other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or

(3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.

(f) Definitions. For purposes of this Rule:

(1) "Protective action" means to take action to protect the client's interests by:

(i) notifying an individual or organization that has the ability to take action to protect the client, or

(ii) seeking to have a guardian ad litem appointed.

(g) Discipline. A lawyer who does not take protective action as permitted by paragraph (b) does not violate this Rule.

Comment

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, may have the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Prob. Code § 810.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer should consider the factors in Probate Code §§ 811 and 812. A lawyer may also seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Business and Professions Code § 6068(e)(2) and Rule 1.6(b).

[4] Where it is reasonably* foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and

seeking assistance from family members, support groups and professional services with the client's informed written consent.* See Rule 1.4.

[5] In taking protective action as permitted by paragraph (b), a lawyer may not substitute his or her own judgment in deciding what is in the client's best interest but must abide by the client's expressed interests and decisions concerning the objectives of the representation. Paragraph (b) does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[6] In obtaining the assistance of another person* such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person,* for authorization to take protective measures on the client's behalf. See Evidence Code § 952. The lawyer must advise the person* who assists the lawyer that the person* is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6 to any third person.*

[7] Paragraph (b) does not apply in the case of a client who is (i) a minor, (ii) involved in a criminal matter, (iii) is the subject of a conservatorship; or (iv) has a guardian or other person* legally entitled to act for the client. The rights of such persons* are regulated under other statutory schemes. See Family Code § 3150; Penal Code § 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, § 5000-5579; Probate Code, Division 4, Parts 1-8, § 1400-3803; and Code of Civil Procedure §§ 372-376.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.14)

Rule 1.14 Client with Diminished Capacity

(a) Duties Owed Client with Diminished Capacity. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably* possible, maintain a normal lawyer-client relationship with the client.

(b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.

(1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person* legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes* that:

(i) there is a significant risk that the client will suffer substantial* physical, psychological, or financial harm unless protective action is taken,

(ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and

(iii) the client cannot adequately act in the client's own interest.

~~(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.~~

(~~c~~2) Information relating to the ~~representation of a client with~~client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. ~~When~~In taking protective action ~~pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.~~as authorized by this paragraph, the lawyer must:

(i) act in the client's best interest, and

(ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure.

(c) Obtaining Consent To Take Protective Action.

(1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably* necessary to preserve client confidentiality and decision-making authority, which includes:

(i) explaining to the client the need to take protective action, and

(ii) obtaining the client's consent to take the protective action.

(2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person* to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:

(i) act in the client's best interest;

(ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure; and

(iii) take all reasonable* steps to ensure that the information disclosed remains confidential.

(d) Obtaining Advance Informed Written Consent* to Take Protective Action. A lawyer may obtain a client's advance informed written consent* to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must be in a separate writing* signed by the client and must include the following written* disclosures:

(1) the authorization to take protective action is valid only when the lawyer reasonably believes* that the circumstances set forth in (b)(1)(i) – (iii) are present; and

(2) the client retains the right to revoke or modify the advance consent at any time.

(e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:

(1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;

(2) any action on behalf of a person* other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or

(3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.

(f) Definitions. For purposes of this Rule:

(1) "Protective action" means to take action to protect the client's interests by:

(i) notifying an individual or organization that has the ability to take action to protect the client, or

(ii) seeking to have a guardian ad litem appointed.

(g) Discipline. A lawyer who does not take protective action as permitted by paragraph (b) does not violate this Rule.

Comment

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

~~[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.~~

~~[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.~~

[~~3~~2] ~~The~~A client ~~may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.~~with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, may have the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Prob. Code § 810.)

~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~

~~*Taking Protective Action*~~

~~[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances,~~

~~using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.~~

[~~6~~3] In determining ~~the extent of the client's~~whether a client has significantly diminished capacity~~, the~~ such that the client is unable to make adequately considered decisions, a lawyer should consider ~~and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the~~the factors in Probate Code §§ 811 and 812. A lawyer may also seek information or guidance from an appropriate diagnostician~~.~~ or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Business and Professions Code § 6068(e)(2) and Rule 1.6(b).

~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.~~

~~*Disclosure of the Client's Condition*~~

[4] Where it is reasonably* foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent.* See Rule 1.4.

[~~8~~5] ~~Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to~~

~~the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When~~In taking protective action ~~pursuant to~~as permitted by paragraph (b), ~~the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.~~a lawyer may not substitute his or her own judgment in deciding what is in the client's best interest but must abide by the client's expressed interests and decisions concerning the objectives of the representation. Paragraph (b) does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[6] In obtaining the assistance of another person* such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person,* for authorization to take protective measures on the client's behalf. See Evidence Code § 952. The lawyer must advise the person* who assists the lawyer that the person* is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6 to any third person.*

[7] Paragraph (b) does not apply in the case of a client who is (i) a minor, (ii) involved in a criminal matter, (iii) is the subject of a conservatorship; or (iv) has a guardian or other person* legally entitled to act for the client. The rights of such persons* are regulated under other statutory schemes. See Family Code § 3150; Penal Code § 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, § 5000-5579; Probate Code, Division 4, Parts 1-8, § 1400-3803; and Code of Civil Procedure §§ 372-376.

~~*Emergency Legal Assistance*~~

~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~

~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.14 was not the primary factor in the Commission's consideration of proposed Rule 1.14, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 337 - 352, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports this rule as a good compromise on this complicated and difficult issue. (See *In the Matter of Karnazes* (Review Dept. 2014) Case No. 10-O-334, 2014 WL 232500*; In re Eugster* (Wa. 2009) 209 P.3d 435.)

   Commission Response: No response required.

2. OCTC supports Comments [3], [4], [5], and [6], although Comment [5] is missing the word "of" in the first line. (In obtaining the assistance [of] another person . . .")

   Commission Response: No response required as to first observation. The Commission has added the missing word to Comment [5].

3. Comments 1 and 2 are more appropriate for treatises, law review articles, and ethics opinions.

   Commission Response: The Commission disagrees with the commenter's assessment. Comment [1] explains the policy underpinning the rule and thus provides interpretative guidance in applying the rule. Comment [2] provides a cross-reference to the Probate Code sections that provide a framework for initially assessing a client's capacity. Those sections are much more preferable than the corresponding Model Rule provision, Model Rule 1.14, Cmt. [6], which is aspirational in nature.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, twenty-one public comments were received. Ten comments agreed with the proposed rule, two comments disagreed, and nine comments agreed only if modified. During the 45-day public comment period, four public comments were received. One comment agreed with the proposed rule, two comments disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Disclosure of Confidential Information to Protect a Client with Diminished Capacity from Financial Harm. There is no provision in rule 3-100 or Bus. & Prof. Code § 6068(e) that would permit a lawyer to disclose confidential information or take other reasonably necessary protective action involving such disclosures to protect a client with diminished capacity when the lawyer reasonably believes the client is at risk of financial harm. (Compare Model Rule 1.14.)

Informed *Written* Consent. Current rule 3-100 permits a lawyer to disclose information protected by Bus. & Prof. Code § 6068(e)(1) if the client gives "informed consent." (See rule 3-100(A).) However, the consent does not have to be in writing.

Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in

California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

There are three things that should be considered when evaluating proposals involving the duty of confidentiality. First, it is important to recognize that California's treatment of confidentiality is unique. In every other jurisdiction in the country, the statement of a lawyer's duty of confidentiality resides in a rule of professional conduct that has been adopted by the jurisdiction's highest court. In California, on the other hand, the confidentiality duty is found in a statutory provision passed by the California legislature and enacted in 1871.

Second, confidentiality rules adopted in the various jurisdictions reflect the greatest variation of any rule derived from the Model Rules. For example, the rules range from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, through jurisdictions that *permit* such disclosures, and on to jurisdictions that prohibit such disclosures, e.g., California. In fact, California law has the strictest confidentiality duty in the United States, with only a single exception expressly recognized in both the statutory provision and the rule.

Third, it is helpful to consider the history behind current rule 3-100 and recognize that the rule was not intended solely as a disciplinary rule. As this history will briefly attempt to recount, the rule is an outgrowth of a legislative amendment to the California statute that encompasses a California lawyer's duty of confidentiality, Business and Professions Code § 6068(e). The rule was drafted with the intent of providing guidance to lawyers practicing in California on the application of the first express exception to confidentiality in California. Understanding this intent helps explain the large number of lengthy comments that the rule contains. This history also seems to suggest that any substantive amendment to the confidentiality duty in California requires an amendment of § 6068(e). This appears especially true of exceptions to the duty.

Confidentiality Exceptions Recognized in California Statutory & Case Law. The current rule contains a single express exception to the duty of confidentiality (disclosure permitted to prevent life-threatening criminal action) as compared to seven specific express exceptions in corresponding Model Rule 1.6. Despite this discrepancy, some of the exceptions appear to be recognized in case law or have counterparts in the Evidence Code.

- Exception to secure legal advice about the lawyer's compliance with the lawyer's professional obligations, similar to Model Rule 1.6(b)(4). (See, e.g., *Fox Seachlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-309 [106 Cal.Rptr.2d 906].)

- Exception to establish a claim or defense in a controversy between lawyer and client, which is much narrower than Model Rule 1.6(b)(5), which permits a lawyer to disclose client confidential information in third party actions. (See Evidence Code §

958; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164.[1]) A Commission dissent argued that such an exception would permit disclosure without a court determination. However, case law recognizes limitations on such claims and defenses. See, e.g, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190 ("Similarly, the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.")

- Exception to permit a lawyer to comply with a court order, similar to Model Rule 1.6(b)(6). (Compare *People v. Kor* (1954) 129 Cal.App.2d 436.)

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other Laws in California Relate, and Refer, to the Duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code sec. 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.pdf [Last visited on 2/7/17.]

- Every jurisdiction in the country except for California and Texas has adopted some version of ABA Model Rule 1.14. Thirty jurisdictions have adopted Model Rule 1.14

[1] Compare *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456] [action dismissed where law firm could not defend itself against malpractice claim filed by lawyer it had advised with respect to plaintiff lawyer's client, and client had refused to waive privilege as to communications necessary to law firm's defense]; *McDermott Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 [99 Cal.Rptr.2d 622] [action dismissed in shareholder derivative action against corporation's outside counsel where only corporation, not shareholders, could waive the privilege, corporation had not waived the privilege, and corporation's privileged communications were necessary to the law firm's defense].)

verbatim.[2] Nineteen jurisdictions have adopted a modified version of Model Rule 1.14.[3]

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

A. Introduction

As part of the consideration of proposed Rule 1.14, the Commission considered the feasibility of the recommending a rule similar to ABA Model Rule 1.14 (Client with Diminished Capacity). The Commission considered various options and received input from several lawyers and organizations that represent clients with diminished capacity. The Commission elected to approve a rule consistent with the Commission's charge that addresses protective action that may be taken on behalf of a client with diminished capacity in the absence of an express exception in Business and Professions Code § 6068(e). The proposed rule and Comments are intended to be consistent with the current rules and case law while not requiring legislative action.

The proposed rule includes the following concepts and principles:

1. Lawyers representing clients with diminished capacity are required to act in the best interests of the client and, to the extent reasonably possible, maintain a normal lawyer-client relationship.

2. Protective action as defined in the rule is permitted only where a client has *significantly* diminished capacity, there is a *significant* risk the client will suffer *substantial* physical, financial or other harm, and the client cannot adequately act on the client's own behalf.

3. The lawyer's ability to take protective action is predicated on the lawyer being able to obtain the client's consent.

4. The lawyer may, but is not required to, take protective action as defined in the rule either with the client's consent or as permitted under Business and Professions Code § 6068(e)(2) and proposed Rule 1.6(b).

5. Where the client has significant diminished capacity, the lawyer must preserve client confidentiality and decision-making authority by explaining the need to take

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[2] The thirty jurisdictions are: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

[3] The nineteen jurisdictions are: Alabama, Alaska, Arkansas, District of Columbia, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New York, North Dakota, Vermont, Virginia, and Wyoming.

protective action and obtaining the client's consent to take such action. The lawyer may employ the assistance of an appropriate person (such as a trained professional) in communicating with the client who is suffering from significant diminished capacity and obtaining client consent. However, in this situation the lawyer must: (1) act in the client's best interest; (2) disclose no more information that is reasonably necessary to protect the client; and (3) take all reasonable steps to ensure the disclosed information remains confidential. See, Evidence Code § 952.

6. A lawyer may obtain advance informed consent to take limited protective action from a client without diminished capacity provided the advance consent include certain written disclosures provided in paragraph (d).

7. A lawyer who takes protective action under the rule is not authorized to take any action that is adverse to the client, including filing a conservatorship petition, to take any action on behalf of a person other than the client that the lawyer would not be able to take under Rule 1.7 or 1.9, or take any action that would violate the client's right to due process of law.

8. The rule is limited to permitting the lawyer to take protective action by either: (1) notifying an individual or organization that has the ability to take action to protect the client; or (2) seeking to have a guardian ad litem appointed.

9. A lawyer is not subject to discipline that chooses to take, or not to take, protective action authorized by the rule.

B. Concepts Accepted (Pros and Cons):

1. Adopt Paragraph (a): Duties Owed Client with Diminished Capacity. This paragraph establishes the principle that even though a client may suffer from diminished capacity, the lawyer must, as is reasonably possible, maintain a normal lawyer-client relationship with the client.

    - Pros: It is important for lawyer's to respect client autonomy and decision making authority as much as is reasonably possible as a general principle. This obligation requires the lawyer to obtain the client's consent prior to taking any action that will affect the client's substantial rights. See, *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404.

    - Cons: Lawyers are not medical professionals and not properly trained to determine when a client is suffering from diminished capacity.

2. Adopt Paragraph (b): Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity. This paragraph establishes the conditions for when a lawyer may take protective action on behalf the client.

    - Pros: Clients in California, particularly elderly clients and those consuming legal services in the trust and estate area, are subject to serious harm by

others taking advantage of their condition when they suffer from significantly diminished capacity. The Commission recognizes the restrictions imposed upon lawyers in California under B&P Code § 6068(e); however, this rule limits the lawyer by prohibiting the lawyer from revealing no more confidential information than is reasonably necessary to protect the client from significant harm. Every jurisdiction other than California and Texas has adopted some version of Model Rule 1.14.

- Cons: This paragraph is permissive and therefore is not a clear and enforceable minimum disciplinary standard. Further, by taking protective action through the notification of a third-party, this invariably will result in the disclosure of a client's confidential information.

3. Adopt Paragraph (c): Obtaining Consent To Take Protective: This paragraph states what steps the lawyer must take prior to taking protective action on behalf of a client with significantly diminished capacity.

   - Pros: The rule preserves client autonomy by requiring that the lawyer first obtain the client's consent before taking action authorized by paragraph (b), including explaining to the client the need to take the protective action. In response to a critique that a client with diminished capacity cannot provide consent; the Commission has been assured by experts in the disability rights field that such consent can be obtained. See, Probate Code §§ 810-813. Further, communications with third-persons who are present to further the interest of the client or those whom disclosure is reasonably necessary for the transmission of the information are protected by the attorney-client privilege under Evidence Code § 952. See also, Comment [5].

   - Cons: A client with diminished capacity cannot provide consent. Paragraph (c)(2) permits the lawyer to obtain the assistance of an appropriate person to help the lawyer communicate with the client in order to receive consent from the client. Such assistance would presumably involve disclosure of a client's confidential information.

4. Adopt Paragraph (d): Obtaining Advance Informed Consent to Take Protective Action: This paragraph allows a lawyer to obtain a client's consent in advance to take protective action in the event the circumstances set forth in paragraph (b)(1)(i) – (iii) should later occur.

   - Pros: The advance consent is limited to situations when the lawyer reasonably believes that the circumstances set forth in paragraph (b)(1)(i) – (iii) are present and the client must be empowered with the right to revoke the consent at any time. This type of advance consent is narrow and provides clients with an option to protect themselves in advance when they believe they may later suffer from diminished capacity and they wish to prevent a third party from taking advantage of their compromised state. In response to public comment, the provision was revised to require that any advance consent be in

a separate writing signed by the client to avoid an unscrupulous lawyer from hiding the provision in a lengthy engagement agreement.

- Cons: This paragraph is permissive and therefore is not a clear and enforceable minimum disciplinary standard. Further, advance consents, at least concerning conflicts of interest, are an unsettled area of law. Should not adopt a rule of professional conduct permitting use of advance consent in such a delicate area concerning mental health when the threshold issue of whether advance consent is upheld typically turns on whether the client received adequate and sufficient disclosure concerning the issue the client is consenting to in advance. In some circumstances, it may be difficult to examine the client to determine whether he or she was aware of what they had consented to when they later suffer from a significantly diminished capacity.

5. Adopt Paragraph (e): Restrictions on Lawyer's Actions: This paragraph limits the actions the lawyer may take under paragraphs (b) and (c).

   - Pros: It is important to inform the lawyer what this rule does not permit and to protect the client from any potential overreaching by the lawyer. Under this rule a lawyer may not take any action adverse to the client, including filing for a conservatorship. The lawyer must abide his or obligations to the client under the conflicts of interest rules. And the lawyer may not violate the client's due process rights. All of the limitations are appropriate in order to protect the client.

   - Cons: None identified.

6. Adopt Paragraph (f): Definitions: This paragraph defines the term "protective action" which is used throughout the rule.

   - Pros: It is important to inform lawyers that the rule only permits a lawyer to notify an individual or organization that is able to take protective action, or seek to have a guardian ad litem appointed. It is client protective to authorize only limited, specific, conduct by the lawyer for the client's behalf and to prevent overreaching by the lawyer. Also, it is important to remember the lawyer is only authorized to take this action if he or she receives the client's consent.

   - Cons: None identified.

7. Adopt Paragraph (g): Discipline: This paragraph provides a safe harbor for lawyers by stating a lawyer who does not take action permitted by paragraph (b) does not violate the rule.

   - Pros: Because both paragraph (c) and (d) are permissive, the lawyer is not required to do anything. This provision makes clear that a lawyer dealing with a client who suffers from diminished capacity does not violate the rule if the lawyer chooses not to attempt to obtain consent from the client in order to

inform an individual or organization that has the ability to take action to protect the client. A similar provision is found in current rule 3-100(E) which similarly provides that a lawyer does not violate rule 3-100 if the lawyer chooses not to disclose confidential information from a client as permitted by that rule to prevent life-threatening bodily injury.

- Cons: Such a provision reinforces the permissiveness of the rule and results in a rule that is not a clear and enforceable minimum disciplinary standard.

8. Adopt seven Comments, all of which provide interpretative guidance regarding the meaning or application of the proposed rule:

   Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved objective of a Comment.

   Comment [2] addresses the conundrum, discussed in relation to paragraph (c), regarding how a client with significantly diminished capacity could provide consent. Importantly, it provides a reference to the Probate Code sections that emphasize the importance of respecting a client's autonomy and recognize the ability of severely compromised individuals to understand, deliberate and express preferences when provided with alternative courses of conduct.

   Comment [3] provides guidance on how to determine whether the client has significantly diminished capacity, including seeking the assistance of a diagnostician.

   Comment [4] provides guidance on how to proceed when it is reasonably foreseeable that the client might suffer from significantly diminished capacity in the future.

   Comment [5], added in response to public comment questioning how a lawyer is to determine what is in the client's best interests. The Comment emphasizes that a lawyer may not substitute the lawyer's own judgment in deciding what is in the client's best interests, but rather must abide by the client's expressed interests and decisions regarding the objective of the representation.

   Comment [6] provides critical clarification of the lawyer's duty to protect confidentiality when the lawyer employs the assistance of an appropriate person, e.g., trained professional or family member, to communicate with the client.

   Comment [7]provides cross-references to the statutes that regulate those situations that are excepted from the rule's application, i.e., where the lawyer represents a minor, a client in a criminal matter, a client subject to a conservatorship proceeding, or a client who has a guardian ad litem.

   - Pros: The proposed rule has been drafted to address a complex situation that requires a lawyer to exercise utmost care and good judgment to protect the

interests of the client. Although care has been taken to draft the black letter text clearly and succinctly, additional guidance is required to assist a lawyer in understanding how to proceed. Such an approach is particularly important and appropriate in situations, such as this, where a client's confidences can be put at risk if the lawyer fails to understand and follow the framework set forth in the permissive black letter provisions.

- Cons: The number and length of the Comments suggest that black letter text does not set forth sufficiently clear and articulable standards as is required under the Commission's Charter.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Concepts Rejected (Pros and Cons):

1. Draft a rule that recognizes an implied authority for the lawyer to disclose confidential information relating to the client when the client has significantly diminished capacity and there is a significant risk the client may suffer substantial harm unless protective action is taken.

   - Pros: The ABA Model Rule is predicated on implied authority, as are the majority of states who have adopted a Rule 1.14 derived from the Model Rule. Allowing California adopt a similar provision would conform California to the preponderance of states that have this rule, helping to promote a national standard.

   - Cons: California is unique in that it is limited by the statutory obligation imposed upon lawyers to preserve the client's secrets, at every peril to the lawyer's self, under B&P Code § 6068(e). Further, there is no known California Supreme Court authority regarding the implied authority to disclose confidential information.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

See Section IX.A, above. The main alternative considered was whether this rule could include a provision authorizing a lawyer to make a report to a person or entity outside of

the lawyer-client relationship even if the client has not given consent to do so. The Commission concluded that this alternative would conflict with the statutory duty of confidentiality and the statutory lawyer-client privilege.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.14 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.14 in the form attached to this Report and Recommendation.

Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments

TOTAL = 4 *A = 1* *D = 2* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-24	Fishkin, Jerry (09-27-16)	N	D		1. Proposed Rule 1.14(b)(1) leaves unclear, what an attorney is supposed to do in a criminal case; and is contrary to long standing case law on an attorney's duties in dependency cases.	1. The Commission disagrees with the commenter's assessment that the rule is unclear or contradicts existing law regarding criminal or dependency law. Paragraph (b)(1) expressly states "Except where the lawyer represents a minor, a client in a criminal matter or a client who is the subject of a conservatorship proceeding …." As paragraph (b) describes the conditions under which a lawyer may act in conformance with the rule, these exceptions clearly state that the rule does not apply in criminal or dependency matters. See also proposed Comment [7].
					2. Proposed Rule 1.14(b)(2) recites a false premise: "Information relating to the client's diminished capacity is protected by Business and Professions Code §6068(e)(1) and Rule 1.6." The primary vice in this statement is that often the information is already known to people attempting to take advantage of the client. If the attorney cannot	2. Regardless of whether "information" about the client's situation that permits a lawyer to proceed under the proposed rule is "already known" to people who allegedly are taking advantage of a client with diminished capacity, the fact is that the lawyer only knows of such conduct by virtue of the lawyer's representation of the client, it

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					refer to the information, the fraudfeasor has the upper hand. This section creates a conclusive presumption and should be deleted.	is confidential to the extent provided in § 6068(e)(1) or Rule 1.6. We do not believe the Rule reasonably can be read as expanding § 6068(e)(1) or Rule 1.6. That information is privileged or confidential under § 6068(e) and rule 1.6 regardless of whether third persons are aware of the information. The lawyer is not permitted to reveal such information without the client's consent, or if disclosure is otherwise permitted under section 6068(e) without that consent.
					3. Proposed Rule 1.14(c)(ii) creates a standard that requires the attorney to obtain consent from a client who is legally incapable of providing consent. The crux of the problem is, what does an attorney do in such a situation?	3. The Commission assumes the commenter is referring to paragraph (c)(1)(ii). The Commission disagrees with the commenter's premise that the described client necessarily is "legally incapable of providing consent." The Commission's research suggests otherwise. See also Comment [2] and Prob. Code § 810.
					4. Proposed Rule 1.14(e) assumes that in all cases, a conservatorship is adverse to the client. In fact, in many cases the conservatorship is the precise	4. Regardless of whether a conservatorship might in some instances protect the client and is arguably not adverse to the client's interests generally,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					legal method to protect the client, since the conservatee lacks legal capacity to make a contract. Prob C. 1872(b).	the Commission continues to believe that a lawyer would violate the lawyer's duty of loyalty and confidentiality owed to the client by instituting conservatorship proceedings based on information learned by the virtue of the representation.
					5. There is no present statute, rule, or case that gives guidance on what an attorney can do when the client appears to be lacking in legal mental capacity. Most existing ethics opinions summarily conclude that any mention of the problem to anyone other than the client violates confidentiality. They assume that protective action is adverse to the client. Both assumptions are false and leave the attorney with no option other than to withdraw and leave the client defenseless.	5. The Commission disagrees with the commenter's opinion that a lawyer's disclosure of the client's condition to third persons is not adverse or a violation of the duty of confidentiality. See points 2 & 4, above.
					6. The commenter cites to ABA Model Rule 1.14 & Rest (3d) Law Governing Lawyers § 24(4), which are described as providing a more flexible approach, and recommends that the Board of Trustees adopt a similar rule.	6. As noted in point 2, above, the Commission has concluded that neither ABA Model Rule 1.14 nor Rest § 24(4) could be implemented in California given the constraints on the lawyer's duty of confidentiality set forth in Bus. & Prof. Code § 6068(e).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					7. The commenter cites to the Third Edition of the "Guide to the California Rules of Professional Conduct for Estate Planning, Trust, and Probate Counsel," §7.5, and notes that "the section asks for legislation that would not permit a petition for conservatorship but would permit the attorney to contact "individuals or entities that have the ability to take action to protect the client."	7. The Commission is unsure whether the commenter is suggesting that a legislative exception to § 6068(e) should be pursued. If that is the case, the commenter's suggestion is now part of the Commission's record.
Y-2016-17	California Advocates for Nursing Home Reform (CANHR) (Chicotel) (01-06-17)	Y	D	1.14	CANHR continues to oppose the adoption of proposed rule 1.14. A client's contemporaneous consent to the revelation of otherwise confidential information in an effort to assist or protect the client is already permitted under the current ethical rules. In general, only mischief can come from re-stating the obvious: clients can consent to waive the confidentiality of their information. In particular, regarding the proposal to permit advance consent to take protective action, we disagree that the RRC-cited client protections (revocability, attorney ethical prohibitions, and requiring a separate writing) are enough to ensure that clients are	The Commission understands the position the commenter has taken in generally objecting to the concept of the proposed rule. However, the Commission continues to believe that the rule will achieve greater public protection than what is currently available under current California law. The basic proposition underlying the rule and which paragraph (a) expressly states is that a lawyer must strive to maintain a normal attorney-client relationship in difficult circumstances. Regarding the specific issue of providing notice to a client before revealing information,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					giving truly informed consent to advance confidentiality waivers. Attorneys who obtain advance consent are not required to tell the client when confidential information is actually going to be revealed, thus giving the client no opportunity to make a relevant revocation. Accordingly, it is strongly recommended that the advance consent provisions include a requirement that clients be told of the attorney's intent to reveal confidential information in adavance of the revelation - to give the client a meaningful opportunity to revoke the consent. We urge the Board to drop Rule 1.14 and allow clients with cognitive impairments to enjoy the same protections of their confidential information as any other client.	the provisions of this rule do not exempt a lawyer from compliance with other duties. A lawyer's duty to communicate significant developments to a client (see proposed rule 1.4 and Bus. & Prof. § 6068(m)) remains applicable when a lawyer has obtained advanced consent and is deciding to act on that authorization.
Y-2016-21o	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC supports this rule as a good compromise on this complicated and difficult issue. (See In the Matter of Karnazes (Review Dept. 2014) Case No. 10-O-334, 2014 WL 232500; In re Eugster (Wa. 2009) 209 P.3d 435.)	1. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. OCTC supports Comments 3, 4, 5, and 6. 3. Comments 1 and 2 are unnecessary and in the nature of ethics opinions. Comment 7 is unnecessary, as it is already covered by the text of the rule.	2. No response required. 3. The Commission continues to disagree with the commenter's assessment. As previously noted, it believes that Comment [1] explains the policy underpinning the rule and thus provides interpretative guidance in applying the rule. Comment [2] provides a cross-reference to the Probate Code sections that provide a framework for initially assessing a client's capacity. Those sections are much more preferable than the corresponding Model Rule provision, MR 1.14, Cmt. [6], which is aspirational in nature. Comment [7] provides cross-references to statutory sections that are applicable in those situations where the rule is not applicable. Lawyers remain obligated to provide competent legal services to clients with diminished capacity even when not proceeding within the framework of the proposed rule. Directing the lawyers to relevant applicable law is a public protection measure.

Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments

TOTAL = 4 *A = 1* *D = 2* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-7m	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)		A	1.14	COPRAC generally supports the proposed rule as drafted. As we stated in our previous letter dated September 8, 2016, the Committee recognizes that the Commission believes existing confidentiality statutes preclude it from proposing a rule that includes the protections provided by Model Rule of Professional Conduct 1.14. We appreciate the fact that the Commission intends to emphasize the confidentiality constraints in the proposed rule when the Rules are submitted to the Supreme Court.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.15
(Current Rule 4-100)
Safekeeping Funds and Property of Clients and Other Persons

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 4-100 (Preserving Identity of Funds and Property of a Client) and considered ABA counterpart, Model Rule 1.15 (Safekeeping Property). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 1.15 (Safekeeping Property).

Rule As Issued For 90-day Public Comment

Proposed rule 1.15 amends current rule 4-100. In substance, it continues the various requirements of the current rule concerning the holding of client funds and property, including the duty to properly account for such funds and property. Proposed rule 1.15 also continues the existing authorization for the Board to adopt recordkeeping standards (proposed paragraph (e)).

The two main issues considered by the Commission in studying this rule were whether to require that: (i) fees paid in advance, including a flat fee, be held in trust until the fees have been earned; and (ii) the duties owed to a client be extended to other persons, such a statutory lienholder with a claim against funds held by the lawyer. The Commission is recommending that both changes be implemented in the proposed rule.

Fees Paid in Advance. Proposed paragraph (a) requires that fees paid in advance be held in trust similar to the current rule's requirement on advances for costs and expenses.[1] The Commission also recommends a new paragraph (b) to address the specific issue of a lawyer's handling of *flat* fees paid in advance, including a protocol that would permit a lawyer to hold such fees in a firm's operating account rather than a trust account.

Proposed paragraph (b) provides:

> (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:
>
> (1) The lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and
>
> (2) The client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

[1] Proposed paragraph (a), in relevant part, has been revised as follows: "All funds received. . . , including advances for **fees,** costs and expenses, shall be deposited in one or more identifiable [trust accounts]."

Paragraph (b) is intended to balance competing interests: (i) the public protection afforded by a rule intended to assure that unearned fees are available for a refund to a client; and, (ii) the freedom of a lawyer and client by agreement to set the terms of a fee arrangement.

Reports of insufficient funds in a client trust account are a significant concern in attorney discipline.[2] At the same time, comments by stakeholders to the first Commission have asserted that a requirement to hold certain fees in a client trust account would be contrary to a client's best interest and would impair a lawyer's ability to focus on a client's representation. In particular, comments from criminal defense lawyers and lawyers who represent clients against the Internal Revenue Service or Franchise Tax Board have expressed concerns that holding advance fees in a trust account creates unnecessary risks of the loss of those funds through government seizure or forfeiture.[3]

Paragraph (b) seeks to accommodate both of these interests by permitting a flat fee paid in advance to be held in a law firm operating account so long as the lawyer provides a mandatory disclosure to the client and obtains the client's agreement in a writing signed by the client. This permissive option is intended to be limited to a *flat* fee paid in advance rather than all fees paid in advance, in part, because commenters have expressed the view that this particular fee arrangement represents a situation where the fees are earned upon receipt and holding such fees in a client trust account would be inconsistent with the basic fiduciary obligation to segregate funds that belong to a lawyer or law firm. Similarly, paragraph (b) would not apply to a true retainer fee as defined in proposed rule 1.5(d) and (e) [current rule 3-700(D)(2)].

Although proposed paragraph (b) permits a flat fee to be held in a law firm operating account, it does not diminish a lawyer's obligation to account for the funds or to refund any amount owing to a client due to a subsequent unexpected failure of consideration. For example, a situation could arise where a lawyer is unable to complete the contemplated legal services due to accident or illness and a refund would be required in this instance despite the fact that the funds might not have been held in a trust account.

The approach proposed in paragraph (b) builds on the State Bar's prior attempts to implement rule changes in the area of advance fees. This includes a 1992 rule filing that would have amended rule 4-100 to provide that: "Unless a written fee agreement expressly provides that a fee paid in advance is earned when paid or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more [client trust accounts]." (See October 1992 State Bar rule filing, Supreme Court case no. S029270.) It also includes an effort in 1997 by the Committee on Professional Responsibility and Conduct ("COPRAC") that would have

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[2] The 2015 State Bar Annual Discipline Report indicates that: "The most common action reported by others, accounting for approximately eighty percent of all reports each year, was actions falling under [Bus. & Prof. Code] section 6091.1, which requires financial institutions to report overdrafts from attorney trust accounts." (2015 State Bar Annual Discipline Report at p. 19.)

[3] For example, in 2010 the first Commission received a comment from attorney Paul L. Gabbert stating:

> In criminal securities litigation involving federal prosecutors and the Securities and Exchange Commission ("SEC") payment of attorney's fees and the relationship of that payment to restraining orders and preliminary injunctions can not only distract the attorney from the case she was hired to defend, it can eclipse the underlying case and result in the attorney having to defend herself in contempt proceedings based on how her fee was paid. Even when the attorney prevails in the litigation, this can result in the functional equivalent of a fee forfeiture because the cost of successfully defending the civil contempt action can greatly reduce or eradicate the fee paid to defend the client in the underlying criminal action. . . .¶ True retainers and other fixed fees are the only way for practitioners to avoid these pitfalls.

required advance fees to be held in trust unless the lawyer obtained a client's informed written authorization to deposit those funds in another account. These attempts created issues that precipitated questions and substantial adverse public comment. With respect to the 1992 proposal, the Supreme Court raised a question about an ambiguity as to the use of the term "earned when paid" and the duty to refund "unearned" fees. The 1997 proposal also engendered claims of ambiguity. The proposal was criticized, in part, for creating a new concept of "informed written authorization" that was perceived as more than written disclosure but less than informed consent. The Commission believes that proposed paragraph (b) is responsive to the concerns raised with respect to these prior, unsuccessful attempts at reform.

The Commission also considered whether proposed paragraph (b) would work together with the Commission's non-refundable and flat fee provisions in proposed rule 1.5 ("Fees for Legal Services") (see the executive summary of proposed rule 1.5) that include a definition of a "flat fee," and concluded that it would. In relevant part, proposed rule 1.5 states that:

> (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
>
> (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

Taken together, the proposed rules 1.5 and 1.15 would implement enhanced public protection by: (1) prohibiting a "nonrefundable fee" except for a true retainer; (2) generally requiring that advanced fees be held in trust; and (3) providing a limited permissive option for flat fee arrangements.

Extending the Rule to Cover Other Persons. The Commission recommends adding the concept that under certain circumstances a lawyer owes duties to protect funds and property of a third person. This change is comparable to the standard in Model Rule 1.15 and to the rules adopted in some jurisdictions. Most significantly, California case law has held that a lawyer owes such duties to third persons. The Commission is concerned that current rule 4-100 is deficient to the extent that it hides the ball on the issue of funds and property entrusted by non-clients. By clarifying the rule, lawyer compliance would be facilitated. To explain this new addition to the rule, the Commission drafted proposed Comment [5] that states:

> [5] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third party, whether the lawyer has assumed a contractual obligation to the third person and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302. However, civil liability by itself

> does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 ("'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'") and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 (lawyer who agrees to act as escrow or stakeholder for a client and a third party owes a duty to the nonclient with regard to held funds).

This explanatory comment is important because it alerts lawyers to the fact that case law research may be needed to ascertain the nature and extent of a duty owed to a third person.[4] Other proposed comments explain what is meant by the term "advances for fees" (see proposed Comment [2]) and caution that paragraph (b)'s protocol for holding a flat fee in a firm operating account does not diminish a lawyer's duty to account for the fee or the lawyer's burden to establish that the fee has been earned.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission substituted the preferred spelling "labeled" for "labelled." The Commission also added the phrase "If the flat fee exceeds $1,000.00" in paragraph (b)(2) to limit paragraph (b)'s application to matters for which a flat fee exceeds $1,000.00.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made non-substantive grammatical and punctuation revisions.

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

[4] In some circumstances, the duty imposed by the proposed rule may be a requirement to communicate and inform a third person concerning that person's claim to client trust funds (see *In the Matter of Nunez* (Review Dept. 1992) 2 Cal State Bar Ct. Rptr. 196 [lawyer believed that client's bankruptcy would nullify a lien and failed to communicate with the lienholder concerning the lien claim), while in other situations a lawyer might be required to withhold disbursement of funds to the lawyer's client to protect the rights of a third person (see *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622 [lawyer's failure to honor a statutory Medi-Cal lien]).

COMMISSION REPORT AND RECOMMENDATION: RULE 1.15 [4-100]

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: James Ham, Raul Martinez

I. CURRENT CALIFORNIA RULE

Rule 4-100 Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph(B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Standards:

Pursuant to rule 4-100(C) the Board of Governors of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph(B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written ledger for each client on whose behalf funds are held that sets forth:

(i) the name of such client,

(ii) the date, amount and source of all funds received on behalf of such client,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and

(iv) the current balance for such client;

(b) a written journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation(balancing) of(a),(b), and(c).

(2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

(a) each item of security and property held;

(b) the person on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person to whom the security or property was distributed.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.15 [4-100]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.15 [4-100]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import , maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this Rule for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and

adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Standards:

Pursuant to this Rule, the Board of Trustees of the State Bar adopted the following standards, effective _____, as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person,

(ii) the date, amount and source of all funds received on behalf of such client or other person,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person,* and

(iv) the current balance for such client or other person;

(b) a written* journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ("'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'") and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT RULE 4-100)

Rule ~~4-100 Preserving Identity of~~1.15 Safekeeping Funds and Property of ~~a Client~~Clients and Other Persons

(a) All funds received or held by a lawyer or law firm* for the benefit of ~~clients by a member or law firm~~a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account~~," "Client's Funds Account~~" or words of similar import , maintained in the State of California, or, with written* consent of the client, in any other

jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction. ~~No funds~~

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

~~(A)~~ (c) Funds belonging to the ~~member~~lawyer or the law firm* shall not be deposited ~~therein~~ or otherwise commingled ~~therewith~~with funds held in a trust account except ~~as follows~~:

(1) ~~Funds~~funds reasonably* sufficient to pay bank charges~~.~~; and

(2) ~~In the case of~~funds belonging in part to a client or other person* and in part presently or potentially to the ~~member~~lawyer or the law firm,* in which case the portion belonging to the ~~member~~lawyer or law firm* must be withdrawn at the earliest reasonable* time after the ~~member's~~lawyer or law firm's interest in that portion becomes fixed. However, ~~when the right of the member~~if a client or other person* disputes the lawyer or law ~~firm~~firm's right to receive a portion of trust funds ~~is disputed by the client~~, the disputed portion shall not be withdrawn until the dispute is finally resolved.

~~(B)~~ (d) A ~~member~~lawyer shall:

(1) ~~Promptly~~promptly notify a client or other person* of the receipt of ~~the client's~~ funds, securities, or other ~~properties.~~property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) ~~Identify~~identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable~~.~~;

(3) ~~Maintain~~maintain complete records of all funds, securities, and other ~~properties~~property of a client or other person* coming into the possession of the ~~member~~lawyer or law firm ~~and render appropriate accounts to the client regarding them~~;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve ~~such~~ records of all funds and property held by a lawyer or law firm* under this Rule for a period of no less than five years after final appropriate distribution of such funds or ~~properties~~property;~~ and~~

~~(3)~~ (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar~~.~~; and

(7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

~~(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.~~

~~(C)~~ (e) The Board of ~~Governors~~Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by ~~members~~lawyers and law firms* in accordance with subparagraph (~~B~~d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

Standards:

Pursuant to ~~rule 4-100(C)~~this Rule, the Board of ~~Governors~~Trustees of the State Bar adopted the following standards, effective ~~January 1, 1993~~_____, as to what "records" shall be maintained by ~~members~~lawyers and law firms* in accordance with subparagraph (~~B~~d)(3).

(1) A ~~member~~lawyer shall, from the date of receipt of ~~client~~ funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person,

(ii) the date, amount and source of all funds received on behalf of such client or other person,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person,* and

(iv) the current balance for such client or other person;

(b) a written* journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and ~~canceled~~cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A ~~member~~lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ("'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'") and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

V. RULE HISTORY

Rule 4-100 has its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 9 provided:

> A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company, authorized to do business in the State of California, in a bank account separate from his own account and clearly designated as "Clients' Funds Account" or "Trust Funds Account," or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company authorized to do business in the State of California, which safe deposit box shall be clearly designated as "Clients' Account" or "Trust Account" or words of similar import, and be separate from the attorney's own safe deposit box.

In 1975, Rule 9 was revised and renumbered as 8-101. The rule that ultimately was approved by the Supreme Court differed from the version that appeared in the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. As part of the comprehensive revisions to the Rules in the 1972 report, the special committee had proposed rule 9-101, which provided:

> **Rule 9-101. Preserving Identity of Funds and Property of a Client.**
>
> (A) All funds of clients paid to a member of the State Bar or Firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the State of California and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein, but the portion belonging to the member of the State Bar or firm of which he is a member may be withdrawn when due unless the right of the member of the State Bar or firm of which he is a member to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive.

Comment

Rule 9-101 originated from ABA Code DR 9-102. The committee amended ABA Code DR 9-102 to include advances by the client to the attorney for costs and expenses as subject to the trust account requirements.

The rule that was ultimately approved in 1975 provided:

Rule 8-101. Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account”, “Client’s funds Account” or words of similar import, maintained in the State of California, or, with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client’s business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonable sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein and the portion belonging to the member of the State Bar or firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

(1) Promptly notify a client of the receipt of his funds, securities or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive. (Amended by order of the Supreme Court, effective January 1, 1975.)

In 1983, rule 8-101 was amended to complement the then new statutory authority of the State Bar to conduct audits of trust accounts upon a State Bar Court determination of reasonable cause to believe that a member has violated rule 8-101. (See Bus. & Prof. Code §§ 6055 and 6086 as amended effective January 1, 1982.) The following underlined language was added to 8-101(B)(3):

> Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them; <u>preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.</u>

In 1989, rule 8-101 was revised and renumbered as 4-100 as part of the comprehensive revision and renumbering of the entire California Rules of Professional Conduct. Rule 4-100(A) and (B) continued the requirements of rule 8-101, regarding setting up and maintaining client trust accounts and handling client funds and property that come into the possession of the attorney.

Paragraph (C) was added to permit the Board of Governors to adopt specific recordkeeping requirements ("standards") to provide guidance to attorneys in setting up trust accounts and to serve as a basis for discipline if those records were not kept.

The 1989 rule amendments to rule 8-101 are shown in the following legislative blackline:

Rule 4-100. ~~8-101.~~ Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member ~~of the State Bar~~ or law firm, ~~of which he is a member,~~ including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account,", "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in ~~such~~ any other jurisdiction where there is a substantial relationship between ~~his~~ the client or ~~his~~ the client's business and the other jurisdiction. ~~and n~~ No funds belonging to the member ~~of the State Bar~~ or the law firm ~~of which he is a member~~ shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges. ~~may be deposited therein.~~

(2) In the case of ~~F~~funds belonging in part to a client and in part presently or potentially to the member ~~of the State Bar~~ or the law firm, ~~of which he is a member must be deposited therein and~~ the portion belonging to the member ~~of the State Bar~~ or law firm of ~~which he is a member~~ must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member ~~of the State Bar~~ or law firm of ~~which he is a member~~ to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member ~~of the State Bar~~ shall:

(1) Promptly notify a client of the receipt of ~~his~~ the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member ~~of the State Bar~~ or law firm and render appropriate accounts to ~~his~~ the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any

order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, ~~to the client~~ as requested by ~~a~~ the client, ~~the~~ any funds, securities, or other properties in the possession of the member ~~of the State Bar~~ which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

In 1992, further proposed amendments to rule 4-100 were submitted to the California Supreme Court, together with amendments to rule 3-700 (re termination of employment, including the duty to refund unearned fees paid in advance). The amendments to these rules would have required that all advance fees for legal services received by an attorney be deposited in the attorney's client trust account unless the attorney's written fee agreement with the client expressly provided that the fee paid in advance was earned when paid or was a "true retainer." Although the proposed amendments avoided use of the terms "fixed fee," "flat fee" or "non-refundable fee," such types of retainer fee agreements would have been permissible under the proposed amendments but the fees paid under such agreements would have been required to be placed in the attorney's client trust account unless the attorney's written attorney-client fee agreement expressly provided that such fees, paid in advance of the provision of legal services, were "earned when paid or is a true retainer … ." (See "Request that the Supreme Court of California Approve Amendments to the Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," October 1992, Supreme Court file number SO29270.)

In a May 11, 1995 Supreme Court letter from John C. Rossi, Assistant Clerk-Administrator, to Diane Yu, State Bar General Counsel, the court advised the State Bar of a possible ambiguity in the proposal. In relevant part, the letter stated:

> If a fee agreement specifies that an advance fee is "earned" when paid, the fee does not fall within rule 3-700(D)(2)'s requirement that members return "unearned" advance fees. Similarly, the new discussion following that rule refers only to an "unearned" fee paid in advance and states that "such fee" may still have to be refunded even if not required to be in a trust account. . . . Thus, the proposed rules appear to exempt advance fees designated as earned when paid from the requirement of refunding fees paid for services that are not performed.

Following receipt of this letter, the State Bar withdrew the request that the Supreme Court approve the proposed amendments to rules 3-700 and 4-100.

While the foregoing submission to the Supreme Court was the last time that the Court considered proposed amendments to rule 4-100, in 1997 a Board Committee

authorized COPRAC to seek public comment on a proposed new rule 4-110 (re advance payment of fees for legal services) that would have required a lawyer to obtain informed authorization from a client to deposit and hold advance fees in an account other than the lawyer's trust account. Following consideration of public comment received on that proposal, COPRAC concluded its consideration of a proposed new rule 4-110.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

    1. OCTC supports this rule and the Comments to this rule. In particular, OCTC supports the amendments to the current rule to require an attorney to maintain advanced fees in a trust account until the fee is earned and requiring the accounting be in writing. This enhances public protection.

        Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

    1. OCTC supports this rule and the Comments to this rule. In particular, OCTC supports the amendments to the current rule to require an attorney to maintain advanced fees in a trust account until the fee is earned and requiring the accounting be in writing. This enhances public protection.

        Commission Response: No response required.

    2. OCTC, however, is concerned with exempting a written agreement to deposit flat fees in the attorney's operating account for fees of $1,000 or less. There is no good reason for this $1,000 exemption.

        Commission Response: The Commission proposes exempting a flat fee of less than $1000 from requirement to obtain the client's consent to depositing the funds into the lawyer's operating account in order to address access-to-justice issues raised by commenters who note that it may be impracticable for many low income clients, such as clients seeking immigration advice who are not in the country, to provide a writing.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. Four comments agreed with the proposed Rule and five comments agreed only if modified.

During the 45-day public comment period, seven public comments were received. Three comments disagreed with the proposed Rule and four comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

State Bar Act. Every member of the State Bar of California is deemed to authorize banks and financial institutions holding client trust fund accounts to disclose records of those accounts to the State Bar, pursuant to Business and Professions Code §§ 6069. 6091.1, and 6091.2, and requires banks to make reports to the State Bar of instances of insufficient funds presented against an attorney's client trust account. §§ 6210-6228 requires IOLTA accounts to be established with the interest to be paid to the State Bar for legal services for the indigent.

Related California law. Under 4-100(A), funds belonging in part to a client and in part presently or potentially to the member must be deposited in the attorney's trust account. The California Supreme Court has declined to resolve the question of whether advance fees must be deposited in the attorney's trust account (See *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 163 [154 Cal. Rptr. 752]). In *Baranowski*, the court did not impose discipline on the attorney for failing to deposit advance fees in a trust account.

The State Bar Court distinguishes a true retainer as a fee paid by a client which is paid solely for the purpose of ensuring the availability of the member for the matter over a given period of time (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752).

Separately, California statutory law establishes two areas where advance payment of fees for legal services are strictly prohibited:

Senate Bill No. 94, enacted in 2009, was codified in Business and Professions Code § 6106.3 and California Civil Code § 2944.7(a), and makes it unlawful for any person who offers to negotiate, arrange or perform a mortgage loan modification or forbearance in exchange for a fee paid by the borrower, to claim, demand, charge, collect or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

Assembly Bill No. 1159, enacted in 2013, was codified in Business and Professions Code §§ 6240 – 6243 and in amendments at §§ 22442, 22442.3 and 22443.1, and prohibits attorneys and immigration consultants from demanding or accepting payment for any immigration reform act services before enactment, by Congress, of an immigration reform act that authorizes undocumented immigrants to attain lawful status under federal law.

B. ABA Model Rule Adoptions

Model Rule 1.15 Variations. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.15: Safekeeping Property," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_15.authcheckdam.pdf [Last visited 2/7/17]

- Jurisdictions for the most part have not adopted the Model Rule approach, which states only general principles concerning trust accounts. Only one jurisdiction has adopted Model Rule 1.15 verbatim[1] and another fourteen jurisdictions have adopted a slightly modified version of Model Rule 1.15.[2] However, thirty-six jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.15."[3] Some jurisdictions have adopted more than one rule to regulate lawyer trust accounts. See, e.g., Delaware Rules 1.15 and 1.15A, available at: http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf [Last visited 3/15/16].

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

A. Concepts Accepted (Pros and Cons):

1. Recommend retaining the basic structure of current rule 4-100 but breaking out some paragraphs for clarity and changing the rule title. The title is changed from "Preserving Identity of Funds and Property of a Client" to "Safekeeping Funds and Property of Clients and Other Persons."

    - Pros: There is no evidence that there is anything wrong with the basic structure of rule 4-100, which in paragraph (A) describes where funds and property subject to the rule must be placed and in paragraph (B) sets forth duties a lawyer has regarding notice, accounting, and distribution of the funds and property. However, the Commission recommends that for clarity, (i) the two sentences of paragraph (A) be split into separate paragraphs and (ii) the several clauses of paragraph (B)(3) also be split into separate

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[1] The one jurisdiction is: Nebraska.

[2] The fourteen jurisdictions are: Alaska, Arizona, District of Columbia, Georgia, Iowa, Kentucky, Maryland, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Vermont, and West Virginia.

[3] The thirty-six jurisdictions are: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

subparagraphs. The title is derived from the first Commission's version on Rule 1.15, except "Handling" is changed to "Safekeeping" (from the Model Rule) and better describes the rule.

- Cons: By separating the duty to place client funds in a trust account (proposed (a)) from the duty to not commingle funds (proposed (b)), double charging for the same misconduct (such as deposit of client trust funds in a lawyer's personal bank account) could result. Maintaining as a single paragraph current rule 4-100(A), which encompasses both duties, would avoid such a result.

2. Recommend adoption of a requirement that advance fees be placed in the lawyer's trust account.

   - Pros: Including this requirement in the rule would be client protective. It is hornbook law that a fee is not earned until the lawyer has completed the agreed services or has otherwise earned the fee. A lawyer should be required to place advance fees in the trust account from which fees may be withdrawn only when the lawyer has earned the fee and the lawyer's interest in the fee has been fixed (i.e., there is no dispute as to the lawyer's entitlement to the fee. This will prevent lawyers from placing the fee in the lawyer's operating account and exhausting the funds before the funds are earned. . In the event the lawyer is discharged, the unearned fees remaining in the trust account will be available for refund. This is the rule in the majority of the states and there is no valid justification for California to provide less public protection. Lawyers have a duty to account for advance fees in any event. To the extent that some lawyers rely upon flat fees paid in advance, a benchmark approach in fee agreements can be used that would accommodate the competing interests of protecting clients and allowing for the freedom to contract.

   - Cons: Whether to require that advance fees be placed in the lawyer's trust account, as is required in Model Rule 1.15 and most jurisdictions that have adopted the Model Rules, is a policy issue that has generated substantial controversy among different practice groups (e.g., bankruptcy, criminal defense lawyers) whenever it has been raised. Retaining the language of the current rule would maintain the status quo. To make the revision would effect a significant change in the law. There has been no clear signal since the Supreme Court decided *Baranowski v. State Bar* (1979) 24 Cal.3d 153 that the law should be changed. Moreover, much of the alleged abuse derives from lawyers who purport to charge a nonrefundable or "earned on receipt" fee for fee arrangements other than a true retainer. That issue has been addressed by this Commission in its proposed Rule 1.5(d) and (e).[4] Finally,

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[4] Proposed Rule 1.5(d) and (e) provide:

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled

lawyers can be found liable in discipline for failing to refund unearned fees. (See, e.g., *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct., Rptr. 752, 758.)) This should be sufficient incentive for lawyers to place advance fees in the trust account without an express requirement to do so.

3. Recommend adoption of paragraph (b), which excepts from the requirement that advance fees be placed in the trust account when the lawyer has provided written disclosure to the client that the client has a right to have the fees placed in the trust account and is entitled to a refund of any unearned fees, and the client has consent in writing following disclosure.

    - Pros: The paragraph strikes a balance between concern that money in the trust account is subject to government seizure or forfeiture and the interest in the public protection afforded by a rule intended to assure that unearned fees are available for a refund to a client. Although proposed paragraph (b) permits a flat fee to be held in a law firm operating account, it does not diminish a lawyer's obligation to account for the funds or to refund any amount owing to a client due to a subsequent unexpected failure of consideration.

    - Cons: Few jurisdictions have a similar exception to the requirement that advance fees be placed in the trust account for a good reason: it substantially decreases the risk that unearned fees will not be available for return to the client. The concern with seizure or forfeiture should be addressed by a change in the laws that permit such government action, not by tinkering with the client trust account rule.

4. Recommend that, with respect to the paragraph (b) exception from the requirement that advance fees be placed in a trust account, the written disclosure signed by the client is required only in those lawyer-client matters where the flat fee exceeds $1,000.00.

    - Pros: In consideration of written comments and an oral presentation at a Commission meeting, the Commission concluded that the requirement that the paragraph (b)(1) disclosures be in a writing signed by the client might be too burdensome for low fee engagements, particularly where it is difficult to obtain the client's signature, e.g., in immigration matters where a third person is communicating with the lawyer on the client's behalf and the client is

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to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

difficult to reach in the client's native country. Regardless, the lawyer must still provide the client with the required disclosures.

- Cons: Paragraph (b) is an unnecessary exception to the paragraph (b)(2) requirement that the disclosures be provided to the client in a writing signed by the client. Regardless of the alleged burden in obtaining the client's signature, paragraph (b)'s requirement of a written disclosure and client consent to *not* placing advance fees in trust recognizes the importance of the lawyer's duties to maintain client funds in trust. Strictly applying the written disclosure and consent requirement should ensure that the client makes a fully informed decision about the placement of the client's funds. This exception to the paragraph (b) exception serves only to dilute the lawyer's trust accounting duties.

5. Recommend including in the rule the concept that under certain circumstances, a lawyer owes duties to protect funds and property of a third person.

   - Pros: This change tracks the first Commission's proposed rule, Model Rule 1.15 and the rule in a number of jurisdictions. California law has held that a lawyer owes duties regarding the funds and property of third persons and the rule should expressly recognize current law. The current rule is deficient because it hides the ball and fails to provide adequate public protection. At the very least, a new comment should reveal that case extends the duties in the rule to non-clients in certain circumstances.

   - Cons: The inclusion of "other person" in the rule may cause confusion as to precisely when a lawyer owes a duty to third persons to protect their funds and property and what that duty entails. A particular problematic consequence of this change is confusion as to a lawyer's duty to honor a lien on client funds (such as statutory liens, contractual liens, medical liens and prior attorney liens) because case law demonstrates that all liens are not treated the same.

6. Recommend retaining term "law firm" in current rule 4-100(A) and throughout the rule. Neither Model Rule 1.15 nor the first Commission proposed Rule 1.15 included the concept.

   - Pros: Both "lawyer" and "law firm" should be retained in the rule to protect the public and to make it clear that the rule applies even if the lawyer is not personally in charge of the firm's trust account. See proposed Rules 5.1 – 5.3. The concerns stated in the Con section below should not materialize because the rule has not proven to have such a negative effect and California neither currently nor in the proposed rules embraces the concept of law firm discipline.

   - Cons: Contrary to the pro argument, retaining "law firm" might continue a negative effect of leading individual lawyers to erroneously believe and claim

that their "law firm" is primarily responsible for a trust accounting violation. If current rule 4-100(A) is changed to refer only to a lawyer, then it would no longer suggest that anyone other than an individual lawyer is responsible for compliance.

7. Recommend retaining current rule 4-100(B)(1) as paragraph (d)(1) and adding the "lawyer knows or reasonably should know" standard to the notice requirement. Paragraph (d)(1) provides a lawyer shall: (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest."

    - Pros: With the addition in the rule of an express duty owed to "other persons," the Commission determined that the duty to give notice to such persons should be qualified by the "knows or reasonably should know" standard.

    - Cons: The current rule's unqualified duty to notify *a client* should not be qualified by the "knows or reasonably should know" language.

8. Recommend retaining current rule 4-100(B)(2) as paragraph (d)(2). Paragraph (d)(2) provides a lawyer shall: "identify and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable."

    - Pros: The paragraph carries forward current paragraph (B)(2) nearly verbatim. There is no indication that this provision has created any problems as currently constituted.

    - Cons: None identified.

NOTE: As noted, (see paragraph 1, above), the Commission determined that dividing the different clauses of current rule 4-100(B)(3) into separate subparagraphs would increase the clarity of the rule.

9. Recommend retaining the first clause of current rule 4-100(B)(3) as paragraph (d)(3), with the addition of "other person". Paragraph (d)(3) provides a lawyer shall: "(3) maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm."

    - Pros: There is no indication that this provision has created any problems as currently constituted. Further, the rule should expressly recognize that a lawyer owes duties to third persons under appropriate circumstances.

    - Cons: None identified.

10. Recommend retaining the substance of the second clause of current rule 4-100(B)(3) as paragraph (d)(4). There are four changes: (i) the word "account" has been substituted for the phrase "render appropriate accounts"," (ii) the term

"other persons" has been added, (iii) the requirement that the lawyer account "in writing" has been added; and the requirement that the lawyer account "promptly" has been added.

- Pros: Paragraph (b)(4) carries forward the substance of rule 4-100(B)(3), but specifies that it also applies to "other persons" to reflect those duties that a lawyer may owe. No substantive change is intended by the substitution of "to account" for the current phrase "render appropriate accounts," which is considered to be ambiguous. Adding the requirement that the account be in writing is client-protective. The addition of the requirement that the lawyer account "promptly" more accurately describes current law.

- Cons: None identified.

11. Recommend retaining the third clause of current rule 4-100(B)(3) as paragraph (d)(5). The clause "of all funds and property held by a lawyer or law firm under this Rule" has been added to modify the term "records."

    - Pros: The clause has been added to clarify that the duty to preserve records is limited to funds and property covered by the rule. No change in substance is intended.

    - Cons: None identified. However, paragraphs (b)(3) and (b)(5) could be combined or reordered to follow one another. (see Standards (1) and (2).

12. Recommend retaining the fourth clause of current rule 4-100(B)(3) verbatim as paragraph (d)(6). Paragraph (d)(6) provides a lawyer shall: "(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar."

    - Pros: There no indication that this provision has created any problems as currently constituted.

    - Cons: None identified.

13. Recommend retaining current rule 4-100(B)(4) as paragraph (d)(7), as modified, but to add term "undisputed" to modify the term "funds or property".

    - Pros: Although the word "undisputed" does not appear in current rule 1-400(B)(4), it is implied in that provision that the lawyer need only distribute "undisputed" funds given the lawyer's duties to hold in trust "disputed funds" set forth in current rule 1-400(A)(2) [proposed paragraph (b)(2) of this Rule.] This is a clarifying change intended simply to expressly state what is already implied in the current rule. No change in substance to the rule is intended.

    - Cons: The current language relies on the concept of "entitled to receive." This language is adequate to encompass the concept of undisputed funds. If the language is changed, a lawyer's duty may be ambiguous in situations where

a client is entitled to receive funds but an alleged dispute by a third party causes a lawyer to improperly delay or withhold disbursement to the client.

14. Recommend retaining current rule 4-100(C) nearly verbatim as paragraph (e). The only changes to the Trustees' enabling clause is to substitute "lawyers" for "members" and change "Governors" to "Trustees".

    - Pros: This clause is the essential enabling provision that authorizes the Board to promulgate standards regarding what records must be kept pursuant to paragraph (c)(3). It should be retained.

    - Cons: None identified.

15. Recommend adding "other persons" to the recordkeeping requirements set forth in Standards (1) and (2).

    - Pros: If the lawyer owes duties to safeguard funds and property of a third person, the lawyer should also have duties to keep records regarding those funds. The standards clarify what records must be maintained and for how long.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include more examples in paragraph (b) of exceptions to the rule against commingling as was done by the first Commission.[5]

    - Pros: The added paragraphs would provide important guidance to lawyers in an area that frequently is the subject of discipline.

    - Cons: It is unnecessary to bring the foregoing exceptions into the rule because they are addressed in case law. These exceptions are nothing more than practice pointers. To include them in a rule would constitute micromanagement and conflict with the Commission's Charter. Further, funds

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[5] The first Commission added the following exceptions to its proposed paragraph re commingling:

(2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;

(3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;

(4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or

(5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.

deposited to restore entrusted funds are not and never were the lawyer's funds; it is the client's funds that are being restored.

2. Recommend deleting "presently or potentially" as modifiers of lawyer's funds in paragraph (b)(2), which is derived from current rule 4-100(A)(2).

   - Pros: The language unnecessarily injects uncertainty into a disciplinary rule. Moreover, on balance it is confusing because it appears logically inconsistent. Paragraph (b) requires a lawyer to withdraw from the trust account funds that belong to the lawyer. A rule should not permit a lawyer to withdraw funds that "potentially" belong the lawyer.

   - Cons: The current language is helpful and promotes compliance because it alerts lawyers to the fact that the character of funds received are not static. Rather, funds belonging initially to a client (such as advances for costs) may become funds belonging to the client's lawyer once the lawyer's interest becomes fixed.

3. Include in paragraph (c)(1) the phrase "claims to have" to modify the "interest" of an "other person".

   - Pros: Including this language will appropriately broaden the rule to require the lawyer to maintain sufficient funds to satisfy claims that have not yet matured.

   - Cons: The concept is ambiguous and would unnecessarily and confusingly broaden the lawyer's duties. It is not clear how a lawyer would know when a client "claims to have" an interest in funds. It is more definite and clear to impose notice duties on a lawyer only when the lawyer knows or reasonably should know the other person *has* an interest.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. Adding the concept of duties owed third persons throughout the rule is a substantive change. (See Section IX.A.2, above.)

2. Qualifying the notice requirement in current rule 4-100(B)(1) by a "knows or reasonably should know" standard is a substantive change. See discussion of proposed paragraph (c)(1) in Section IX.A.7, above.)

3. The addition of the requirement in paragraph (c)(4) that the lawyer account "promptly" to clients and other persons is a substantive change. (See Section IX.A.10, above.)

4. If the Commission were to agree that the standards be applied to "other persons" in addition to clients, it would be a substantive change. (See Section IX.A.15, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. All recommended changes not identified in paragraph IX.C as substantive changes are non-substantive changes. (See paragraphs IX.A.1, 6, 6, 8, 9, and 11-14.)

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.15 [4-100] in the form stated attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.15 [4-100] in the form attached to this Report and Recommendation.

Proposed Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
Synopsis of Public Comments

TOTAL = 7 *A = 0* *D = 3* *M = 4* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-20	American Immigration Lawyers Ass'n (AILA) of Northern California Chapter (Lee) (01-09-17)	Y	M		1. We recommend that Comment 3 be amended to reflect that an agreement in a writing signed by the client is not always necessary. Comment 3 makes no reference to the exemption from the signed writing requirement if the fee does not exceed $1,000. 2. Proposed rule 1.15 fails to address whether it applies to existing fee agreements, a significant issue.	The Comment picks up the exception by reference to the applicable paragraph. Therefore, no change to the comment is necessary. The concern raised by the commenter relates to how the rule is implemented not to the substance of the rule. Changes to the Rules of Professional Conduct are generally not retroactive. As a result, the adoption of this proposed rule would not require lawyers or their clients to unwind prior financial transactions which were governed by the old rules. For example, advance deposits of legal fees placed into a law firm's operating account prior to the adoption of the new rule could remain in the firm's operating account. Any advance deposit of fees tendered to the lawyer after the effective date of the proposed rules would be governed by the new

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						requirement that the funds be placed into the client trust account unless the client gives informed written consent to deposit the advance fee into the lawyer's operating account.
					3. AILA requests that further study of the potential impact on the public and access to justice be implemented prior to the adoption of rule 1.15. A change to the rule at this point would adversely affect the ability of low-income consumers to access the justice system and be very disruptive to our ability to serve immigrant clients.	The Commission has evaluated the issues and does not believe further study is needed. Many U.S. jurisdictions currently have a rule similar to the proposed rule, and the Commission is not aware of any access-to-justice problems in those jurisdictions caused by Rule 1.15.
Y-2016-1	Bach, James (12-09-16)	No	D	1.15	1. This proposed rule imposes one more useless burden – trust accounting - on attorneys who provide flat fee arrangements for clients who often would not otherwise have access to legal services.	1. The Commission disagrees with the commenter's assessment. All California attorneys are required to account for client funds and maintain appropriate written records of the receipt and disbursement of client money. The proposed rule does not impose a new accounting requirement. The proposed rule simply carries forward the requirement in current rule 4-100(B) to account to the client regardless of the fee arrangement.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. The attorney is charged with the impossible task of determining when each part of the fee is due, and then moving money in and out of a trust account to avoid rule violation.	2. The Commission disagrees with the commenter's assessment. A lawyer and client can agree in their legal services agreement when all or part of a flat fee is earned, or can agree to invoke the paragraph (b) exception regarding the placement of flat fees into the attorney's operating account under paragraph (b).
					3. For an attorney to take flat fee cases and for them to be profitable, it is necessary at some point in the case for the attorney to say that the fee has been earned and is nonrefundable, even though all of the work has not yet been done.	3. The proposed rule does not regulate when a particular fee is earned. See proposed Rule 1.5 [4-200].
					4. The State Bar should make the jobs of its members easier. I do not see any compelling reason to upset decades-old practices, and to impose significant burdens, costs and liabilities on its members who provide flat fee legal services, and who require payment in advance to insure they get paid.	4. The Commission again disagrees with the commenter's assessment. The proposed rule conforms to a national standard for safekeeping client funds and property, a substantial majority of jurisdictions requiring that advance fees be maintained in a trust account for client protection.

Proposed Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
Synopsis of Public Comments

TOTAL = 7 *A = 0* *D = 3* *M = 4* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-6c	Los Angeles County Bar Association (Schmid) (12-20-16)	Y	D	1.15(a)	1. We continue to oppose the adoption of paragraph (a) of Proposed Rule 1.15 in its current revised form. The inclusion of the word "fees" in paragraph (a) would mandate that all routine fee retainers (which are customarily required as advance deposits on fees for a new client engagement) be deposited into a trust account. 2. The Proposed Rule fails to address whether or not fees that have already been advanced prior to the effective date of the rule will need to be moved from a general account or other source to a trust account. In order to avoid further disruption, we strongly urge that, if the Proposed Rule is adopted in its current form, fees so advanced prior to the effective date of the change be excluded from the application of the rule.	1. The Commission continues to believe that requiring that advance fees be placed in a trust account is a public protection measure that has been recognized by a substantial majority of the jurisdictions in the United States. Further, paragraph (b) of the proposed rule permits an attorney to deposit flat fees into the attorney's operating account with the client's informed written consent. The proposed rule will not have a negative impact on legal business models, and contains an exception for fees of less than $1,000. 2. The Commission continues to believe that the concern raised by the commenter is addressed to how the rule should be applied and does not believe that any further changes to either the text or the comments of the rule are required. Changes to the Rules of Professional Conduct are generally not retroactive. As a result, the adoption of this proposed rule would not require lawyers or their clients to unwind prior financial transactions which were

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						governed by the old rules. For example, advance deposits of legal fees placed into a law firm's operating account prior to the adoption of the new rule could remain in the firm's operating account. Any advance deposit of fees tendered to the lawyer after the effective date of the proposed rules would be governed by the new requirement that the funds be placed into the client trust account unless the client gives informed written consent to deposit the advance fee into the lawyer's operating account.
					3. Commenter notes that the Rules Revision Commission, in its response in the Synopsis of Public Comments, stated its belief that this issue is one of several "easily resolvable implementation issues if the Supreme Court decides to adopt the rule." We propose that, instead of addressing this concern as an implement issue, paragraph (a) of the Proposed Rule should be modified to delete the words "or held," to make more clear that the Proposed Rule only applies to "funds	3. The language of the rule does not need to be revised in this fashion to address a transition from the existing rule to the proposed rule. The Commission does not believe that the commenter's suggested deletion of current rule language is appropriate to address what is a transient concern with implementation of the rule.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					received" (i.e., after the effective date of the rule), rather than extending to "funds held" (i.e., as of the effective date of the rule).	
Y-2016-10b	Miller, Merwyn J. (01-04-17)	N	M	1.15(b)	1. Minimum flat fees which are paid in advance are not included in the definition of 1.15(b) and, therefore, under the proposal must be place in the trust account without exception. Based on my years of experience as an attorney, this approach will cause more disputes between client, attorney, and others, provide less protection to specified parties, restrict the freedom with which attorneys render advice, and increase fees to the client. 2. Increase in lawyer-client disputes. In the probate field, flat fees paid by the estate are deductible. If the fees are not deemed "paid" until earned, the estate's reporting them as "paid" will create a tax deficiency because of the reporting error. 3. Less protection. There will be	Requiring unearned fees to be deposited in a client trust account will not result in an increase in disputes between attorneys and clients, restrict the freedom of an attorney to give advice or increase legal fees. The comment does not explain why these events would occur. Further, for many years, other U.S. jurisdictions have required such fees to be deposited into a trust account, and there is no evidence that those jurisdictions are experiencing the problems alleged in the comment. The rule will not affect tax treatment of attorney fees because whether a fee is earned or unearned does not depend on where the money is deposited by the lawyer. Further, other jurisdictions with rules similar to that proposed by the Commission do not report the alleged problem mentioned in the comment. The proposed rule has no

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					less protection for beneficiaries because the trustee of the estate will not provide a full accounting to of the estate's transactions to them.	impact on a lawyer or trustee's duty to fully account to beneficiaries. The comment fails to explain why the rule would result in less protection for beneficiaries or why the rule would result in a trustee not providing a full accounting of estate transactions.
					4. Fee increases. Because of the added administrative costs of maintaining the trust account and the potential that clients will discharge their lawyer when confronted with the repeated decisions the client will have to make consenting to the lawyer's withdrawal of payments out the trust account, fees will increase as the lawyer is taking more risk that he will get his complete fee.	Lawyer fees will not increase because of the proposed rule. The administrative costs of maintaining an IOLTA trust account are insignificant. Further, clients are not required to approve every withdrawal from a client trust account where the lawyer's fee agreement provides that the lawyer may take fees as they are earned. The experience of other jurisdictions with a similar rule fails to corroborate the concern.
					5. Less robust and complete advice. A lawyer's advice to the client trustee to render a complete accounting to beneficiaries will be less robust and complete because of the potential that the client will not approve the withdrawal from the trust account.	The experience of other jurisdictions with a similar rule fails to corroborate the concern. Existing rules already prohibit an attorney from taking a fee that is disputed by a client. The rule will not trigger more fee disputes.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					6. Recommendation. Include minimum flat fees in your definition of flat fees at 1.5(e) and make clear that an attorney will not violate the rules for charging more if the client requires the attorney to deposit the fee in his trust account.	A "minimum flat fee," which the commenter appears to define as a minimum fee subject to additional charges, is most likely a prohibited non-refundable fee and is not allowed under current rules. The Commission has concluded that public protection is furthered when an attorney deposits advance fees into a client trust account, and this is the rule prevailing in a substantial majority of U.S. jurisdictions.
					7. Recommendation. I recommend that you either remove the term "writing" from 1.15(b)(1) leaving (b)(2) to require that all flat fees in excess of $1000 be in writing, or rewrite (b)(2) to make it clear that if the flat fee does not exceed $1000 there is no requirement of a writing.	Removing the word "writing" could lead to undesirable disputes about oral agreements and would not protect the public. The Commission believes that clients should be given the choice to allow the attorney to deposit advance fees into the lawyer's operating account, or require that they be maintained in a trust account until earned.
Y-2016-2	Morse, Rory S. (12-15-16)	N	D	1.15	I strongly disagree with the proposal to require attorneys to hold flat fees in trust until the completion of the work. I understand there is a concern	The proposed rule has been modified to address concerns raised during the initial public comment period that the rule would impose a

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					about money paid in advance that is subject to a refund being placed directly into a business account where that money can be spent freely, but there are other approaches to address this concern, such as a simple requirement to maintain a minimum balance within business accounts. The increase in administrative work with maintaining flat fees in a trust account, billing hourly time against them, and recordkeeping to live up to a formal audit under this rule would double to triple administrative time required on maintaining billing records for relatively simple flat fee works for clients, and most would not benefit in any way from such increased administrative work.	disproportionate burden legal services matters for which a low fee is charged, e.g., in immigration cases. The Commission is not aware of any empirical evidence indicating that requiring the deposit of flat fees into a trust account until earned creates unreasonable administrative problems. To the contrary, many law firms today in the United States and in California deposit flat fees into their Client Trust Accounts and withdraw those funds when earned.
Y-2016-9	Reed, Robert (01-04-17)	N	M	1.15	Modify for flat-fees above $1000 to be deposited in a client trust account. Any amount less would be cumbersome.	Client money is at risk when a lawyer spends an advance fee before performing legal services. It is not unreasonably burdensome to deposit flat fees into a trust account rather than into an operating account. The comment does not explain why it would be unreasonably burdensome to deposit unearned fees into a trust account rather than into an

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						operating account.
Y-2016-21p	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y			1. OCTC supports this rule and the Comments to this rule. In particular, OCTC supports the amendments to the current rule to require an attorney to maintain advanced fees in a trust account until the fee is earned and requiring the accounting to be in writing. This enhances public protection. 2. OCTC, however, is concerned with exempting a written agreement to deposit flat fees in the attorney's operating account for fees of $1,000 or less. There is no good reason for this $1,000 exemption.	1. No response required. The Commission proposes exempting a flat fee of less than $1000 from requirement to obtain the client's consent to depositing the funds into the lawyer's operating account in order to address access-to-justice issues raised by commenters who note that it may be impracticable for many low income clients, such as clients seeking immigration advice who are not in the country, to provide a writing

Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
(Commission's Proposed Rule Adopted on January 20, 2017 –
Redline to Public Comment Draft Version)

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import , maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) ~~The~~ the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed~~.~~; and

(2) ~~If~~ if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges~~.~~; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this Rule for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by the client or other person,* any undisputed funds or property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Standards:

Pursuant to this Rule, the Board of Trustees of the State Bar adopted the following standards, effective _____, as to what "records" shall be maintained by lawyers and law firms* in accordance with subparagraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person,

(ii) the date, amount and source of all funds received on behalf of such client or other person,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person,* and

(iv) the current balance for such client or other person;

(b) a written* journal for each bank account that sets forth:

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

Comment

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665]. However, civil liability by itself does not establish a violation of this Rule. Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] (“’When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.’”) and *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] (lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds).

[2] As used in this Rule, “advances for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see Rule 1.5(d) and (e). Subject to Rule

1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.16
(Current Rule 3-700)
Declining or Terminating Representation

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-700 (Termination of Employment) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.16 (Declining or Terminating Representation). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.16 (Declining or Terminating Representation).

Rule As Issued For 90-day Public Comment

Proposed rule 1.16 follows the substance and format of ABA Model Rule 1.16 while carrying forward certain concepts found in current rule 3-700. In concert with ABA Model Rule 1.16, proposed rule 1.16 applies to both the acceptance and termination of representation. The proposed rule follows the format of ABA Mode Rule 1.16 in that situations mandating withdrawal are set forth in paragraph (a) while permissive withdrawal situations are addressed in paragraph (b). The provisions in current rule 3-700(A)(1) and (A)(2) concerning seeking a tribunal's permission to withdraw and the duty to not prejudice the client have been moved to paragraphs (c) and (d), respectively.

Paragraph (a)(1) carries forward the substance of current rule 3-700(B)(1), which prohibits a lawyer from representing a client where the action lacks probable cause and is brought to harass. In addition to formatting changes, the proposed rule substitutes the defined term, "reasonably should know" for the current rule's "should know."

Paragraph (a)(2) carries forward the substance of current rule 3-700(B)(2), which prohibits a lawyer from representing a client where doing so violates that lawyer's ethical obligations. In addition to formatting changes, the proposed rule substitutes the defined term "reasonably should know" for the current rule's "should know."

Paragraph (a)(3) carries forward the substance of current rule 3-700(B)(3), which provides that a lawyer shall not represent a client if the lawyer's mental or physical condition renders the lawyer ineffective.

Paragraph (a)(4) is a substantive change derived from ABA Model Rule 1.16(a)(3) requiring withdrawal and compliance with the rule when the client discharges the lawyer. Although case law provides that a client has the right to discharge his or her lawyer for any reason, see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385], this concept is lacking in the current rule. Because lawyers will sometimes attempt to resist a client's attempts to discharge them, making this a disciplinary offense protects the public.

Paragraph (b)(1) carries forward the substance of current rule 3-700(C)(1)(a) but clarifies that a lawyer's ability to withdraw based on a client's pursuit of a meritless claim applies in both litigation and non-litigation matters.

Paragraphs (b)(2) and (b)(3) carry forward the substance of current rule 3-700(C)(1)(b) and (c), but add concepts derived from ABA Model Rule 1.16 which permit withdrawal based on fraudulent as well as unlawful conduct.

Paragraph (b)(4) carries forward current rule 3-700(C)(1)(d), which permit withdrawal when a client's conduct renders it unreasonably difficult for the lawyer to continue effectively.

Paragraph (b)(5) expands the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in ABA Model Rule 1.16(b)(5). Paragraph (b)(5) permits withdrawal when a client breaches any agreement or obligation to the lawyer, including those not related to an agreement or obligation for fees or expenses. The lawyer must warn the client before withdrawing under the circumstances.

Paragraph (b)(6) permits a lawyer to withdraw with the consent of the client.

Paragraph (b)(7) carries forward current rule 3-700(C)(3), which permits withdrawal if a lawyer is unable to work with co-counsel.

Paragraph (b)(8) permits withdrawal for the reasons stated in paragraph (a)(3).

Paragraph (b)(9) permits withdrawal for the reasons stated in paragraph (a)(2).

Paragraph (b)(10) permits withdrawal from cases pending before a tribunal on the grounds that the lawyer has a good faith belief that the tribunal will find good cause for withdrawal.

Paragraph (c) carries forward the substance of current rule 3-700(A)(1), which provides that a lawyer shall seek the permission of the tribunal before terminating the representation if permission is required by the tribunal.

Paragraph (d) carries forward the substance of current rule 3-700(A)(2), which provides that a lawyer shall not terminate representation before taking reasonable steps to avoid foreseeable prejudice to the client.

Paragraphs (e)(1) and (e)(2) carry forward current rule 3-700(D)(1) and (D)(2), which provide that a lawyer must promptly return a client's file and property and promptly refund any unearned fees. Paragraph (e)(1) has been modified to provide that "client materials and property" includes those stored electronically. Paragraph (e)(2) has been modified to require the return of any unused advanced expenses.

Comment [1] clarifies that the rule applies to the sale of a law practice.

Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another in which the lawyer represents that same client. This concept is important in avoiding prejudice to the client.

Comment [3] emphasizes a lawyer's duty of confidentiality when seeking permission from the tribunal to withdraw.

Comment [4] provides citations to certain statutes that place limits on a lawyer's duty to provide the client with the file upon withdrawal.

Comment [5] carries forward current rule 3-700, discussion paragraph 3, regarding a lawyer's right to make a copy of the client's file and seek recovery of the lawyer's expense for doing so.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised subparagraph (b)(4) to substitute the word "representation"

for “employment.” This subparagraph describes a basis for permissive withdrawal where the client’s conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. The Commission substituted the term “representation” for “employment” because the latter might suggest the presence of an actual employer-employee relationship when the intended scope of this subparagraph is intended to encompass all lawyer-client relationships, including those that are independent contractor relationships and not an employment relationship.

The Commission also revised subparagraph (e)(1) to substitute the phrase “statute or regulation” for “statutory limitation.” This subparagraph refers to applicable non-disclosure considerations such as a protective order or a non-disclosure agreement. The Commission determined that the reference to non-disclosure considerations arising from a “statutory limitation” was too narrow. The phrase “statute or regulation” was considered to be a broader and a more appropriate reference.

In the rule Comments, the Commission added a new Comment [3] to clarify that the mandatory withdrawal provision in subparagraph (a)(1) does not mandate withdrawal where a lawyer for a defendant in a criminal or similar proceeding defends the proceeding by requiring that every element of the case be established.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.16 [3-700]

Commission Drafting Team Information

Lead Drafter: Howard Kornberg
Co-Drafters: Joan Croker, Carol Langford, Raul Martinez

I. CURRENT CALIFORNIA RULE

Rule 3-700 Termination of Employment

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.16 [3-700]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.16 [3-700]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.16 [3-700] Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

(2) the lawyer knows* or reasonably should know* that the representation will result in violation of these Rules or of the State Bar Act;

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*

(3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*

(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(6) the client knowingly* and freely assents to termination of the representation;

(7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or

(10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(e) Upon the termination of a representation for any reason:

(1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not; and

(2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See Rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and Rule 1.6, and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-700)

~~Rule~~ 1.16 [3-700] ~~Termination of Employment~~ Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

~~(A) In General.~~

~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~

~~(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~(B) Mandatory Withdrawal.~~

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

(1) ~~The member~~the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or

taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The memberthe lawyer knows* or reasonably should know* that continued employment the representation will result in violation of these rulesRules or of the State Bar Act; or

(3) The member'sthe lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment representation effectively.; or

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(14) Thethe client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(a1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or;

(b2) the client either seeks to pursue an illegal a criminal or fraudulent* course of conduct, or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*

(c3) the client insists that the memberlawyer pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, orcriminal or fraudulent;*

(d4) the client by other conduct renders it unreasonably difficult for the memberlawyer to carry out the employmentrepresentation effectively, or;

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(~~f~~6) ~~breaches an agreement or obligation to the member as to expenses or fees.~~the client knowingly* and freely assents to termination of the representation;

~~(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~

(~~3~~7) ~~The~~the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; ~~or~~

(~~4~~8) ~~The member's~~the lawyer's mental or physical condition renders it difficult for the ~~member~~lawyer to carry out the ~~employment~~representation effectively; ~~or~~

(9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or

~~(5) The client knowingly and freely assents to termination of the employment; or~~

(~~6~~10) ~~The member~~the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(~~D~~e) ~~Papers, Property, and Fees.~~Upon the termination of a representation for any reason:

~~A member whose employment has terminated shall:~~

(1) ~~Subject~~subject to any applicable protective order ~~or~~, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all ~~the~~ client ~~papers~~materials and property. "Client ~~papers~~materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, ~~expert's reports~~whether in tangible, electronic or other form, and other items reasonably* necessary to the ~~client's~~client's representation, whether the client has paid for them or not; and

(2) ~~Promptly~~the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been~~ earned or incurred. This provision is not applicable to a true retainer fee ~~which is~~ paid solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.

Comment~~Discussion~~

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See Rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and Rule 1.6, and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

~~Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.~~

~~Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590~~

~~[124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).~~

[6] Paragraph (~~D) is~~e)(1) does not ~~intended to~~ prohibit a ~~member~~lawyer from making, at the ~~member's~~lawyer's own expense, and retaining copies of papers released to the client, ~~nor~~or to prohibit a claim for the recovery of the ~~member's~~lawyer's expense in any subsequent legal proceeding.

V. RULE HISTORY

A. Summary of 1989 Amendments

Rule 3-700 became operative on May 27, 1989. The predecessor to current rule 3-700, former rule 2-111, originally approved and made operative on January 1, 1975, was entitled "Withdrawal from Employment." Prior to the enactment of rule 2-111, there was no rule of professional conduct that governed a lawyer's withdrawal from representation of a client. However, Code of Civil Procedure §§ 284-285.1 set forth procedures governing withdrawal of a lawyer from proceedings *before a tribunal*.

Former rule 2-111 largely tracked Disciplinary Rule ("DR") 2-110 of the ABA Model Code of Professional Responsibility ("ABA Code") and governed withdrawal from representations in both litigation and non-litigation matters.[1] Aside from non-substantive changes such as substituting the term "member of the State Bar" for "lawyer" and the phrase "these Rules of the State Bar Act" for the term "a Disciplinary Rule," former rule 2-111 changed Disciplinary Rule 2-110 by adding concepts derived from the ABA Code, Disciplinary Rules 5-101 and 5-102.[2] This resulted in the addition of several prophylactic

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[1] Chapter 2 of the 1975 Rules of Professional Conduct largely tracked the corresponding organization of the ABA Code. However, the 1975 Rules added rule 2-101 (General Prohibition Against Solicitation of Professional Employment), with the corresponding Disciplinary Rules in the ABA Code being renumbered.

[2] Disciplinary Rules 5-101 and 5-102 provided:

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

provisions in paragraph (A) that addressed the withdrawal of a lawyer, or a lawyer in the lawyer's firm, when either might be called as a witness on behalf of the client in litigation concerning the subject matter of the representation, or if the lawyer's testimony might be prejudicial to the client.[3] The provisions addressing a lawyer as a witness have since been moved into current rule 5-210 (Member As Witness).[4]

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(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

[3] Specifically, former rule 2-111 added to DR 2-110(A) the following subparagraphs, (A)(4)(a)-(d) and (A)(5):

(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:

(a) If the member's testimony will relate solely to an uncontested matter; or

(b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the member's testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or

(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

(5) If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be

Rule 2-111(A)(3) also contained a sentence not found in Disciplinary Rule 2-110(A)(3), which clarified that the requirement to promptly refund unearned fees did not apply to a "true retainer."[5] That sentence remains in current rule 3-700.

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-700, which became operative on May 27, 1989. Rule 3-700 for the most part adheres to the organizational structure and language of former rule 2-111, but it adds paragraph (D) and a Discussion section. The following legislative black line version of the rule shows the changes to the provisions of the 1979 version of former rule 2-111 that were carried forward into rule 3-700:[6]

Rule ~~2-111.~~ 3-700 ~~Withdrawal from~~ Termination of Employment

(A) In ~~general~~General.

(1) If permission for ~~withdrawal from~~ termination of employment is required by the rules of a tribunal, a member ~~of the State Bar~~ shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) ~~In any event, a~~ A member ~~of the State Bar~~ shall not withdraw from employment until ~~he~~ the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of ~~his~~ the client, including giving due notice to ~~his~~ the client, allowing time for employment of other counsel, [**MOVED TO 3-700(D)(1)**] ~~delivering to the client all papers and property to which the client is entitled~~ complying with rule 3-700(D), and complying with applicable laws and rules.

[**MOVED TO 3-700(D)(2)**] ~~(3) A member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.~~

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called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

[4] Subsequent amendments to those provisions are addressed in the Report & Recommendation for Proposed Rule 3.7.

[5] Rule 2-111(A)(3) differed from Disciplinary Rule 2-110(A)(3) as follows:

(3) A ~~lawyer~~ member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.

[6] The deleted text of rule 2-111(A)(4) and (5), which was moved to current rule 5-210, is not shown.

* * *

(B) Mandatory Withdrawal.

A member ~~of the State Bar~~ representing a client before a tribunal~~,~~ shall withdraw from employment with ~~its~~ the permission of the tribunal, if required by its rules, ~~shall withdraw from employment,~~ and a member ~~of the State Bar~~ representing a client in other matters shall withdraw from employment, if:

(1) ~~He~~ The member knows or should know that ~~his~~the client is bringing ~~a legal~~ an action, conducting a defense, asserting a position in litigation, or ~~otherwise having steps taken for him solely~~ taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person ~~or solely out of spite, or is taking or prosecuting an appeal merely for delay, or for any other reason not in good faith~~; or

(2) ~~He~~ The member knows or should know that ~~his~~ continued employment will result in violation of these ~~Rules of Professional Conduct~~rules or of the State Bar Act; or

(3) ~~His~~ The member's mental or physical condition renders it unreasonably difficult ~~for him~~ to carry out the employment effectively.

(C) Permissive Withdrawal.

If ~~Rule 2-111~~rule 3-700(B) is not applicable, a member ~~of the State Bar~~ may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) ~~His~~The client~~:~~

(a) ~~Insists~~ insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law~~;~~, or

(b) ~~Personally~~ seeks to pursue an illegal course of conduct~~;~~, or

(c) ~~Insists~~ insists that the member ~~of the State Bar~~ pursue a course of conduct that is illegal or that is prohibited under these ~~Rules of Professional Conduct~~rules or the State Bar Act~~;~~, or

(d) ~~By~~ by other conduct renders it unreasonably difficult for the member ~~of the State Bar~~ to carry out ~~his~~the employment effectively~~;~~, or

(e) ~~Insists~~ insists, in a matter not pending before a tribunal, that the member ~~of the State Bar~~ engage in conduct that is contrary to the judgment and advice of the member ~~of the State Bar~~ but not prohibited

under these ~~Rules of Professional Conduct~~rules or the State Bar Act~~;~~, or

(f) ~~Deliberately disregards~~ breaches an agreement or obligation to the member ~~of the State Bar~~ as to expenses or fees~~; or~~.

(2) ~~His~~ The continued employment is likely to result in a violation of these ~~Rules of Professional Conduct~~ rules or of the State Bar Act; or

(3) ~~His~~ The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) ~~His~~ The member's mental or physical condition renders it difficult for ~~him~~the member to carry out the employment effectively; or

(5) ~~His~~ The client knowingly and freely assents to termination of ~~his~~the employment; or

(6) ~~He~~ The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) [**MOVED FROM 2-111(A)(2)**] Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

[**MOVED FROM 2-111(A)(3)**] (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

The then Rules Revision Commission explained the proposed revisions to former rule 2-111 that would result in rule 3-700:

Proposed rule 3-700 generally continues the regulations found in current rule 2-111 regarding termination of employment.

Proposed amendments to subparagraph (A)(1), which currently requires permission for withdrawal if such permission is required by a tribunal, make clear that the rule is applicable in all situations where termination of employment occurs and not merely in situations involving withdrawal from representation before a tribunal.

Subparagraph (A)(2), which currently prohibits an attorney from withdrawing until certain steps are taken to avoid foreseeable prejudice to the rights of the client, would be amended to specify a consistent standard: "reasonably foreseeable". This standard has been well-defined by the courts. The requirement that the attorney deliver to the client all the client's papers and property, which is currently included in subparagraph (A)(2), has been moved to subparagraph (D)(1) of the proposed rule and has been expanded to clarify the troubling issue of what constitutes "client papers and property".

The deletion of subparagraph (A)(3), which requires an attorney who withdraws to promptly refund any part of a fee paid in advance that has not been earned, would not constitute a substantive change. The substance of this rule is continued in proposed new subparagraph (D)(2).

Subparagraphs (A)(4) and (A)(5), dealing with members as witnesses, have been consolidated and moved to a separate new rule 5-210. This important topic should have its own rule so that it may be more easily located.

No substantive changes are proposed to paragraph (B) which sets forth the circumstances under which an attorney must withdraw from employment.

No substantive changes are proposed to paragraph (C) which sets forth the circumstances under which an attorney may withdraw from employment, except

that subparagraph (C)(1)(f) would be amended to provide that a member may withdraw if a client breaches an agreement or obligation to the member as to expenses or fees. This change is intended to prevent the disputes that have taken place under present rule 2-111(C)(1)(f) as what constitute a client's "willful disregard" of an obligation to pay fees. Note however, that in this circumstance, as in all circumstances in which termination of employment occurs, the attorney may not withdraw unless he or she complies with paragraph (A) of the rule.[7]

Paragraph (D), which was a codification of existing case law, was added to clarify the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It also required that the member "promptly" return unearned fees paid in advance and reinforced a member's duty to comply with rule 4-100(A)(2) if the client disputes the amount.[8]

B. Summary of 1992 Proposed Amendments

Amendments to rule 3-700 were proposed in 1992 in conjunction with proposed amendments to rule 4-100.[9] The proposed amendments to rules 3-700 and 4-100 required that all advance fees for legal services received by a member be deposited in the member's client trust account unless the member's written fee agreement with the client expressly provided that the fee paid in advance is earned when paid or is a "true retainer" (as set forth in rule 3-700(D)(2)). Although the proposed amendments avoided the use of the terms "fixed fee," ''flat fee" or "non-refundable fee," such types of retainer fee agreements would have been permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provided that such fees, paid in advance of the provision of legal services, are earned when paid.

Proposed new subparagraph (B)(4) added a new requirement mandating that a member withdraw from representation of a client where the member or the member's law firm is

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[7] See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987, at pages 40-41.

[8] Rule 4-100(A)(2) provides:

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

[9] See "Request that the Supreme Court of California Approve Amendments To Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," Supreme Court case number S029270, October 1992.

discharged by the client. This requirement would have put lawyers on notice that a client has absolute power to terminate the attorney-client relationship.[10]

A proposed amendment to subparagraph (D)(2) would have expanded the definition of the term "true retainer fee" to include a fee paid solely for the purpose of ensuring the availability of the member either for a matter *or for a given period of time*:

> (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for ~~the~~ a matter or for a given period of time.

A proposed new third paragraph of the Discussion section would have taken the last two sentences of the second paragraph of the current rule Discussion and modified them in a non-substantive manner. New language would then have been added to clarify that: 1) the fact that an advance for legal fees need not be placed in a trust account pursuant to rule 4-100 does not by itself mean that the member may not have to refund a portion thereof (reference would be provided to rule 4-200 (Fees for Legal Services)); and 2) all advances for costs and expenses must be placed in a trust account pursuant to rule 4-100.

> Subparagraph (D)(2) ~~also~~ requires that the member "promptly'' return an unearned fee paid in advance. If ~~a client disputes the amount to be returned~~ such a fee~~s have~~ has been placed in a trust account pursuant to rule 4-100, the member shall comply with the provisions of rule 4-100(A)(2), should the client dispute the amount to be returned. The fact that such fee need not be placed in a trust account does not by itself mean that the member may not have to refund a portion thereof. (See also rule 4-200.) In any event, all advances for costs and expenses must be placed in a trust account. (See Stevens v. State Bar (1990) 51 Cal.3d 283 [272 Cal.Rptr. 167].)

The State Bar later withdrew its request for the foregoing amendments following a letter inquiry from the Supreme Court that identified an ambiguity in the proposal:

> The court wishes to advise the State Bar of a possible ambiguity in the proposed amendments to rules 3-700 and 4-100. If a fee agreement specifies that an advance fee is "earned" when paid, the fee does not fall within rule 3-700(D)(2)'s requirement that members return "unearned" advance fees. Similarly, the new discussion following that rule refers only to an "unearned" fee paid in advance and states that "such fee" may still have to be refunded even if not required to be in a trust account. (See also rule 1-100(C) [discussion cannot add independent basis for discipline].) Thus, the proposed rules appear to exempt advance fees

[10] See *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]. The same provision had been proposed by the 1972 Special Committee to Study the ABA Code of Professional Responsibility, but was not included in former rule 2-111.

designated as earned when paid from the requirement of refunding fees paid for services that are not performed.

No further amendments to rule 3-700 have been requested or approved since 1992.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule and the Comments to this rule.

     Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. OCTC supports this rule and the Comments to this rule.

     Commission Response: No response required

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, six public comments were received. Two comments agreed with the proposed Rule, three comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, one public comment was received. The one comment agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]
- *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]
- *In the Matter of Shalant* (Review 2005) 4 Cal. State Bar Ct. Rptr. 829
- *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]
- Penal Code §§ 1054.2 and 1054.10.
- *In re Aguilar and Kent* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]

- CAL 2007-174 (Electronic Client Files)
- CAL 1992-127 (Cooperation with Successor Counsel)

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.16, which is a direct counterpart to rule 3-700, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_16.pdf [Last visited 2/7/17]

- Every jurisdiction has adopted some version of ABA Model Rule 1.16. Twenty jurisdictions have adopted the Model Rule verbatim,[11] 27 jurisdictions have adopted a substantially similar rule,[12] and four jurisdictions have adopted a rule that diverges substantially from the Model Rule: California, Massachusetts,[13] Minnesota,[14] and New York.[15]

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[11] The twenty jurisdictions are: Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.

[12] The twenty-seven jurisdictions are: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

[13] Massachusetts Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but includes a paragraph (e), which contains an expanded description of what constitutes a client file and provides:

> (e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:
>
> (1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.
>
> (2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials.
>
> (3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.
>
> (4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.
>
> (5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph

(6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.

(6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

(7) notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

[14] Like Massachusetts, Minnesota's Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but has adopted an expanded definition of "client papers and property," and several other provisions:

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

(1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;

(2) in pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

[15] New York, which was the last jurisdiction to abandon a set of rules based on the ABA Code of Professional Responsibility, has retained rule structure that is similar to California Rule 3-700,

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

A. Concepts Accepted (Pros and Cons):

1. Recommend following the ABA rule in applying to both acceptance and termination of representation and changing the title to "Declining or Terminating Representation" from "Termination of Employment"

    - Pros: The rule should apply both to the decision whether to accept or decline a representation and to the decision to withdraw from the representation.

    - Cons: There is no evidence that current rule 3-700 is inadequate.

2. Recommend following the ABA rule format and structure under which situations mandating withdrawal are set forth in paragraph (a), permissive withdrawal situations are in paragraph (b), and the provisions in current rule 3-700(A)(1) and (2) concerning a tribunal's permission to withdraw and duty not prejudice the client are moved to paragraphs (c) and (d), respectively.

    - Pros: The current rule has a structure unique among jurisdictions. No substantive change is intended or will result from the reorganization and moving paragraphs (A)(1) and (2) to paragraphs that correspond to the Model Rule paragraphs will remove an unnecessary difference between California and other jurisdictions, promoting a national standard.

    - Cons: The current structure sets forth the primary considerations for a lawyer when withdrawing from a representation: the duty not to prejudice the client and the duty to inform the court of the withdrawal. These two duties should remain at the beginning of the Rule.

3. Recommend retaining current rule (B)(1) as paragraph (a)(1), with only format and style changes, including the substitution of a defined term, "reasonably should know" for the current rule's "should know".

    - Pros: There is no evidence that this provision no longer remains relevant to a decision to decline or withdraw from a representation. Its language parallels the language in current rule 3-200(A), which the Supreme Court directed the first Commission to restore to its proposed Rule 3.1 and which this Commission has recommended be included in its proposed Rule 3.1.

    - Cons: None identified.

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as both rules derive in large part from ABA Code, DR 2-110. New York also expands the section of its rule concerning permissive withdrawal.

4. Paragraph (a)(2). Recommend retaining current rule 3-700(B)(2), with only format and style changes, including the substitution of a defined term, "reasonably should know" for the current rule's "should know" and the substitution of "representation" for "employment," as has been done throughout the proposed Rules.

    - Pros: No evidence there is a problem with the provision.

    - Cons: None identified.

5. Recommend adoption of paragraph (a)(3), which carries forward the substance of current rule 3-700(B)(3), with some changes to clarify the rule's application and the substitution of "representation" for "employment," as has been done throughout the proposed Rules.

    - Pros: The substance of current rule 3-700(B)(3) appropriately mandates that a lawyer withdraw from representation under the conditions described. The revised provision, however, sharpens the standard by substituting "impairs" for "renders it unreasonably difficult" and "competently" for "effectively." Substituting "impair" and "competent" creates a clear standard. In particular, "competently," which is a standard referenced throughout the proposed Rules, "competently," a word used throughout the proposed Rules, should be employed as the standard requiring *mandatory* termination of a representation. However, no substantive change is intended.

    - Cons: None identified.

6. Recommend addition of paragraph (a)(4), derived from Model Rule 1.16(a)(3), requiring withdrawal and compliance with the rule when the client discharges the lawyer.

    - Pros: Although a client's right to discharge his or her lawyer for any reason is well-settled in California case law, (see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]), there is no similar provision in current rule 3-700, so the inclusion of proposed subparagraph (a)(4) would be substantive change *to the Rules of Professional Conduct*, though it should not represent a change in a California lawyer's duties. This is an important provision to have because lawyers will sometimes attempt to resist client's attempts to discharge them. Making this a disciplinary offense should avert most such situations.

    - Cons: Proposed paragraph (a)(4) states the obvious. It is unnecessary.

7. Recommend retaining current rule 3-700(C)(1)(a), but clarify that it applies in both litigation and non-litigation matters.

    - Pros: Adding the clause, "in litigation, or asserting a position or making a demand in a non-litigation matter" to the language in current rule 3-700(C)(1)(a) clarifies that the duty to withdraw applies in both litigation and

non-litigation representations. Although the application of current rule 3-700(C)(1)(a) to non-litigation matters arguably can be implied, the express statement of its will leave no doubt.

- Cons: None identified.

8. Recommend retaining current rule 3-700(C)(1)(b), but add a concept from Model Rule 1.16(b)(2) that the lawyer's withdrawal is permitted if the client used the lawyer's services in committing a fraud.

   - Pros: The situation permitting withdrawal in proposed subparagraph (b)(2) is described in substantially more detail than current rule 3-700(C)(1)(b). It is appropriate in a rule provision that *permits* withdrawal to provide extra guidance on when withdrawal is permitted.

   - Cons: None identified.

9. Recommend expanding the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in Model Rule 1.16(b)(5), so that withdrawal would be permitted when a client breaches any agreement or obligation to the lawyer, even if the breach is not related to an agreement or obligation regarding fees or expenses, and require that the lawyer warn the client that the lawyer will withdraw unless the client fulfills the obligation.

   - Pros: Similar to the previous concept, a more detailed explanation of a lawyer's duties is appropriate in a provision permitting withdrawal. In addition, two points should be noted. *First*, the lawyer's right to withdraw is limited to the client's breach of a material term of an agreement with the lawyer. *Second*, the lawyer's obligation to warn the client of a possible termination must come after the client's breach so that, for example, a warning cannot be buried in the initial fee agreement.

   - Cons: None identified.

10. Recommend retaining the remaining permissive withdrawal provisions in rule 3-700(C) in substantially the same form as in the current rule, including carrying forward paragraphs (C)(2), (C)(3), (C)(4), (C)(5) and (C)(6) as proposed paragraphs (b)(9), (b)(7), (b)(8), (b)(6) and (b)(10), respectively.

    - Pros: There is no evidence that these provisions have caused problems in interpretation or application.

    - Cons: None identified.

11. Recommend that current rule 3-700(D)(1) be revised in paragraph (e)(1) to clarify that "client materials and properties" may be in electronic or other forms in addition to "tangible" forms and that certain statutory obligations may restrict the lawyer's ability to provide the client with information from the file.

- Pros: Proposed subparagraph (e)(1) makes two substantive changes that are warranted by law or the current state of technology in law practice. First, in adding a reference to limitations imposed by applicable protective orders, non-disclosure agreements, and statutes or regulations, it recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. Second, the proposed subparagraph also clarifies that the material to be returned may be "in tangible, *electronic, or other form*." (Emphasis added.) The current rule does not so expressly provide. Given the widespread maintenance of client files in electronic form, as exemplified by the extensive amendments to court procedural rules to address issues raised by electronic discovery, this clarification is an important addition to the rule.

- Cons: None identified.

12. Recommend retaining as paragraph (e)(2) current rule 3-700(D)(2), modified to include the concept of returning expenses that have been advanced to the lawyer but not incurred.

    - Pros: Expressly requiring the return of expenses that have been advanced to the lawyer but not incurred is client protective.

    - Cons: None identified.

13. Recommend adoption of six Comments.

    - Pros: All six Comments are concise and provide guidance in applying or interpreting the rule by delimiting the rule's scope: Comment [1] clarifies that the rule applies to the sale of a law practice. Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another matter in which the lawyer represents the same client. This is important in avoiding prejudice to the client. Comment [3] clarifies the application of paragraph (a)(1) when a lawyer is representing defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement. The Comment alerts such a lawyer to Rule 3.1, which permits a lawyer to require that every element of the case be established in such situations without violating Rule 3.1's corresponding prohibition of the conduct described in paragraph (a)(1) of this rule. Comment [4] emphasizes the lawyer's duty of confidentiality when seeking permission from a tribunal to withdraw. Comment [5] provides citations to certain statutes that place limits on a lawyer's duty to provide the client with the file upon withdrawal. Comment [6] carries forward current Discussion ¶. 3 regarding a lawyer's right to make a copy of the file released to the client and to seek recovery of the lawyer's expense in doing so.

    - Cons: None.

14. Recommend rejection of all eight of the Model Rule Comments.

    - Pros: The Comments to Model Rule 1.16 are largely discursive practice pointers that repeat the black letter of the rule, state the obvious, and provide little if any interpretative guidance.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. In paragraph (a)(2), add the phrase "or other law" as in the Model Rule.

    - Pros: The rule should explicitly identify the "violation of other law" as mandating that a lawyer decline or withdraw from a representation. Although the current rule arguably covers that situation by prohibiting a violation of "these Rules or the State Bar Act" which include, respectively, rule 3-200(A) and Bus. & Prof. Code § 6068(a) (It is the duty of an attorney "(a) To support the Constitution and laws of the United States and of this state"), rule 3-700 should not hide the ball by requiring such interpretative gymnastics.

    - Cons: Including "or other law" would mandate withdrawal for every discovery violation in which a client might engage.

2. Retain in the proposed Rule the substance of current rule 3-700(C)(1)(e), which permits withdrawal from representation when the client "insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act."

    - Pros: Although this provision is a carryover from the ABA Code of Professional Responsibility that was not incorporated into the Model Rules, it identifies a situation that warrants permissive withdrawal.

    - Cons: This provision was a carry-over from ABA Code of Professional Responsibility, Disciplinary Rule 2-110(C)(1)(e). (The ABA did not carry the provision forward when it adopted Model Rule 1.16 in 1983). The corresponding Model Rule provision that was intended to cover conduct previously addressed by subparagraph (C)(1)(e) was subparagraph (b)(5) of the 1983 version of the Model Rule (since re-designated "(b)(6)"). Although the first clause of Model Rule 1.16(b)(6) regarding the representation creating an unreasonable financial burden on the lawyer was rejected, the concept in the second clause, i.e., that the representation "has been rendered unreasonably difficult by the client," is found in proposed Rule 1.16(b)(4). Because that provision adequately covers the conduct addressed by current rule 3-700(C)(1)(e), it was determined the latter provision should be deleted from the proposed rule, bringing the California rule in line with the ABA Model Rule.

3. Retain current rule 3-700, Discussion ¶. 1, in the proposed rule as a Comment.

    - Pros: Current Discussion ¶.1, regarding a lawyer's duty to take reasonable steps to avoid prejudicing the client when withdrawing, provides valuable guidance.

    - Cons: Discussion ¶.1 merely states the obvious, i.e., that what constitutes reasonable steps "will vary according to the circumstances." It provides little if any guidance of either an interpretative or practical nature.

4. Retain current rule 3-700, Discussion ¶. 2, in the proposed rule as a Comment.

    - Pros: Discussion ¶.2 provides citations to case law to assist a lawyer in complying with the lawyer's duties under current rule 3-700(D) [proposed paragraph (e)].

    - Cons: Proposed paragraph (e) is sufficiently detailed and clearly written to provide adequate guidance.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

1. Addition of paragraph (a)(4) [Model Rule 1.16(a)(3)] is a substantive change. (See Section IX.A.6, above.)

2. The expanded coverage of paragraph (b)(5), based on 3-700(C)(1)(f) is a substantive change. (See Section IX.A.9, above.)

3. Paragraph (e)(1)'s permitting lawyers to return files to the client in "in tangible, *electronic, or other form*," is a substantive change in the rule, though arguably it simply recognizes the modern practice of how files are commonly maintained. (See Section IX.A.11, above.)

4. The addition of a duty to return advanced expenses that have not been spent in paragraph (e)(1) is a substantive change. (See Section IX.A.12, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example,

those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the Rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. The reorganization of current rule 3-700 is a non-substantive change. (See IX.A.2, above.)

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.16 [3-700] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.16 [3-700] in the form attached to this Report and Recommendation.

Proposed Rule 1.16 [3-700] Declining or Terminating Representation
Synopsis of Public Comments

TOTAL = 2 *A = 2* *D = 0* *M = 0* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27b	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Yes	A		We previously objected to this Rule because, as initially written, it appeared to mandate withdrawal for criminal defense attorneys who held the state to its burden of proof in cases where the attorney lacked probable cause to believe that the client was innocent. We also objected to provisions that required our attorneys to send criminal files to clients in jail or state prison, when portions of those files (such as CDs or DVDs) might violate jail or prison rules. Both of these objections appear to have been addressed in the revised rule; consequently, we have no object to the Rule as currently formulated.	No response required.
Y-2016-21q	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	A		OCTC supports this rule and comments.	No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.17
(Current Rule 2-300)
Sale of a Law Practice

EXECUTIVE SUMMARY

The Commission evaluated current rule 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.17 (Sale of Law Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules, including relevant Probate Code sections. The result of the Commission's evaluation is proposed rule 1.17 (Sale of a Law Practice).

Rule As Issued For 90-day Public Comment

The proposed rule retains the substance of current rule 2-300, edited for clarity and to conform the language of the rule with current practice. The main issue considered when drafting the rule was whether to substantially modify the current rule by adopting a derivation of ABA Model Rule 1.17 to allow for the sale of a field of practice (such as a firm's personal injury matters), the seller's practice in a geographic area (such as all cases in Los Angeles County), or the seller's practice in a jurisdiction (such as the seller's Nevada clients). The Commission rejected such an approach for several reasons. Most notably, by retaining California's approach of permitting the sale of a practice under strictly controlled conditions, the proposed rule: (i) avoids the use of sham associations of lawyers to facilitate the transfer of a practice; (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters; and (iii) gives clients an opportunity to choose their own legal counsel. The Commission was concerned that expanding the rule along the lines of the ABA Model Rule would: (i) provide a device for evading the restrictions on fee sharing and referral fees found in proposed rule 1.5.1 (Fee Divisions Among Lawyers) [current rule 2-200]; (ii) create a great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships; and (iii) add to the commercialization of the practice of law.

There are three comments to the rule. Comment [1] explains the policy underlying the requirement that the sale be of "all or substantially all of the law practice of a lawyer." Comment [2] explains that existing agreements as to fees and scope of work must be honored by the purchaser and that any modification of these agreements must comply with the Rules of Professional Conduct and the State Bar Act. Comment [3] retains the substance of the third Discussion paragraph to the current rule.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the language in Comment [2] to clarify the use of the term "solely" in paragraph (a). The new language states that under paragraph (a), a purchaser must honor the existing fee arrangements between the seller and the client as to fees and scope of work. The new language also explains that in some situations fee increases or other changes to existing fee arrangements might be justified by the circumstances of a particular case or matter.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.17 [2-300]

Commission Drafting Team Information

Lead Drafter: Robert Kehr
Co-Drafters: Jeffrey Bleich, Raul Martinez

I. CURRENT CALIFORNIA RULE

Rule 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.17 [2-300]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.17 [2-300]
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.17 [2-300] Sale of a Law Practice

All or substantially* all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to another lawyer or law firm* subject to all the following conditions:

(a) Fees charged to clients shall not be increased solely by reason of the sale.

(b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code § 6068(e)(1), then;

(1) if the seller is deceased, or has a conservator or other person* acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code § 6180.5, then prior to the transfer;

(i) the purchaser shall cause a written* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the purchaser shall obtain the written* consent of the client. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall cause a written* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall obtain the written* consent of the client prior to the transfer. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.

(c) If substitution is required by the rules of a tribunal* in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.

(d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.

(e) Confidential information shall not be disclosed to a nonlawyer in connection with a sale under this Rule.

(f) This Rule does not apply to the admission to or retirement from a law firm,* retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] The requirement that the sale be of "all or substantially* all of the law practice of a lawyer" prohibits the sale of only a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially* all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial* fee-generating matters. The purchasers are required to undertake all

client matters sold in the transaction, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[2] Under paragraph (a), the purchaser must honor existing arrangements between the seller and the client as to fees and scope of work and the sale may not be financed by increasing fees charged for client matters transferred through the sale. However, fee increases or other changes to the fee arrangements might be justified by other factors, such as modifications of the purchaser's responsibilities, the passage of time, or reasonable* costs that were not addressed in the original agreement, Any such modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1. Payment of a fee to a nonlawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-300)

Rule 1.17 [2-300] Sale ~~or Purchase~~ of a Law Practice ~~of a Member, Living or Deceased~~

All or substantially* all of the law practice of a ~~member~~lawyer, living or deceased, including goodwill, may be sold to another ~~member~~lawyer or law firm* subject to all the following conditions:

(~~A~~a) Fees charged to clients shall not be increased solely by reason of ~~such~~the sale.

(~~B~~b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code ~~section~~§ 6068~~, subdivision~~ (e)(1), then;

(1) if the seller is deceased, or has a conservator or other person* acting in a representative capacity, and no ~~member~~lawyer has been appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, then prior to the transfer;

(~~a~~i) the purchaser shall cause a written* notice to be given to ~~the~~each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client ~~papers~~materials and property, as required by ~~rule 3-700~~Rule 1.16(~~D~~e)(1); and that if no response is received to the ~~notification~~notice within 90 days ~~of the sending of such notice~~after it is sent, or ~~in~~if the ~~event the client's~~client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified

by the client~~. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements~~, and

(~~b~~ii) the purchaser shall obtain the written* consent of the client ~~provided that such~~. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client~~ if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.~~.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(~~a~~i) the seller, or the ~~member~~lawyer appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, shall cause a written* notice to be given to ~~the~~each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client ~~papers~~materials and property, as required by ~~rule 3-700~~Rule 1.16(~~D~~e)(1); and that if no response is received to the ~~notification~~notice within 90 days ~~of the sending of such notice~~after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client~~. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements~~, and

(~~b~~ii) the seller, or the ~~member~~lawyer appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, shall obtain the written* consent of the client prior to the transfer ~~provided that such~~. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client~~ if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller~~.

(~~C~~c) If substitution is required by the rules of a tribunal* in which a matter is pending, all steps necessary to substitute a ~~member~~lawyer shall be taken.

~~(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.~~

(d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.

(~~E~~e) Confidential information shall not be disclosed to a ~~non-member~~nonlawyer in connection with a sale under this ~~rule~~Rule.

(~~F~~f) ~~Admission~~This Rule does not apply to the admission to or retirement from a law ~~partnership or law corporation,~~firm,* retirement plans and similar arrangements, or sale of tangible assets of a law practice ~~shall not be deemed a sale or purchase under this rule~~.

Comment ~~Discussion~~

[1] The requirement that the sale be of "all or substantially* all of the law practice of a lawyer" prohibits the sale of only a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially* all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial* fee-generating matters. The purchasers are required to undertake all client matters sold in the transaction, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[2] Under paragraph (a), the purchaser must honor existing arrangements between the seller and the client as to fees and scope of work and the sale may not be financed by increasing fees charged for client matters transferred through the sale. However, fee increases or other changes to the fee arrangements might be justified by other factors, such as modifications of the purchaser's responsibilities, the passage of time, or reasonable* costs that were not addressed in the original agreement, Any such modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of these Rules and the State Bar Act.

~~Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.~~

~~"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).~~

[3] Transfer of individual client matters, where permitted, is governed by ~~rule 2-200~~Rule 1.5.1. Payment of a fee to a ~~non-lawyer~~nonlawyer broker for arranging the sale or purchase of a law practice is governed by ~~rule 1-320.~~Rule 5.4(a).

V. RULE HISTORY

In 1987, the State Bar recommended a new rule 2-300 to the California Supreme Court as part of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation" ("1987 Request"), page 27 of Bar Misc. No. 5626, December 1987, and pages 5-6 of Enclosure 1. The 1987 version of the rule provided:

> **Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1987 Version]**
>
> All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:
>
> (A) Fees charged to clients shall not be increased solely by reason of such sale.
>
> (B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then prior to the transfer;
>
> (1) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
>
> (2) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (1) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90 day period.
>
> (C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

The 1987 Request provided the following statement for recommending a new rule 2-300:

Proposed rule 2-300 was drafted by COPRAC after an extensive study. The lack of express standards to guide members concerning the termination of their practices results in inadequate protection of clients and the lack of an orderly transfer of client matters to new counsel.

In addition, a member who retires from a firm may receive retirement compensation which can include the value of the member's share of goodwill. In contrast, a sole practitioner who retires from the practice of law cannot receive compensation which includes the value of the goodwill of the practice. (*Geffen v. Moss* (1975) 53 Cal.App.3d 215.)

The proposed rule would permit compensation which includes the value of goodwill and would regulate such sales in order to protect the rights and interests of existing clients and potential consumers of legal services. (See page 27 of the 1987 Request.)

In response to the 1987 Request, the Supreme Court sent the State Bar a letter that raised the following issues concerning proposed rule 2-300:

3. Proposed Rule 2-300(A) (Sale or Purchase of a Law Practice of a Member, Living or Deceased) contains ambiguous language limiting attorney's fee increases following the sale and purchase of a law practice. Does the subdivision prohibit all post-sale fee increases? Or, is it simply intended to

prohibit unnecessary, unreasonable, or inadequately noticed fee increases? If so, should notice be sent to all clients whenever a sale takes place under this rule? Proposed Rule 2-300 further omits a necessary provision which would indicate that all activities of the seller are subject to Proposed Rule 3-100 (Duty to Maintain Client Confidence and Secrets Inviolate). Even if proposed rule 3-100 does apply, rule 2-300(B) should require the seller, not the purchaser, to send written notice to the client to prevent disclosure of any privileged or confidential client identification information. (See *People v. Pic'l* (1981) 114 Cal.App.3d 824, 883; *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 291.) To the same end, should proposed rule 2-300(B) specify that the written notice should be sent to the client at least 90 days prior to the transfer, whenever any sale occurs under this rule? (June 9, 1988 Letter from Supreme Court of California to State Bar of California, at page 2 provided as Enclosure 4 to Bar Misc. 5626 "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" dated September 1988.)

In response to the Supreme Court's June 9, 1988 inquiry concerning proposed rule 2-300, the State Bar stated:

As to the question regarding fee increases after the sale, the proposed language was patterned after the language in current rule 2-108 and was not intended to prohibit all post sale fee increases. It was intended to prohibit the purchaser from routinely charging the "purchased" clients a higher fee than is charged to existing clients to cover the costs of the purchase. In order to clarify conduct prohibited by paragraph (A), it is recommended that the following paragraph be added to the Discussion portion of the rule:

> Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

As to the question regarding giving notice to all clients whenever a sale is made, the Discussion portion of the rule states that the rule is not intended to permit piecemeal sale of cases, except in rare instances, but rather to permit and regulate the sale and purchase of entire law practices. Therefore, if a member determines to sell his or her practice, except in rare instances, all clients will be subject to the transfer and will therefore receive the notice contemplated by paragraph (B).

As to the concern about inserting a provision indicating that the seller is bound by the ethical duty of confidentiality, such a provision was thought to be redundant because all members of the bar are bound by all the standards of professional responsibility, including Business and Professions Code § 6068, subdivision (e), in whatever situation.

The question raised requiring the seller, rather than the purchaser, to send the notice to avoid the disclosure of confidential information raises the issue of client

protection. If the attorney whose law practice is being sold is deceased or is represented by another, the sale might well be handled by someone other than the lawyer. Because the sale might be handled on the seller's side by a non-lawyer, it was determined to impose the duty on the purchaser to send the notice. This is because the purchaser is the one party to the transaction who is certain to be a member of the bar. If the duty to send the notice was placed on the seller, who might not be a lawyer and is therefore not bound by the Rules of Professional Conduct, compliance with the notice requirement could not be ensured.

The Court also inquired regarding the requirement that a written notice be sent 90 days prior to the transfer of the files to avoid disclosure of client secrets prior to consent of the client to the transfer. This involves the same issue of client protection outlined above. There was great concern that if the seller is deceased, has a conservator or other person acting in a representative capacity and the purchaser does not have access to the files, client matters might be left unattended for the 90 day period between the notice and transfer of the files. Allowing flexibility in the time for transfer and permitting the purchaser to act in an emergency on behalf of a client of the seller before the 90 day period for response expired would afford the client greater protection in those situations in which the seller is deceased or incapacitated.

Upon further reflection, it appears that greater client protection would be afforded if the rule contained the procedures outlined in the Court's letter in those situations in which the seller is not deceased, has not had a conservator appointed, nor has another person acting for him or her in a representative capacity. Therefore, the version of the rule most recently adopted by the Board imposes this duty of giving notice to the client on the seller in those situations in which the seller is acting on his or her own behalf in the sale.

As to those situations in which the seller is deceased, has had a conservator appointed, or has another acting in a representative capacity, the version of the rule currently being recommended continues to impose the duty of notice to the client on the purchaser because, in those situations, the client would be afforded the greatest protection possible. (See pages 9-12 of Bar Misc. 5626 "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" dated September 1988.)

In accordance with the State Bar's response, the State Bar submitted a modified proposed rule as follows:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1989 version]

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by ~~rule 3-100~~ Business and Professions Code section 6068, subdivision (e), then ~~prior to the transfer~~;

(1) if the seller is deceased, has a conservator or other person acting in a representative capacity, prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph ~~(1)~~(a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90 day period.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(a) the seller shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date

of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

The foregoing version was approved operative on May 26, 1989 as part of comprehensive revisions to the Rules of Professional Conduct.

In 1991, the State Bar requested that the Court amend rule 2-300 and provided this explanation:

Proposed amendment to subparagraphs (B)(1), (B)(2)(a) and (B)(2)(b) would add reference to Business and Professions Code, section 6180.5, regarding the courts' authority to assume jurisdiction over an attorney's practice where the attorney dies, resigns or becomes an inactive member of the State Bar (either voluntarily or involuntarily).

Proposed amendment to subparagraphs (B)(2)(a) and (B)(2)(b) would require that a new attorney appointed by the court pursuant to section 6180.5 comply with the written notice and consent requirements found in these two

subparagraphs. Proposed amendment to subparagraph (B)(1) would clarify that subparagraphs (B)(1)(a) and (B)(1)(b) do not apply in situations where a new attorney has been appointed by the court pursuant to section 6180.5. (Supreme Court File No. S024408, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," dated December 1991, at page 12.)

The State Bar amended the rule and submitted the following version to the Supreme Court:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1992 version]

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

(1) if the seller is deceased, <u>or</u> has a conservator or other person acting in a representative capacity, <u>and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then</u> prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90 day period.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

(See Enclosure 1 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, Supreme Court File No. S024408, for the clean version text of this rule.)

The Court approved the foregoing amendments operative on September 14, 1992. The 1992 version is current rule 2-300.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC notes that Comment [1] could raise antitrust issues that would make this rule unenforceable. OCTC recommends that the Commission research the issue of whether prohibiting the sale of only a field or area of a practice, a practice in a geographical area, or a practice in a particular jurisdiction raises anti-trust issues.

     Commission Response: The Commission has not made the requested change. The Commission does not believe that the ABA Model Rule approach would provide sufficient public protection for the clients who files are transferred as part of the sale. It is not aware of any problems that have arisen under the current rule.

     In addition, the Commission is unaware of any such antitrust problems that have arisen under the current California rule or similar rules in other jurisdictions.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Two comments agreed with the proposed Rule, two comments disagreed, one comment agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment

synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Business and Professions Code § 16602

   California law regulates certain anti-competitive agreements among partners. Business and Professions Code § 16602 provides that:

   (a) Any partner may, upon or in anticipation of any of the circumstances described in subdivision (b), agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

   (b) Subdivision (a) applies to either of the following circumstances:

   (1) A dissolution of the partnership.

   (2) Dissociation of the partner from the partnership.

2. Business and Professions Code §§ 6180 et seq.

   The State Bar Act provides that the courts shall have jurisdiction over the law practice of a lawyer who dies, resigns, or becomes an inactive or disbarred member.

3. Business and Professions Code §§ 6190 et seq.

   The State Bar Act provides that the courts shall have jurisdiction over the law practice of a lawyer who has for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client.

4. Probate Code Probate Code § 2468.

   The conservator of the estate of a disabled attorney who was engaged in the practice of law at the time of his or her disability, or other person interested in the estate, may bring a petition seeking the appointment of an active member of the State Bar of California to take control of the files and assets of the practice of the disabled member. The appointed person serves as the "practice administrator" and may petition to exercise the powers set forth in Business and Professions

Code § 6185. Section 6185 includes the authority to sell "the practice and its goodwill."

The State Bar of California offers a model agreement[1] for the designation of an attorney to administer a lawyer's law practice in the event that the lawyer becomes disabled or incapacitated. The agreement details the typical responsibilities of the lawyers involved in an "Agreement to Close Law Practice in the Future" and is intended to facilitate compliance with Probate Code § 2468 and Business and Professions Code § 6185.

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.17: Terminology," revised September 27, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_17.pdf [last visited 2/7/17]

- Eight states have adopted Model Rule 1.17 verbatim.[2] Sixteen states have adopted a slightly modified version of Model Rule 1.17.[3] Twenty-four jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.17."[4] Three states did not adopt Model Rule 1.17.

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

A. Concepts Accepted (Pros and Cons):

1. Retain the substance of current rule 2-300, edited in conformity with current practice.

    - Pros: No compelling argument has been made for any substantive change in the current California rule.

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[1] The model agreement can be found at: http://ethics.calbar.ca.gov/Ethics/SeniorLawyersResources/AttorneySurrogacy.aspx.

[2] The eight jurisdictions are: Arizona, Indiana, Iowa, Kansas, Vermont, West Virginia, Wisconsin, and Wyoming.

[3] The sixteen jurisdictions are: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Missouri, Montana, Nebraska, Nevada, Rhode Island, South Dakota, Utah, and Washington.

[4] The twenty-four jurisdictions are: California, District of Columbia, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, and Virginia.

- Cons: See Section IX.B, below.

B. Concepts Rejected (Pros and Cons):

1. Substantially modify the current California Rule by adopting some version of the ABA MR so as to permit sale of a field of practice (such as a firm's contingent fee cases), the seller's practice in a geographic area (such as all cases in Kern County), or the seller's practice in a jurisdiction (such as the seller's Nevada clients).

   - Pros: The main argument in favor of expansion is that doing so would recognize the economic realities of law practice.

   - Cons: Current California rule 2-300 is narrowly drafted to permit a solo practitioner to recoup through a one-time sale of his or her practice the good will developed in the practice over the practitioner's professional lifetime. This sale might happened due to the lawyer's death or retirement or because the lawyer is leaving the practice of law, such as would happen if the lawyer were appointed to the bench. Thus, current rule 2-300 overcame the earlier, traditional concept that clients cannot be bought or sold, and it did so only to the extent of leveling the playing field by giving to solo practitioners an opportunity to realize the value of the practice just as might be the case with lawyers in large law firms whose interests can be purchased by the firm or its remaining partners. By permitting the sale of a practice under strictly controlled conditions, the current rule: (i) avoids the former use of sham associations of lawyers to facilitate transfer of a practice; (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters; and (iii) gives clients an opportunity to choose their own legal counsel. An expansion along the MR's lines would: (i) provide a device for evading the restrictions on fee sharing and referral fees found in Rule 1.5.1 [currently rule 2-200]; (ii) create a great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships; (iii) add to the commercialization of the practice of law' and (iv) create the risk that clients whose matters are less lucrative might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The current rule was created to address a genuine concern. No compelling reason for the MR expansion has been advanced by its proponents other than that there might be situations where there could be a genuine special need to carve out some part of an established practice; an example would be a lawyer who is not leaving the practice of law but due to health problems cannot handle particular matters, but that situation can be handled under Rule 1.5.1 through a co-counsel fee-sharing arrangement or a referral arrangement that reduces or eliminates the burden on the ill lawyer.

2. Remove the word "solely" from paragraph (a).

    - Pros: At least two commenters on the first Commission's proposals (OCTC and a group of law professors) recommended this change, and the Commission reconsidered this possibility. The previous commenters did not explain their view, and we find nothing to support the change.

    - Cons: As the State Bar said in its exchanges with the Supreme Court prior to the original adoption of the current Rule, a buyer of a law practice should not routinely increase fees. This would have the effect of causing the clients to pay a part of the purchase price. However, there are legitimate bases on which the buyer and a client might agree to increase fees. These include a change in the scope of the legal work and the passage of time. In addition, we are not aware that the current inclusion of "solely" has caused any client harm. To further clarify the "solely by reason" limitation in paragraph (a), the Commission recommends the adoption of proposed new Comment [2]. To the extent the earlier commenters had in mind that the purchaser of a law practice should be prohibited from *ever* raising fees on the matter sold, that likely would make it impossible to ever sell a law practice under proposed Rule 1.17 and would be inconsistent with the current rule and the views exchanged with the Court in the drafting of prior versions of the current rule.

3. Shorten from 90 days to 30 days the waiting period stated in paragraphs (b)(i) and (ii).

    - Pros: This was recommended to the first Commission by the Santa Clara County Bar Assoc., but we are unable to see any aspect of client protection in that suggestion. The Rule does not require the buyer to wait 90 days before providing services. It states that "... if the client's rights would be prejudiced by a failure of the purchaser to act during that time [the 90-day period], the purchaser may act on behalf of the client until otherwise notified by the client."

    - Cons: There is no evidence that the 90-day period is deficient, so there is no reason to change the current Rule in that respect.

2. Address the antitrust and other constitution issues raised by Office of Chief Trial Counsel.

    - Pros: None identified.

    - Cons: The Commission does not see any antitrust or constitutional issues. As to the former, the "all or substantially all" language was part of the original version of this rule when adopted by the Supreme Court, has been part of the rule ever since, and has triggered no antitrust complaints to our knowledge. The Commission is not aware of any constitutional challenge due to that limitation.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

None.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member”.

    - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.17 [2-300] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.17 [2-300] in the form attached to this Report and Recommendation.

Proposed Rule 1.17 [2-300] Sale of Law Practice
Synopsis of Public Comments

TOTAL = 2 *A = 1* *D = 0* *M = 1* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-11	Poll, Edward (01-05-17)	N	M	1.17	It would make sense, both ethically and economically, for the protection of clients and the well-being of lawyers, to permit sales of practice areas rather than limiting law practice sales to "all or substantially all" of a law practice.	This comment repeats a perspective the Commission thoroughly discussed in making its decision to retain the "all or substantially all" language of current rule 2-300. While there are pros and cons to increasing the opportunity for lawyers to profit from sales of a portion of a law practice, the Commission's view on balance is that the current rule works well, that there would be no material client benefit to any change along the line suggested, and that restrictions against the piecemeal sale of a practice are needed to protect clients and ensure that lawyers meet their paramount duty of loyalty.
Y-2016-21r	State Bar Office of Chief Trial Counsel (Dresser) (OCTC) (01-09-17)	Y	A	1.17	OCTC supports this rule, however notes that Comment 1 could raise anti-trust or other constitutional issues that would make this rule unenforceable, e.g. the sale of only a field or area of a practice, a practice in a geographical area, or a practice in a particular jurisdiction.	If the OCTC letter is intended to suggest that the possibility of an anti-trust violation b/c the Rule permits only sales of "all or substantially all" of a law practice, the Commission is not aware of any authority suggesting this result and notes that the language recommended by the Commission continues California's current and long-standing rule.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.18
(No Current Rule)
Duties to Prospective Client

EXECUTIVE SUMMARY

The Commission reviewed and evaluated ABA Model Rule 1.18 (Duties to Prospective Client) for which there is no California counterpart. In addition, the Commission considered the national standard of ABA Model Rule 1.18. The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. In connection with the Commission's request for 90-day public comment on all of the proposed rules, the Commission reported to the Board that the Commission had determined not to recommend the adoption of Model Rule 1.18.[1]

Following consideration of public comment supporting adoption of a version of Model Rule 1.18, the Commission reconsidered its prior decision and has now developed a proposed rule that is recommended for an initial public comment period.

Rule As Issued For 45-day Public Comment

Proposed rule 1.18 is derived from ABA Model Rule 1.18 and imposes duties upon lawyers relating to consultations with prospective clients. In particular, the duty to preserve the confidentiality of information the lawyer acquires during a pre-lawyer/client relationship consultation. Given the historical importance of confidentiality relating to the effective provision of legal services, a rule addressing prospective client duties is appropriate. Although concepts articulated in the rule are already the law in California and do not establish new standards,

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[1] Among the reasons for that Commission decision were the following.

(1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.

(2) The guidance provided by proposed rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., opinions 2003-161 and 2005-168), and case law.

(3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information from a prospective client to be screened, would in effect enable a lawyer in a law firm to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then permit other lawyers in the same firm appear against that person in the very matter in which representation was sought. Permitting screening in a situation that is tantamount to a side-switching conflict is likely to harm public trust and confidence in the legal profession.

(4) In general, screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be maintained inviolate subject only to informed consent to do otherwise.

placing such a rule in the disciplinary rules will alert lawyers to this important duty. The rule will provide lawyers with guidance through a clearly-articulated standard on how to comport themselves during a consultation to protect not only the prospective client but also to protect current clients from losing the lawyer of their choice, thus enhancing public protection and confidence in the legal profession.

Paragraph (a) provides that a person who consults with a lawyer for the purpose of retaining the lawyer or obtaining legal services or advice is a prospective client for purposes of this rule. Paragraph (a) departs from ABA Model Rule 1.18 in that the consultation may be done directly or through an authorized representative. It likewise departs from the model rule by clearly articulating the scope of qualifying consultations so that a prospective client may not simply disclose information in an attempt to disqualify the consulting lawyer from representing an opponent.

Paragraph (b) provides that a lawyer may not use or reveal information learned from a consultation with a prospective client except as permitted by Rule 1.9.

Paragraph (c) provides that a lawyer is barred from representing a client with interests adverse to those of the prospective client in the same or substantially-related matter if the lawyer received material confidential information from the prospective client which is material to the matter. An exception to this principal is addressed in paragraph (d). This paragraph departs from the counterpart language in ABA Model Rule 1.18 in that it refers to "material" information rather than the ABA standard of information from a prospective client "that could be significantly harmful" to that person in the matter.

Paragraph (d) provides that when a lawyer has received information prohibiting representation pursuant to paragraph (c), the lawyer may nonetheless continue representation of the affected client if: (1) the prospective client and the affected client provide informed written consent or; (2) the lawyer took steps to avoid exposure to no more information than was necessary to determine if the lawyer could undertake representation of the prospective client and the prohibited lawyer is screened from the case and the prospective client is promptly given written notice regarding compliance with this rule. The screening provision of paragraph (d) balances the need for prospective clients to be secure in their secrets with the need for lawyers to obtain sufficient information to determine whether they should or can accept the representation.

Comment [1], derived in part from ABA Model Rule 1.18, Comment [1], clarifies that the term "prospective client" includes a person's "authorized representative." The comment explains that while a prospective client's information is protected, a law firm may nonetheless accept or continue representation of a client with interests adverse to the prospective client in accordance with paragraph (d). The comment also cites to Evidence Code § 951 and states that the rule is not intended to limit the application of the evidentiary lawyer-client privilege.

Comment [2] is a substantially-truncated version of ABA Model Rule 1.18, Comment [2], which has be supplemented to draw important distinctions about when the rule applies. First, a person who communicates with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal advice is not a prospective client under the rule. Second, a lawyer may expressly disclaim a willingness to consult with a person and that person would not be a prospective client under the rule. Third, a person who communicates with a lawyer without good faith intention to seek legal advice or representation is also not a prospective client under the rule.

Comment [3] is derived from ABA Model Rule 1.18, Comment [4] and cautions lawyers to take care not to expose themselves to more information than is necessary to determine whether to accept the representation.

Comment [4], derived from ABA Model Rule 1.18, Comment [7], but modified to reflect California law (e.g., the requirement of informed written consent), clarifies the application of paragraph (d) and provides how a screened lawyer may be compensated.

Comment [5], derived from ABA Model Rule 1.18, Comment [8], provides the scope of the written notice required pursuant to paragraph (d).

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.18

Commission Drafting Team Information

Lead Drafter: **Dean Zipser**
Co-Drafters: **Lee Harris, Tobi Inlender, Hon. Dean Stout, Mark Tuft**

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.18, from which proposed Rule 1.18 is derived.][1]

Rule 1.18 Duties To Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

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[1] Although there is no rule of professional conduct that incorporates the concept embodied in proposed Rule, Evidence Code § 951 is relevant. Section 951 provides:

> 951. As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

See also State Bar Formal Ethics Opns. 2003-161 and 2005-168.

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 1.18
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.18
Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.18 Duties To Prospective Client

(a) A person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 that the lawyer learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent,* or

(2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and

(i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

Comment

[1] As used in this Rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code § 6068(e) and Rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client. This Rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[2] Not all persons* who communicate information to a lawyer are entitled to protection under this Rule. A person* who by any means communicates information unilaterally to a lawyer, without reasonable* expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a "prospective client" within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[3] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably* appears necessary for that purpose.

[4] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers in a law firm* as provided in Rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent* of both the prospective and affected clients is obtained. See Rule 1.0.1(e-1) (informed written consent*). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened* and written* notice is

promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening procedures employed.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.18)

Rule 1.18 Duties To Prospective Client

(a) A person* who ~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter~~, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no ~~client-lawyer~~lawyer-client relationship ensues, a lawyer who has ~~learned information from~~communicated with a prospective client shall not use or reveal ~~that~~ information protected by Business and Professions Code § 6068(e) and Rule 1.6 that the lawyer learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received ~~information~~ from the prospective client ~~that could be significantly harmful to that person in~~information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is ~~disqualified~~prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received ~~disqualifying~~ information ~~as defined~~that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent, ~~confirmed in writing,~~* or~~:~~

(2) the lawyer who received the information took reasonable* measures to avoid exposure to more ~~disqualifying~~ information than was reasonably* necessary to determine whether to represent the prospective client; and

(i) the ~~disqualified~~prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

Comment

[1] ~~Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations~~As used in this Rule, a prospective client includes a person's authorized representative. A lawyer's discussions with a prospective client ~~usually are~~can be limited in time and depth and leave both the prospective client and the lawyer free ~~(~~, and sometimes required~~)~~, to proceed no further. ~~Hence,~~ Although a prospective ~~clients should receive some but not all of the protection afforded clients.~~client's information is protected by Business and Professions Code § 6068(e) and Rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client. This Rule is not intended to limit the application of Evidence Code § 951 (defining "client" within the meaning of the Evidence Code).

[2] ~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person~~Not all persons* who communicate information to a lawyer are entitled to protection under this Rule. A person* who by any means communicates information unilaterally to a lawyer, without ~~any~~ reasonable* expectation that the lawyer is willing to discuss the possibility of forming a ~~client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer~~lawyer-client relationship or provide legal advice is not a "prospective client~~."~~" within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person,* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

~~[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.~~

[~~4~~3] In order to avoid acquiring ~~disqualifying~~ information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter ~~should~~must limit the initial ~~consultation~~interview to only such information as reasonably* appears necessary for that purpose. ~~Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.~~

~~[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.~~

~~[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.~~

[~~7~~4] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers in a law firm* as provided in Rule 1.10~~, but~~. However, under paragraph (d)(1), the consequences of imputation may be avoided if the ~~lawyer obtains the~~ informed written consent*~~, confirmed in writing,~~ of both the prospective and affected clients is obtained. See Rule 1.0.1(e-1) (informed written consent*). In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all ~~disqualified~~prohibited lawyers are timely screened* and written* notice is promptly given to the prospective client. ~~See Rule 1.0(k) (requirements for screening procedures).~~ Paragraph (d)(2)(i) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is ~~disqualified~~prohibited.

[~~8~~5] Notice~~, including~~ under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and ~~of~~ the screening

procedures employed~~, generally should be given as soon as practicable after the need for screening becomes apparent~~.

~~[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.18 was not the primary factor in the Commission's consideration of proposed Rule 1.18, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 397 - 406, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
  (In response to 45-day public comment circulation):

  1. Neither this proposed rule nor proposed Rule 1.0 defines "materially adverse" or why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

     Commission Response: The term "materially adverse" is not intended to be given a one-size-fits-all construction and is not susceptible to a simple blackletter definition. As in the case of other rules using the same term (e.g., Rule 1.9), the term must be applied in a manner that appreciates the particular facts and circumstances of the matters under consideration. This is the case in the jurisdictions that have adopted a version of this rule. Generally, ethics opinions provide explanatory guidance on applying the term. (See, e.g., New York City Bar Ass'n Op. 2013-01 (10/1/13); see also New York State Bar Ass'n Op. 1103 (7/15/2016) (applying the term in the context of NY Rule 1.9). The Commission anticipates that a similar approach to clarifying the term would be the case in California.

  2. OCTC is concerned about the use of the term "knowingly" in paragraph (c) and in the other conflict rules.

     Commission Response: The term "knowingly" is a defined term in Rule 1.0.1(f) and includes the concept that "[a] person's knowledge may be inferred from circumstances." The Commission believes this is the appropriate standard for paragraph (c) of this rule.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 45-day public comment period, seven public comments were received. Four comments agreed with the proposed rule, one comment disagreed, and two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Duty to Protect Confidential Information of Prospective Client. Model Rule 1.18 imposes a duty on lawyers to protect information disclosed during a consultation by a prospective client. California does not have a similar rule but Evidence Code § 951 defines client to mean "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." Section 951 does not require that a lawyer-client relationship ensue. See also Cal. State Bar Ethics Op. 2003-161. (See proposed Rule 1.18 Materials, attached.)

- CAL 2003-161 (Duties owed a prospective client)

As noted in rule 3-100, Comment [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

a. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

b. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business & Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and lawyer for the

purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179). Even information in the public record that is not easily discoverable is protected by the duty. (*Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

Duty of Confidentiality and Lawyer-Client Privilege Compared. The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily defined concept of a "confidential communication" (see Evid. Code sec. 952 for the definition of a "confidential communication" between a "lawyer" (see Evid. Code sec. 950 for the definition of "lawyer") and a "client" (see Evid. Code sec. 951 for the definition of "client"). For example, the duty encompasses information acquired by virtue of the lawyer–client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is preparing advertising material may not use information protected by the duty without the client's consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see, Evid. Code sec. 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code sec. 6068(e)(2)).

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code sec. 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code sec. 6453).

c. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." § 2018.030(a). Any other work product of an attorney "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." § 2018.030(b).

Duty of Confidentiality and Work-Product Compared. There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Civ. Proc. sec. 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. sec. 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code sec. 6068(e)(2)).

B. ABA Model Rule Adoptions

- **Model Rule 1.18**. The ABA State Adoption Chart for Model Rule 1.18, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.18," revised December 9, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf (Last accessed on 2/7/17)

Model Rule 1.18 was adopted by the ABA in 2002 as part of the Ethics 2000 Commission's comprehensive review of the Model Rules. The rule was amended in 2012 as part of the Ethics 20/20 Commission's review of the Model Rules to determine if any further changes to the Model Rules were warranted in light of the increase in cross-border practice and in the use of technology in providing legal services.[2]

Every jurisdiction except California and six others[3] has adopted some version of ABA Model Rule 1.18. Nine jurisdictions have adopted the 2012 rule verbatim,[4] ten adopted the 2002 version verbatim and have not since amended their rules,[5] nineteen

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[2] The 2012 amendments were made to paragraphs (a) and (b) as follows:

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

[3] The six jurisdictions that have not adopted any version of Model Rule 1.18 are: Alabama, Georgia, Michigan, Mississippi, Texas and Virginia.

[4] The nine jurisdictions that have adopted the 2012 version of the Model Rule verbatim are: Delaware, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Mexico, Oregon and West Virginia.

[5] The ten jurisdictions are: Alaska, Indiana, Kentucky, Maine, Nebraska, Oklahoma, Rhode Island, South Dakota, Utah and Wisconsin.

jurisdictions have adopted a version of the rule that is a substantially similar variation of the Model Rule,[6] and six have a substantially modified version of Model Rule 1.2.[7]

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

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of a rule patterned on Model Rule 1.18 that sets forth duties owed to a prospective client, which is defined as a person who consults with a lawyer in the lawyer's capacity as such for the purpose of obtaining legal services or advice.

    - Pros: There are a number of reasons for recommending the adoption of proposed Rule 1.18:

        (1) Although the Rules of Professional Conduct historically have not addressed duties owed to a prospective client, being limited to duties owed current and former clients, in certain circumstances a lawyer will incur duties to a prospective client, in particular a duty to preserve the confidentiality of information the lawyer acquires during a pre-lawyer-client relationship consultation. Given the historical importance of confidentiality to the effective provision of legal services, a rule addressing prospective client duties is appropriate. Placing such a rule in the disciplinary rules will alert lawyers to this important duty, thus enhancing compliance and facilitating enforcement, provide important public protection, and should also promote confidence in a legal profession that honors the confidential information of any person that consults with a lawyer, in turn promoting respect for the administration of justice.

        (2) Proposed Rule 1.18 would be one of the several proposed rules that follow the ABA approach of addressing confidentiality as it applies to current (Rules 1.6, 1.8.2), former (Rule 1.9(c)), and prospective (this Rule, 1.18) clients in several distinct rules. Together these rules provide detailed guidance about the duty of confidentiality by establishing clear standards regarding a lawyer's use or disclosure of confidential information.

        (3) Proposed Rule 1.18 would also be one of several rules that similarly follow the ABA approach of addressing conflicts of interest between and among clients or prospective clients in several separate rules, i.e., Rule 1.7

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[6] The nineteen jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maryland, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont and Wyoming.

[7] The six jurisdictions are: District of Columbia, Nevada, New Jersey, New York, North Dakota and Washington.

(Conflict Of Interest: Current Clients); Rule 1.8.6 (Compensation From One Other Than Client); Rule 1.8.7 (Aggregate Settlements); Rule 1.9 (Duties To Former Clients); Rule 1.10 (Imputation Of Conflicts of Interest: General Rule); Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees); and Rule 1.12 (conflicts of interest involving a former judge, arbitrator, mediator or other third-party neutral).

(4) Although there is no California Rule counterpart, the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Cal. Evid. Code § 951, which does not require the formation of a lawyer-client relationship but instead defines "client" as a person who "consults" with a lawyer in the lawyer's capacity as a lawyer "for the purpose of securing legal service or advice." Section 951 is discussed at length in Cal. State Bar Formal Opn. 2003-161, available at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=Insc9IfZpdQ%3d&tabid=838 [last visited 5/16/16]. It will not establish a new standard but will provide guidance to lawyers through a clearly articulated standard on how to comport themselves during a consultation to protect not only the prospective client but also to protect the lawyer's current clients from losing the lawyer of their choice.

(5) The screening provision of paragraph (d) balances the need for prospective clients to be secure in their secrets and the need for lawyers to obtain sufficient information to determine whether they should – or even can – accept the representation.

(6) The court in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, which involved a prospective client fact pattern, effectively held that ethical screens provided an appropriate balance between the needs of prospective and current clients. Moreover, the California Supreme court implied that an unconsented ethical screen might even be permitted in cases where a lawyer has obtained material information from an opposing party in the very matter at issue. See *People ex rel Dept. of Corporations v. SpeeDee Oil Exchange Systems, Inc*. (1999) 20 Cal.4th 1135, 1153-1154.

(7) The protection of the client's information is broader than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation.

(8) Language derived from California case law concerning conflicts of interest ("material" information) has been substituted in paragraph (c) for imprecise model rule language ("significantly harmful") so as to remove ambiguities regarding the rule's application and to enhance compliance and enforcement.

(9) Nearly every jurisdiction has adopted a version of Model Rule 1.18, first adopted by the ABA in 2002.

- Cons: There are several reasons not to recommend adoption of a counterpart to Model Rule 1.18.

  (1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.

  (2) In any event, the purported guidance provided by proposed Rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., Cal. State Bar Formal Opn. Nos. 2003-161 and 2005-168), and case law.

  (3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information of a prospective client to be screened would enable other lawyers in the screened lawyer's firm to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought. Even if the other, non-screened firm lawyers had not been exposed to the prospective client's information in a consultation, this has the potential to cause great harm to the legal services consuming public.

  (4) Screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be protected.

2. Recommend adoption of Model Rule 1.18(a), as revised to substitute (i) "for purpose of" for "about the possibility of" and (ii) "or securing legal advice" for "with respect to the matter," and include other language derived from Cal. Evid. Code § 951.

   - Pros: The first change clarifies that the person communicating with the lawyer must have come with the purpose of forming a relationship or seeking legal advice and not simply to disclose information in an attempt to disqualify the consulting lawyer from representing the opponent. The second change clarifies that a lawyer-client relationship need not be formed for the duty of

confidentiality to be imposed on the lawyer. These changes bring the Model Rule provision in line with the California Evidence Code. (See Evid. Code § 951.)

- Cons: None identified.

3. Recommend adoption of Model Rule 1.18(b), as revised to include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and expressly qualifying such information by the clause "that the lawyer has learned as a result of the representation."

   - Pros: The protection of the client's information is broadened by these changes than that provided under the Model Rule; the proposed rule protects not only confidential information learned during a consultation but also that information that a lawyer might learn as a result of the consultation, e.g., through subsequent investigation. The references to § 6068(e) and Rule 1.6 clarifies precisely what information that might be gleaned as a result of the consultation is at stake and is to be protected under this Rule.

   - Cons: None identified.

4. Recommend adoption of Model Rule 1.18(c), as revised, but include a reference to the source of confidentiality in California (§ 6068(e) and Rule 1.6) to clarify what communicated information is at stake and substitute "material to the matter" for the Model Rule's clause, "significantly harmful to that person." Further, substitute "prohibited" for "disqualified."

   - Pros: The phrase "material to the matter," language derived from California case law concerning conflicts of interest, is an appropriate substitution for the imprecise and undefined model rule language ("significantly harmful to that person") and removes ambiguities regarding the rule's application and to enhance compliance and enforcement. The substitution of "prohibited" for "disqualified" reflects the primary nature of the proposed rule as a disciplinary rather than a civil disqualification standard, and clarifies that actual disqualification is not a prerequisite to a finding that the rule was violated.

   - Cons: The substitution of "prohibited" for "disqualified" is a meaningless change as courts will rely on the proposed rule in disqualification motions just as they cite to the provisions of current rule 3-310 when confronted with a disqualification motion now.

5. Recommend adoption of Model Rule 1.18(d), as revised, which provides that a law firm may continue to represent a current or new client ("affected client") in the same matter under two conditions: (i) both the prospective client and affected client provide informed written consent; or (ii) the law firm erects a timely screen, notice is promptly provided the prospective client. Importantly, it is specified that the written notice "enable the prospective client to ascertain

compliance with the provisions of this Rule," thus providing clear guidance as to the scope of notice that must be provided. (See paragraph IX.A.6, below.)

- Pros: As noted, [see paragraph 1, "Pros" Nos. (5) & (6)], permitting screening of a lawyer who is prohibited because of information acquired from a consultation with a prospective client, strikes the appropriate balance between the interests of the prospective client in the confidentiality of that person's information and a law firm's clients' ability to retain his or her lawyer of choice.

- Cons: See Section IX.A.1, "Cons" Nos. (3) and (4).

6. Recommend adoption of five Comments derived from Model Rule 1.18: Comment [1], derived in part from Model Rule 1.18, Cmt. [1] and the first Commission's proposed Rule 1.18, clarifies that the term "prospective client" includes a person's "authorized representative" (as expressly provided in Evid. Code § 951) and states the rule is not intended to limit the application of § 951.

   Comment [2], a substantially truncated version of Model Rule 1.18, Cmt. [2], which has been supplemented to draw important distinctions about when the rule applies: (i) a person who communicates with a lawyer with no reasonable expectation the lawyer is willing to represent the person or provide legal advice is not a prospective client; (ii) a lawyer may expressly disclaim a willingness to consult with the person; and (iii) a person who communicates with the lawyer without a good faith intention to seek legal advice or representation is also not a prospective client.

   Comment [3], derived from Model Rule 1.18, Cmt. [4], cautions lawyers to take care not to expose themselves to more information than necessary to determine whether to accept the representation, such conduct being a prerequisite to the implementation of an ethical screen. (See introductory clause of paragraph (d).)

   Comment [4], derived from Model Rule 1.18, Cmt. [7], but modified to reflect California law, (e.g., the requirement of "informed written consent"), clarifies the application of paragraph (d). The last sentence provides interpretative guidance regarding the application of paragraph (d)(2)(i).

   Comment [5], derived from Model Rule 1.18, Cmt. [8], delimits the scope of notice required under paragraph (d)(2)(ii). The last clause has been deleted as repetitive of the rule.

   - Pros: All of the proposed Comments explain how the rule should be interpreted or applied, the appropriate function of Comments in the Rules.

   - Cons: Some of the Comments restate the rule or state the obvious:

     Comment [3] is simply another way of stating the requirement stated in the introductory clause of paragraph (d).

Comment [4] could be reduced to a simple reference to Rule 1.0.1(k).

Comment [5]'s substance belongs in the black letter of the rule as part of paragraph (d)(2)(ii).

B. Concepts Rejected (Pros and Cons):

1. Recommend that paragraph (d)(2)(ii) require only that the prospective client be informed about the fact of a screen rather than be given notice.

   - Pros: The prospective client is not being represented by the lawyer with respect to the screening and this militates against a broad and detailed notice requirement that might mislead that person into believing that the lawyer is acting in their best interests. If notice is required then the Rule or Comment should expressly require that the lawyer inform the prospective client that the lawyer is not representing them and that prospective client should seek an independent lawyer for legal advice in connection with the screening.

   - Cons: Simply informing the prior prospective client about the fact of the screen is inadequate information.

2. Recommend adoption of a new paragraph (d)(2)(iii), which has no counterpart in the Model Rule and is derived from Colorado Rule 1.10(d)(4), and which imposes a duty on lawyers in the screening firm to "reasonably believe" that the screen will effectively prevent disclosure of protected information to the firm or the affected client.

   - Pros: Including this clause, as is also being recommended by the 3-310 the Commission for inclusion in the screening provisions of proposed Rules 1.10, 1.11 and 1.12, provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It has been included for two reasons: *First*, it provides a better test of the an ethical screen's effectiveness than does Model Rule 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a prospective client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not,

then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with Rule 5.2(b) as posited in the "Cons," below. Second, there is no reason why the screening provision in a rule addressing a lawyer's duty to protect the confidential information of a prospective client should be any different from the screening requirements in a rule that protects the confidentiality interests of a former client.

- Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. Although the concept of proposed Rule 1.18 exists in current law, e.g., Evidence Code § 951, case law, (e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]; *Barton v. United States District Court*, 410 F.3d 1104 (9th Cir. 2005)), and ethics opinions (State Bar Formal Ops. 2003-161 and 2005-168), the proposed rule would nevertheless be a substantive change in that the concept is now being included as a disciplinary rule.

D. Non-Substantive Changes to the Model Rule:

1. Substituting the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.18 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.18 in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.18(d)(2)

This message states my dissent from proposed Rule 1.18(d)(2), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

I generally support proposed Rule 1.18. It is consistent with Evid. C. § 951 and related case law, and I believe that placing in the Rules a lawyer's confidentiality duty to prospective clients will make the point more accessible to lawyers and enhance client protection. I nevertheless dissent from this proposal as to proposed paragraph (d)(2).

Proposed paragraph (c) generally prohibits a representation adverse to a person who provided material confidential information to a lawyer while seeking to hire the lawyer. As a general rule, when a lawyer has a conflict based on confidentiality or loyalty obligations, the prohibition applies to all firm lawyers (and this is stated correctly in the second sentence of proposed paragraph (c)).[1]

Proposed paragraph (d)(2) would create an exception, permitting the personally prohibited lawyer's firm to accept the adverse representation by creating a non-consensual ethics screen designed to separate the personally prohibited lawyers from the balance of the firm. That paragraph has a threshold requirement that the personally prohibited lawyer "took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client …."

Most Rule 1.18 situations will have no need for the proposed paragraph (d)(2) exception because it is common practice for lawyers to limit their initial communications with prospective clients to basic information needed to check for possible conflicts of interest. For example, if a prospective client calls a lawyer because "I've been sued by Mr. X", the lawyer can determine that the firm represents Mr. X, decline the engagement, and have no resulting conflict of interest because the lawyer obtained no confidential information.[2]

What, then, might be involved in a lawyer obtaining information beyond the identities of the parties or participants, but that would come within the standard of avoiding

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[1] The imputed knowledge rule generally presumes that client confidential information obtained by one lawyer in a law firm is deemed to be possessed by all other lawyers in the firm. This presumption "is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work." *Elan Transdermal v. Cygnus Therapeutic Systems*, 809 F. Supp. 1383, 1390 (N.D. Cal. 1992); *Rosenfeld Construction Co. v. Superior Court*, 235 Cal. App.3d 566, 573 (1991); and *Chadwick v. Superior Court*, 106 Cal. App.3d 108, 116 (1980).

[2] One example of this self-discipline is that many law firm web sites permit a reader to email a firm lawyer but direct the reader to not disclose any confidential information.

"exposure to more information than was reasonably* necessary to determine whether to represent the prospective client"? Here are a few examples:

- A prospective client's ability to pay fees and litigation costs often is important, and in that situation firms can insist on obtaining detailed financial information about the prospective client "to determine whether to represent the prospective client". This could include asset and income information, business or employment prospects, and the availability of family members or others to assure payment of fees and costs.

- A lawyer sometimes wants to be certain that the client does not have unreasonable expectations about the representation and can be expected to handle settlement negotiations and other litigation aspects in a practical way. This would cause the lawyer to dig into the client's motivations. To take one example, a lawsuit intended for strategic business purposes could make the prospective client rigid and cause the client to insist on litigation tactics with which the lawyer might not be comfortable.

- Some representations depend on the client's credibility, particularly in litigation heavily dependent on disputed findings. A lawyer in that situation can be expected to draw out the prospective client to take the client's measure as a witness. This also could involve inquiry about other potential witnesses and other sources of relevant information.

The lawyer in any of these situations might spend hours with the prospective client, and might learned private business, financial and personal information of the most sensitive sort, but still qualify for the paragraph (d)(2) exception because the lawyer avoided "exposure to more information than was reasonably* necessary to determine whether to represent the prospective client." That prospective client then would be faced with an adversary armed with all that confidential information in what, as one commenter pointed out, amounts to side-switching – the clearest and most serious confidentiality violation.

Non-consensual side-switching is problematic. One reported California appellate opinion that permits it, *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), presents a rare factual situation. It remains to be seen now the appellate courts will deal with non-consensual screening in varying factual settings. The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client's confidential information is not available to the lawyers representing the prospective client's current adversary.

One of the goals of the standards governing lawyer conduct is to engender client trust in lawyers and in their advice. Appropriate legal advice guides clients in lawful conduct, which protects the clients' interests, avoids injuries to others, prevents disputes, and reduces the burden on the courts. Quite obviously, a lawyer can supply full and reliable legal advice only if the client fully discloses all potentially relevant information to the lawyer, and a client will do that only if the client trusts the lawyer to not misuse the

client's information. A lawyer operating without a command of the facts will supply incomplete, misleading, and even incorrect advice to the client. Without that trust, clients will not fully disclose themselves, as a result will not receive full and reliable advice, and won't trust the advice they do receive. Appellate courts considering non-consensual screening will need to consider whether the practice interferes with these goals.

It also is important that proposed paragraph (d)(2) would create a rigid disciplinary standard that, for example, would apply to all firms without regard to size or organization. *See Filippi v. Elmont Union Free School Dist. Bd. of Educ.,* 722 F. Supp. 2d 295, 307-08 (E.D.N.Y. 2010) (screening rejected because firm had only six lawyers and citing other cases in which screening was rejected due to firm size, one being a fifteen-lawyer firm) and *Hitachi, Ltd. v. Tatung Co*., 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) (where court determined ethics screen insufficient because the matter was being handled by one of six members of an intellectual property group in an office of a large firm and the tainted member was one of the six members in the same office). This proposed rigid system also would apply without regard to the sensitivity of the information obtained by the screened lawyer. See, e.g., *Energy Intelligence Grp., Inc. v. Cowen & Co., LLC*, 2016 U.S. Dist. LEXIS 92176, *11 (S.D.N.Y. 2016).

For these reasons, I respectfully dissent from proposed Rule 1.18(d)(2) and would leave the topic of non-consensual screening to development by the courts.

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.18(d)(2)

Paragraph (d)(2) strikes a proper balance between the obligation to protect confidential information received from a prospective client and allowing clients access to other lawyers in the firm who have had no contact with the prospective client or exposure to the prospective client's information. The rules adopted in 36 states plus the District of Columbia as well Restatement Third the Law Governing Lawyers §15 (ALI 2000) permit ethical screening as a way of avoiding imputation when limited confidential information is imparted by a prospective client. The rule has been shown to enhance public protection by establishing clear and enforceable standards regarding the obligation to protect a prospective client's confidential information while permitting consumers access to legal services. California's experience with ethical screens in other contexts (e.g., experts, non-attorney employees, former judges, lawyers moving in and out of government service) has proven to be effective. See *Kirk v. First American Title Ins. Co.*(2010) 183 Cal. App. 4th 776, 803.

Paragraph (d)(2) allows imputation to be removed only if the prohibited lawyer limited the information learned to what was reasonably necessary to determine whether to represent the would-be client and the prohibited lawyer is timely screened from participation in the matter. Without the ability to remove imputation in this manner, prospective clients would have the same right as former clients to prevent other lawyers

in the firm from undertaking a subsequent adverse representation over their objection. The Commission believes that removing paragraph (d)(2) would be inconsistent with case law and would unreasonably restrict the right of clients to counsel of their choice.

The provisions of Rule 1.18 reflect the realities of modern practice. Lawyers and law firms are routinely contacted, electronically and otherwise, by prospective clients. Every consultation by a lawyer with a putative client should not expose law firms of various sizes and geographical locations to imputation of the prohibited lawyer's conflict. Under paragraph (d)(2) the lawyer consulting with the prospective client bears the burden of showing that the lawyer took "reasonable" (see Rule 1.0.1(h)) measures to limit the amount of information learned to that which was reasonably necessary to determine whether to accept the representation. Other lawyers in the firm seeking to undertake the subsequent adverse representation bear the burden of showing the timely imposition of adequate procedures to isolate the prohibited lawyer and protect the prospective client's confidential information. (see Rule 1.0.1(k)). Thus, the various scenarios posited by the dissenter may or may not permit the removal of imputation under paragraph (d)(2) depending on the circumstances in a particular case.

It is not correct that a prospective client would be forced to accept screening imposed unilaterally by a law firm and would have no way to verify that the prospective client's confidential information is adequately protected. The Commission believes it has addressed these concerns by modifying paragraph (d)(2)(ii) to impose the same written notice requirements that are required in proposed Rule 1.11(b)(2) and Rule 1.12(c)(2) in order to allow the prospective client to be able to ascertain compliance with the provisions of the rule.

The proposed rule does not create a risk of "side switching" as that concept has been articulated in case law. There is no prospect of side switching in the case of a prospective client because by definition no lawyer-client relationship ensues from the initial consultation and, therefore, the other lawyers in the firm are not changing sides in the same or a substantially related matter.

Proposed Rule 1.18 Duties to Prospective Clients
Synopsis of Public Comments

TOTAL = 7 *A = 4* *D = 1* *M = 2* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25b	Bar Association of San Francisco (Banola) (01-13-17)	Yes	A		We support proposed Rule 1.18 because it provides important guidance to lawyers practicing in California on what duties are owed to prospective clients in contrast to former clients. We also believe the proposed Rule will enhance the ability of lawyers and clients to communicate regarding potential new matters. While the Committee recognizes that a few California cases address duties to prospective clients in the disqualification context and that California Evidence Code § 951 addresses this duty in regard to the attorney-client privilege, there is otherwise no clear guidance for California lawyers. As part of their risk management practice, members of our Committee have counseled clients on duties to prospective clients and recommended that prospective clients be included in the law firms' conflict check procedures. Law firms that do not include prospective clients as part of their conflict check procedures may be unaware they have a conflict of interest in accepting a new representation.	No response required.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					As a result, the firms may unknowingly accept a new representation that is materially adverse to the interests of a prospective client, or fail to implement effective screening measures to avoid the conflict of interest. Alerting lawyers to duties owed to prospective clients through Proposed Rule 1.18 will require lawyers and law firms to incorporate such risk management best practices in order to comply with the rule, and, consequently, will help to avoid imputation of confidential information and late discovery of such conflicts.	
Y-2016-18b	Lamport, Stanley (01-09-17)	No	M		The screening provisions in paragraph (d)(2) should be removed from the rule. The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client's confidential information is not available to the lawyers representing the prospective client's current adversary.	The Commission believes that the proposed rule strikes an appropriate balance between the policies of protecting confidential information of a prospective client on the one hand, and allowing access to legal services without imposing the same disqualification consequences as in the case of a current or former client on the other. The commenter has identified some of the policy reasons against screening that the Commission fully considered. The Commission believes that

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						the proposed rule, including the provision for unconsented screening would effectuate better public protection than the status quo of not having any rule at all. Given the importance of confidentiality to a lawyer's effective provision of legal services, a rule addressing prospective client duties is appropriate. Some provisions of the rule are already the law in California and do not establish new standards. Accordingly, placing these provisions in the disciplinary rules will alert lawyers to these important duties. The rule focuses on how a lawyer must conduct themselves during a consultation to protect not only the prospective client but also to protect current clients from losing the lawyer of their choice, thus enhancing compliance with duties and public protection, and promoting confidence in the legal profession.
Y-2016-23a	Sall, Spencer, Callas & Krueger (Sall) (01-09-17)	Yes	M		Adoption of the rule in its current form is opposed and the provisions on screening should be deleted entirely or substantially limited.	Generally, the Commission believes that the rule strikes an appropriate balance between protecting confidential information of a prospective client and allowing

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						access to legal services without imposing the same disqualification consequences as in the case of a current and former client.
					1. No screening of potential clients is appropriate except where screening would be permitted by proposed rule 1.10 and screening is never appropriate where a lawyer is engaged in conduct that essentially is side-switching on a client.	1. The Commission believes that paragraph (c) protects against situations in which the lawyer who consults with a prospective client "switches sides" in the same matter. Side switching in cases such as *Henriksen* and as discussed in *Kirk* involved lawyers who were shown to have had significant involvement in the prior matter. Paragraph (c) would prohibits such a lawyer from representing a client with materially adverse interests in the same or a substantially related matter.
					2. Even if screening is permitted, the scope of subdivision (d)(2) is overbroad.	2. Under the proposed rule, whether a lawyer can be screened to avoid imputation of the lawyer's disqualifying conflict to the firm depends on a number of factors, including the level of information the lawyer receives. (Compare proposed rule 1.10(a)(2).) Screening is not available if the lawyer failed to take

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						reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. If the amount of information the firm has considered in making that determination is substantial and includes disqualifying information, screening would not be available under paragraph (d).
Y-2016-21s	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	D		1. Neither this proposed rule nor proposed rule 1.0 defines "materially adverse" or why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.	1. The term "materially adverse" is not intended to be given a one-size-fits-all construction and is not susceptible to a simple blackletter definition. As in the case of other rules using the same term (e.g., rule 1.9), the term must be applied in a manner that appreciates the particular facts and circumstances of the matters under consideration. This is the case in the jurisdictions that have adopted a version of this rule. Generally, ethics opinions provide explanatory guidance on applying the term. (See, e.g., New York City Bar Ass'n Op. 2013-01 (10/1/13); see also New York State Bar

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						Ass'n Op. 1103 (7/15/2016) (applying the term in the context of NY Rule 1.9). The Commission anticipates that a similar approach to clarifying the term would be the case in California. 2. The term "knowingly" is a defined term in rule 1.0.1(f) and includes the concept that "[a] person's knowledge may be inferred from circumstances." The Commission believes this is the appropriate standard for paragraph (c) of this rule.
					2. OCTC is also concerned about the use of the term "knowingly" in paragraph (c) and in the other conflict rules.	
Y-2016-7n	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Yes	A	1.18	COPRAC supports the adoption of proposed Rule 1.18	No response required.
Y-2016-13	US Department of Justice (DOJ) (Ludwig) (01-06-2017)	Yes	A	1.18	In our September 27, 2016 letter, we wrote to "support the adoption of [a] proposed Rule that addresses a lawyer's obligations with respect to information communicated in confidence to a lawyer by a prospective client." We appreciate the Commission's willingness to reconsider its decision to omit such a rule and support proposed Rule 1.18 as drafted.	No response required.