AGENDA ITEM
702 NOV 2016

DATE: November 4, 2016

TO: Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Return from Public Comment and Request for Release for Additional Public Comment

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EXECUTIVE SUMMARY

The Board of Trustees ("Board") has assigned the Commission for the Revision of the Rules of Professional Conduct ("Commission") to conduct a study of the Rules of Professional Conduct of the State Bar of California ("rules") and to recommend comprehensive amendments. The Commission drafted sixty-eight proposed new and amended rules that the Board authorized for a 90-day public comment period. Following consideration of the public comments received, the Commission made substantive changes to thirty of the proposed rules in response to the comments received. This agenda item presents the Commission's request for an additional 45-day public comment period on these revised rules. In addition, the Commission has drafted two proposed rules that were not a part of the initial 90-day public comment period and the Commission requests that these two proposed rules be included in the 45-day public comment period. In a separate agenda item, the Commission requests Board adoption of proposed rules that the Commission has not substantively revised following consideration of public comments. (See Board agenda item 701 NOV 2016.)

Members with questions about this agenda item may contact Randall Difuntorum: (415) 538-2161 or State Bar of California, 180 Howard Street, San Francisco, CA 94105.

BACKGROUND

The Rules of Professional Conduct of the State Bar of California are attorney conduct rules, the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval.[1]

[1] Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state." Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar."

At the Board's November 2014 meeting, the Board authorized the State Bar President's appointment of the Commission and directed the Commission to conduct a study of the Rules of Professional Conduct with the goal of proposing comprehensive amendments for final Board action in early 2017. (See Board Open Session Agenda Item 123, November 7, 2014.) General information about the Commission is found online at the Commission's page on the State Bar website: http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx. The information available includes: a roster of the members of the Commission (including, advisors and liaisons); action summaries of the Commission's meetings; and an FAQ on public attendance at open session Commission meetings. The Commission has conducted twenty-five meeting days beginning with its first meeting held on March 27, 2015.[2]

At its June 2 - 3, 2016 meeting, the Commission completed the first stage of its project to propose comprehensive revisions by studying all of the current rules and, with one exception, all of the American Bar Association Model Rules of Professional Conduct ("Model Rules"). The Commission prepared sixty-eight proposed new and amended rules that were presented to the Board at its June 23, 2016 meeting. At that meeting, the Board authorized a 90-day public comment period and a public hearing to receive comments on the proposed rules.[3]

ISSUE PRESENTED

The Commission has completed the second stage of its project by considering all of the public comments and public hearing testimony on the proposed rules. At its meeting on October 21 - 22, 2016, the Commission made substantive changes to some but not all of the proposed rules in response to the public input. In this agenda item, the Commission requests Board authorization for an additional 45-day public comment on the proposed rules that have been substantively changed. In addition, the Commission drafted two proposed rules that were not a part of the initial 90-day public comment period and the Commission requests that these two proposed rules be included in the 45-day public comment period. Accordingly, the issue presented here is whether to authorize the requested public comment period. Authorizing the requested public comment period would position the Commission and the Board to review the anticipated public input and timely consider the issue of whether to adopt these rules prior to the deadline for submission to the Supreme Court in 2017. In a separate agenda item, the Commission is requesting that the Board adopt the proposed rules that were not substantively revised following the initial 90-day public comment period.

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[2] The Commission last met on October 21 – 22, 2016 in Los Angeles. The next meeting of the Commission is scheduled for January 20 – 21, 2016 in San Francisco.

[3] The Rules of Professional Conduct are rules of the State Bar and the procedures for considering amendments to rules of the State Bar require publication for public comment. (Board Book, Tab 12, Title 1, Division 2, Rule 1.10.)

DISCUSSION

1. The Commission Charter

At the Board's November 7, 2014 meeting, the Board adopted a Commission Charter that was informed by instructions provided in a September 19, 2014 letter to the State Bar from Frank A. McGuire, Court Administrator for the Supreme Court of California. The Commission Charter is set forth below.

COMMISSION CHARTER

> The Commission is charged with conducting a comprehensive review of the existing California Rules of Professional Conduct and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017. In conducting its review of the existing Rules and developing proposed amendments to the Rules, the Commission should be guided by the following principles:
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> > 1. The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
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> > 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.
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> > 3. The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, 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 with respect to professional responsibility issues whenever possible.
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> > 4. The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.
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> > 5. Substantive information about the conduct governed by the rule should be included in the rule itself. 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.
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> The proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.

2. Proposed New and Amended Rules

In accordance with the Charter, the Commission drafted seventy proposed new and amended rules. Sixty-eight proposed rules were submitted to the Board and issued for public comment

and subsequently two additional rules were drafted that have not yet been issued for public comment. The Commission's proposal includes both substantive and non-substantive changes to the text of the current Rules,[4] as well as proposals for new rules for which there are no counterparts in the current Rules.[5]

Attachment 1 provides the full text of all of the proposed rules with a table of contents. The presentation of the proposed rules in this document distinguishes between the rules that are the subject of the Commission's separate request for Board adoption and the rules for which the Commission is requesting an additional 45-day public comment. All of the proposed rules are provided in this document to allow the Board to see the proposed rules in context as many rules are interrelated and include key cross references to other rules. As previously indicated, the issue presented in this agenda item is whether to authorize the requested 45-day public comment period to obtain input on the proposed substantive changes and to seek input, for the first time, on two new proposed rules that were drafted recently by the Commission and not included in the original 90-day public comment period.

Attachment 2 provides for each of the thirty-two rules proposed for public comment: (1) an executive summary,[6] (2) a clean version draft, (3) a redline comparison draft to the current California rule or Model Rule counterpart, (4) where appropriate, a redline comparison draft showing non-substantive changes to the original public comment version of the rule, and (5) with the exception of the two rules recently drafted by the Commission, a public comment

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[4] One non-substantive revision is the Commission's recommendation that the current rules be re-numbered to follow the rule numbering and organization of the ABA Model Rules. In some situations, there are variations from the ABA numbering. For example, the rule prohibiting sexual relations with a client in the Model Rules is subsumed as a paragraph of an omnibus rule, Model Rule 1.8 (Conflicts of Interest; Current Clients; Specific Rules). The Commission is recommending that the rules subsumed within Model Rule 1.8 be given separate numbers, but in a sequence that tracks the order of Model Rule 1.8. Thus, in the Model Rules, the sexual relations rule is Model Rule 1.8(j) but in the Commission's proposed rules, the recommended rule number is rule 1.8.10.

Another global revision is the substitution of the term "lawyer" for the term "member" throughout the Commission's proposed rules. Use of the term "lawyer" reflects the fact that the rules are binding on practitioners who are not members of the State Bar, such as lawyers who are appearing as counsel *pro hac vice* under Rule of Court 9.40.

Both the rule numbering of the Model Rules and the use of the term "lawyer" rather than "member" are national standards as all other United States jurisdictions except California have rules that are based upon the Model Rules.

[5] Each of the Commission's proposals for a new rule that does not have an existing California counterpart is derived at least in part from a rule in the Model Rules that has been adopted in a preponderance of the jurisdictions.

[6] For purposes of continuity, the executive summaries begin with the same information that was provided to the Board in June when the initial 90-day public comment period was requested by the Commission. Added at the end of each summary is a new section addressing "Post-Public Comment Revisions." This new section summarizes the changes made by the Commission in the version of the rule that is being recommended for additional public comment.

synopsis table that includes the Commission's responses to the points raised by the initial public comments and testimony received.[7]

Attachment 3 provides a Commission report on seven Model Rules that were studied but are not being recommended by the Commission. During the 90-day public comment period, comments were received on three of these Model Rules. For one of these three Model Rules, Model Rule 1.18 (Duties to Prospective Clients), the Commission agreed with the public comments urging reconsideration and adoption of this rule and the Commission prepared a proposed rule that is recommended for inclusion with the proposed rules for which a 45-day public comment period is requested. For the remaining six Model Rules, while staff does not believe that it is necessary for the Board to affirmatively vote on the Commission's recommendations to reject a Model Rule, the Board can elect to confirm those recommendations by a vote, on either a case-by-case or inclusive basis.

3. Proposed Rules 1.18 and 2.1

In addition to working on the rules that were the subject of the 90-day public comment period authorized by the Board last June, the Commission has drafted two proposed rules: rule 1.18 (re prospective clients) and rule 2.1 (lawyer as an advisor) that were not a part of the initial 90-day public comment period. As mentioned above, rule 1.18 was presented to the Board last June as a Model Rule that was considered by the Commission but not recommended for adoption. Public comment was received that persuaded the Commission to prepare a version of rule 1.18 for public comment. Similarly, Model Rule 2.1 was not yet studied by the Commission when the Commission made its request last June for the initial 90-day public comment period. The Commission has now completed a study of that Model Rule and has prepared a draft for public comment. The Commission is requesting that these two rules be included in the 45-day public comment period.

4. Plan for Presenting the Proposed Rules

Set forth below is a table[8] presenting a recommended process, similar to a consent agenda procedure, for the Board to take action on the rules recommended for adoption. There are thirty-two proposed rules that are requested for the 45-day public comment period. The majority of these proposed rules should not require an individual presentation and vote. Staff has identified seventeen proposed rules that fall into this category. It is recommended that the Board consider taking one vote to authorize public comment for these seventeen proposed rules, provided that no Board member expresses interest in selecting one or more of these rules for individual

[7] If a member of the Commission has dissented from an action taken by the Commission, then the statement of that dissenting Commission member is provided as a part of the relevant executive summary.

[8] The first column lists the proposed rule considered by the Commission. The second column provides the rule number of a counterpart, if any, in the existing California rules. If there is no counterpart, then "n/a" is entered in the second column for that proposed rule. The third column is staff's attribution of a level of controversy, if any, posed by the proposed rule (namely, "Not Controversial," "Moderately," and "Very"). A brief issue statement of a representative issue also appears in the third column; however, a rule's executive summary in Attachment 2 should be consulted to fully understand the brief issue statement. The fourth column indicates the anticipated process for acting on the proposed rule in terms of a possible "one vote" on seventeen proposed rules and separate votes on the other rules.

discussion and action, similar to a consent agenda procedure. In the last column in the table below, these seventeen rules are designated for "ONE VOTE."

This would leave fifteen proposed rules for planned separate presentations and votes. In the table below each of these fifteen proposed rules is marked by a grey shaded row with text highlighted in yellow. Representatives of the Commission will attend the Board meeting and will be prepared to discuss these proposed rules prior to taking a vote. However, rather than considering each of these fifteen rules individually with fifteen votes, there are eight rules that are appropriate for presentation in four discrete groups with a single vote to adopt all of the rules in the respective group, provided that no Board member expresses interest in culling-out one of these eight rules for an individual vote. These four groups are identified below the table. If the foregoing procedure is used, then the public comment authorization for the thirty-two proposed rules would be considered by addressing: seventeen rules with a single "consent" vote; eight rules presented as four groups with four votes; and seven individually presented rules for seven separate votes.

PROPOSED RULE	**Current Rule**	**Controversy Level** (representative issue(s))	**Plan for November Board of Trustees Meeting**
1.0 Purpose and Function of the Rules of Professional Conduct	1-100	Moderately (pro bono comment)	Separate Presentation
1.2.1 Advising or Assisting the Violation of Law	3-210	Moderately (medical marijuana)	Separate Presentation
1.3 Diligence	3-110(B)	Moderately (in the current rules, diligence is a part of competence)	Separate Presentation (in a group with rule 5.1)
1.5 Fees for Legal Services	4-200	Very (restriction on non-refundable fee arrangements)	Separate Presentation (in a group with rule 1.15)
1.7 Conflict of Interests: Current Clients	3-310	Very (hybrid approach with elements from the current CA rules and the Model Rules)	Separate Presentation
1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to the Client	3-300	Moderately (no requirement to advise a client to seek independent counsel if the client is already represented;	Separate Presentation

PROPOSED RULE	Current Rule	Controversy Level (representative issue(s))	Plan for November Board of Trustees Meeting
		applies to former client in some circumstances)	
1.8.3 Gifts from Client	4-400	Moderately (conforms to Probate Code protocol)	ONE VOTE
1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	4-210	Moderately (indigent client costs)	ONE VOTE
1.8.7 Aggregate Settlements	3-310(D)	Not Controversial	ONE VOTE
1.8.10 Sexual Relations with Client	3-120	Very (adopts ban; creates inconsistency with State Bar Act)	Separate Presentation
1.9 Duties to Former Clients	3-310(E) (6068(e)	Moderately ("generally known" information exception; recognition in Comment of *Wutchumna* case and *Oasis* case)	ONE VOTE
1.11 Special Conflicts of Interest for Former And Current Government Officers And Employees	n/a (but see 3-310)	Moderately (imputes conflicts for disciplinary purposes; permits unconsented screening)	Separate Presentation (in a group with rule 1.12)
1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	n/a (but see 3-310)	Moderately (imputes conflicts for disciplinary purposes; permits unconsented screening)	Separate Presentation (in a group with rule 1.11)
1.13 Organization as Client	3-600	Moderately (no whistleblower provision for private or gov't)	ONE VOTE
1.14 Client with Diminished Capacity	n/a (but see 3-100 and 6068(e))	Very (authorizes limited action that might conflict with client autonomy)	Separate Presentation

PROPOSED RULE	Current Rule	Controversy Level (representative issue(s))	Plan for November Board of Trustees Meeting
1.15 Safekeeping of Funds and Property of Clients and Other Persons	4-100	Very (codifies duties to non-clients; requires advance fees to be held in trust)	Separate Presentation (in a group with rule 1.5)
1.16 Declining Or Terminating Representation	3-700	Not Controversial	ONE VOTE
1.17 Sale of a Law Practice	2-300	Moderately (does not address sale of area of practice)	ONE VOTE
1.18 Duties to Prospective Clients (recently drafted by the Commission, previously rejected and not included in the initial 90-day public comment period)	n/a	Very (includes non-consensual screening)	Separate Presentation
2.1 Advisor (recently drafted by the Commission, not included in the initial 90-day public comment period)	n/a	Moderately (no current CA rule)	ONE VOTE
2.3 Evaluation for Use by Third Persons **REJECT**	n/a	Not Controversial	NO MOTION/VOTE NEEDED
3.1 Meritorious Claims and Contentions	3-200	Not Controversial	ONE VOTE
3.3 Candor Toward the Tribunal	5-200(A) – (D)	Moderately (remedial measures; narrative approach)	ONE VOTE
3.5 Contact with Officials and Jurors	5-300 5-320	Moderately (restrictive judicial standard for gifts)	ONE VOTE
3.9 Advocate In Non-adjudicative Proceedings	n/a	Moderately (no current CA rule)	ONE VOTE
4.2 Communication with a Represented Person	2-100	Moderately ("party" to "person")	ONE VOTE

PROPOSED RULE	Current Rule	Controversy Level (representative issue(s))	Plan for November Board of Trustees Meeting
4.3 Dealing with Unrepresented Person	n/a	Moderately (no current CA rule)	ONE VOTE
4.4 Duties Concerning Inadvertently Transmitted Writings	n/a	Moderately (no current CA rule but there is case law)	ONE VOTE
5.1 Responsibilities of Managerial and Supervisory Lawyers	n/a (but see 3-110 Disc. ¶1)	Moderately (comparable managerial authority)	Separate Presentation (in a group with rule 1.3)
5.7 Responsibilities Regarding Law-related Services **REJECT**	n/a	Not Controversial	NO MOTION/VOTE NEEDED
6.1 Voluntary Pro Bono Publico Service **REJECT (but see rule 1.0, cmt. [5])**	n/a	Very (access to justice policy implications)	NO MOTION/VOTE NEEDED
6.2 Accepting Appointments **REJECT**	n/a	Not Controversial	NO MOTION/VOTE NEEDED
6.4 Law Reform Activities **REJECT**	n/a	Not Controversial	NO MOTION/VOTE NEEDED
7.1 Communications Concerning a Lawyer's Services	1-400	Moderately (discontinues CA single rule approach; omits existing standards used by OCTC)	ONE VOTE
7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges **REJECT**	n/a	Not Controversial (no current CA rule)	NO MOTION/VOTE NEEDED
8.1 False Statement Regarding Application for Admission, Readmission, Certification or Registration	1-200	Moderately (failure to correct a statement known to be false)	ONE VOTE
8.3 Reporting Professional Misconduct **REJECT**	n/a	Moderately (no current CA rule)	NO MOTION/VOTE NEEDED

PROPOSED RULE	Current Rule	Controversy Level (representative issue(s))	Plan for November Board of Trustees Meeting
8.4 Misconduct	1-120	Moderately (conduct that is prejudicial to the administration of justice; covert investigations)	Separate Presentation (in a group with rule 8.4.1)
8.4.1 Prohibited Discrimination, Harassment and Retaliation	2-400	Moderately (discontinues prerequisite for a civil finding; anti-bias provision not limited to client retention or firm management)	Separate Presentation (in a group with rule 8.4)
TOTAL = 32 rules recommended for 45-day public comment 7 ABA Model Rules not recommended[9]		**Very = 7** (1 rejected) **Moderately = 24** (1 rejected) **Not = 8** (5 rejected)	**One Vote = 17 rules** **Separate presentation = 15** (11 votes if groups used) **Rejected/no motion or vote needed = 7**

GROUPED RULE PRESENTATIONS (4 VOTES)

(1) Diligence and Supervision:
1.3 (diligence)
5.1 (supervision)

(2) Fees and Client Trust Accounting:
1.5 (fees)
1.15 (trust accounting)

(3) Imputation and Screening:
1.11 (government imputation)
1.12 (former judge imputation)

(4) Misconduct and Discrimination
8.4 (misconduct)
8.4.1 (discrimination)

[9] The seven rejected rules are: 2.3, 5.7, 6.1, 6.2, 6.4, 7.6 and 8.3.

INDIVIDUAL RULE PRESENTATIONS (7 VOTES)

(1) 1.0 (purpose of the rules)

(2) 1.2.1 (advising violation of the law)

(3) 1.7 (conflicts of interests, current clients)

(4) 1.8.1 (adverse interests/business transactions)

(5) 1.8.10 (sexual relations with a client)

(6) 1.14 (client with diminished capacity)

(7) 1.18 (duties to prospective clients)

4. Report on Public Hearing Testimony and Written Public Comments

A public hearing was held on July 26, 2016 at the State Bar's Los Angeles office with teleconference access for telephonic speakers and a video-conference link to the San Francisco office for speakers who were able to attend at the San Francisco office location.[10] Each of these access options was used by at least one speaker. There were ten speakers who provided twenty-one individual comments on discrete rule topics as most speakers addressed more than one proposed rule. The speakers included representatives from the United States Department of Justice and the Public Defender's Office of Los Angeles County.

The 90-day public comment period ended on September 27, 2016. Approximately 520 individual comments were received on discrete rule topics from 135 public comment submissions. Public commenters were encouraged to use an online form for submitting comments. The online form included the following fields for indicating a commenter's position on a proposed rule: (1) agree with this proposed rule; (2) disagree with this proposed rule; (3) agree only if modified; and (4) state no preference. About thirty percent (30.5%) indicated agreement with proposals and about 25% (25.5%) indicated disagreement. About forty percent (40.3%) indicated agreement only if a proposal was modified. About three percent (3.5%) marked the box on the online form for "state no preference."

Among the organizations that submitted a written comment or provided testimony are the following: American Immigration Lawyers Association of Northern California; Association of Corporate Counsel; Bar Association of San Francisco Legal Ethics Committee; Black Women Lawyers Association of Los Angeles, Inc.; California Attorneys for Criminal Justice; League of California Cities; Los Angeles County Bar Association; Loyola Law School Project for the Innocent; Orange County Bar Association; San Diego County Bar Association; State Bar Commission on Access to Justice; State Bar Committee on Professional Responsibility and Conduct ("COPRAC"); State Bar Committee on the Delivery of Legal Services; State Bar Office

[10] The Commission considered public comments and public hearing testimony at its meetings on August 26, 2016, September 30, 2016, and October 21 - 22, 2016. Commission votes and action in response to public comments was taken only at the Commission's October 21 - 22, 2016 meeting.

of the Chief Trial Counsel; and the United States Department of Justice. In addition, an informal group of law professors who teach legal ethics and a group of large Bay Area law firms concerned about advanced waivers of conflicts of interest each submitted letters with multiple signatories.

Detailed public comment synopsis tables are found in Attachment 2 and include the Commission's response to issues raised by commenters. Attachment 2 also provides redline versions of the rules that show the changes to the original 90-day public comment versions. The full text of the public hearing transcript and the written public comments are voluminous and are available upon request from the Office of Professional Competence.[11]

Next Steps for Completion of the Rule Revision Project

If the Board agrees with the Commission's recommendation to authorize a 45-day public comment period on the proposed rules presented in this agenda item, then the public comment period would end approximately on January 9, 2017. This would give the Commission two two-day meetings (scheduled for January 20 - 21, 2017 in San Francisco and February 2 - 3, 2017 in Los Angeles) to study the public input and prepare a recommendation for Board action at the Board's March 10, 2017 meeting. Rules adopted at this March 10th meeting would be combined with the other rules adopted by the Board and prepared for submission to the Supreme Court by the deadline of March 31, 2017.[12]

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item requests Board authorization for a 45-day public comment period on proposed new and amended Rules of Professional Conduct. Board action to adopt these rules would occur only after the public comment process. In addition, Rule of Professional Conduct amendments adopted by the Board do not become binding and operative unless and until they are approved by the Supreme Court of California.

BOARD BOOK IMPACT

None.

[11] Contact Lauren McCurdy by email: lauren.mccurdy@calbar.ca.gov; by telephone: (415) 538-2107; or by mail: State Bar of California, 180 Howard Street, San Francisco, CA 94105.

[12] No amended rule would become operative unless and until the proposed rule is approved by the Supreme Court of California.

BOARD RESOLUTIONS

Should the Board of Trustees concur with the recommendation of the Commission for the Revision of the Rules of Professional Conduct, the following resolutions would be appropriate:

I. Resolution authorizing public comment on 17 proposed rules.

> **RESOLVED**, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, the following proposed new or amended Rules of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached: rules 1.8.3, 1.8.5, 1.8.7, 1.9, 1.13, 1.16, 1.17, 2.1, 3.1, 3.3, 3.5, 3.9, 4.2, 4.3, 4.4, 7.1 and 8.1; and it is
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> **FURTHER RESOLVED**, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

II. Resolutions authorizing public comment on 4 groups of proposed rules.

Proposed Rules 1.3 and 5.1 (re diligence and supervision)

> **RESOLVED**, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, the following proposed new or amended Rules of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached: rules 1.3 and 5.1; and it is
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> **FURTHER RESOLVED**, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rules 1.5 and 1.15 (re fees and client trust accounting)

> **RESOLVED**, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, the following proposed new or amended Rules of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached: rules 1.5 and 1.15; and it is
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> **FURTHER RESOLVED**, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rules 1.11 and 1.12 (re imputation and screening)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, the following proposed new or amended Rules of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached: rules 1.11 and 1.12; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rules 8.4 and 8.4.1 (re misconduct and discrimination)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, the following proposed new or amended Rules of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached: rules 8.4 and 8.4.1; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

III. Resolutions authorizing public comment on the remaining 7 individual proposed rules.

Proposed Rule 1.0 (re the purpose of the rules)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.0 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.2.1 (re advising violation of law)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.2.1 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.7 (re conflicts of interests, current clients)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.7 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.8.1 (re adverse interests and business transactions)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.8.1 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.8.10 (re sexual relations with clients)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.8.10 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.14 (re representing a client with diminished capacity)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed amended Rule 1.14 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

Proposed Rule 1.18 (re duties to prospective clients)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment for a period of 45-days, proposed new Rule 1.18 of Professional Conduct prepared by the Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT(S) LIST

Attachment 1: Full text of the proposed rules with a table of contents.

Attachment 2: Executive summaries, rule drafts (clean, redline), and public comment synopsis tables of comment letters and public hearing testimony received for each of the proposed rules.

Attachment 3: Report on Model Rules that are not being recommended by the Commission.

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The bracketed number after the proposed rule number is the current California rule number, if any.
An asterisk (*) identifies a word or phrase defined in the terminology rule, Rule 1.0.1.

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CLIENT-LAWYER RELATIONSHIP

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

(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.

Rule 1.0.1 [1-100(B)] Terminology – [Adoption]

(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.

Rule 1.1 [3-110] Competence – [Adoption]

(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.

Rule 1.2 [3-210] Scope of Representation and Allocation of Authority – [Adoption]

(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).

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law – [Public Comment]

(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) 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] 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] 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.

Rule 1.3 [3-110(B)] Diligence – [Public Comment]

(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.

Rule 1.4 [3-500] Communication with Clients – [Adoption]

(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.

Rule 1.4.1 [3-510] Communication of Settlement Offers – [Adoption]

(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.

Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance – [Adoption]

(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.

Rule 1.5 [4-200] Fees for Legal Services – [Public Comment]

(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.

Rule 1.5.1 [2-200] Fee Divisions Among Lawyers – [Adoption]

(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.*

Rule 1.6 [3-100] Confidential Information of a Client – [Adoption]

(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 the lawyer reasonably believes* 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.

Rule 1.7 [3-310] Conflict of Interest: Current Clients – [Public Comment]

(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:

(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 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. 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, claim, controversy, 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 (a) and (b) do 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 a legal position on behalf of a client might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter does not alone 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.

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client – [Public Comment]

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.

Rule 1.8.2 Use of Current Client's Information – [Adoption]

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.

Rule 1.8.3 [4-400] Gifts from Client – [Public Comment]

(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).

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client – [Public Comment]

(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.

Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client – [Adoption]

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.

Rule 1.8.7 [3-310(D)] Aggregate Settlements – [Public Comment]

(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.

Rule 1.8.8 [3-400] Limiting Liability to Client – [Adoption]

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).

Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review – [Adoption]

(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.*

Rule 1.8.10 [3-120] Sexual Relations with Current Client – [Public Comment]

(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 current 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 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9 – [Adoption]

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.

Rule 1.9 [3-310(E)] Duties To Former Clients – [Public Comment]

(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;* or

(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 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 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 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 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.

Rule 1.10 Imputation of Conflicts of Interest: General Rule – [Adoption]

(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) or (b) 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 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees – [Public Comment]

(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).

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral – [Public Comment]

(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.

Rule 1.13 [3-600] Organization as Client – [Public Comment]

(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 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 for purposes of the authorized matter.

[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 1.14 Client with Diminished Capacity – [Public Comment]

(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.

Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons* – [Public Comment]

(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.

(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.

(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.

Rule 1.16 [3-700] Declining or Terminating Representation – [Public Comment]

(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.

Rule 1.17 [2-300] Sale of a Law Practice – [Public Comment]

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).

Rule 1.18 Duties To Prospective Client – [Public Comment]

(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.

COUNSELOR

Rule 2.1 Advisor – [Public Comment]

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.4 Lawyer as Third-Party Neutral – [Adoption]

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in Rule 1.12.

[3] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator – [Adoption]

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

ADVOCATE

Rule 3.1 [3-200] Meritorious Claims and Contentions – [Public Comment]

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) 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, may nevertheless defend the proceeding by requiring that every element of the case be established.

Rule 3.2 Delay of Litigation – [Adoption]

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.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

Rule 3.3 [5-200(A)-(D)] Candor Toward the Tribunal* – [Public Comment]

(a) A lawyer shall not:

(1) knowingly make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code § 6068(e) and Rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(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.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code § 6068(e) and Rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know* of a violation of paragraph (b) after the lawyer's representation has concluded. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel – [Adoption]

A lawyer shall not:

(a) 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. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(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.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

Rule 3.5 [5-300, 5-320] Contact with Judges, Officials, Employees, and Jurors – [Public Comment]

(a) Except as permitted by statute an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court; or

(2) with the consent of all other counsel in the matter; or

(3) in the presence of all other counsel in the matter; or

(4) in writing* with a copy thereof furnished to all other counsel in the matter; or

(5) in ex parte matters.

(c) As used in this Rule, "judge" and "judicial officer" shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* 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.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 [5-120] Trial Publicity – [Adoption]

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a

substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6, lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, general area of residence, and occupation of the accused;

(ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this Rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (iii) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and Rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7 [5-210] Lawyer as Witness – [Adoption]

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

(1) the lawyer's testimony relates to an uncontested issue or matter;

(2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall

be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent,* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].

Rule 3.8 [5-110] Special Responsibilities of a Prosecutor – [Adoption]

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:*

(1) The information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) There is no other feasible alternative to obtain the information;

(f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although this Rule does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and this Rule is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See Rule 4.2.)

[8] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Rule 3.9 Advocate in Non-adjudicative Proceedings – [Public Comment]

A lawyer representing a client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This Rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges – [Adoption]

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue "all available legal remedies," or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others – [Adoption]

In the course of representing a client a lawyer shall not knowingly:*

(a) make a false statement of material fact or law to a third person;* or

(b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code § 6068(e)(1) or Rule 1.6.

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See Rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Rule 4.2 [2-100] Communication with a Represented Person – [Public Comment]

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person* the lawyer knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:

(1) A current officer, director, partner,*or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

(c) This Rule shall not prohibit:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

(d) For purposes of this Rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the

comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This Rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this Rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person,* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This Rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This Rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v.*

Superior Court (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.

Rule 4.3 Communicating with an Unrepresented Person – [Public Comment]

(a) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* incorrectly believes* the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings* – [Public Comment]

Where it is reasonably* apparent to a lawyer who receives a writing* relating to the lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.

[2] This Rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers – [Public Comment]

(a) A lawyer who individually or together with other lawyers possesses managerial authority in

a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these Rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules.*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities might satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[8] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,*associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.

Rule 5.2 Responsibilities of a Subordinate Lawyer – [Adoption]

(a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.

(b) 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.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants – [Adoption]

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

Rule 5.3.1 [1-311] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer – [Adoption]

(a) For purposes of this Rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

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

(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(5) "Restricted lawyer" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.

(b) A lawyer shall not employ, associate in practice with, or assist a person* the lawyer knows* or reasonably should know* is a restricted lawyer to perform the following on behalf of the lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities that constitute the practice of law.

(c) A lawyer may employ, associate in practice with, or assist a restricted lawyer to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing, associating in practice with, or assisting a person* the lawyer knows* or reasonably should know* is a restricted lawyer, the lawyer shall serve upon the State Bar written* notice of the employment, including a full description of such person's current bar status. The written* notice shall also list the activities prohibited in paragraph (b) and state that the restricted lawyer will not perform such activities. The lawyer shall serve similar written* notice upon each client on whose specific matter such person* will work, prior to or at the time of employing, associating with, or assisting such person* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written* notice and shall retain such proof and a true and correct copy of the client's written* notice for two years following termination of the lawyer's employment by the client.

(e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist a restricted lawyer whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(f) When the lawyer no longer employs, associates in practice with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

Comment

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 1.13.)

Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements with Nonlawyers – [Adoption]

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer's estate or other representative;

(3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act;

(4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or

(5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm* in the matter.

(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;

(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,* organization or group to practice law in violation of these Rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law – [Adoption]

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice – [Adoption]

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or

(2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

PUBLIC SERVICE

Rule 6.3 Membership in Legal Services Organization – [Adoption]

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code § 6068(e)(1) or Rules 1.7 or 1.9; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

Rule 6.5 [1-650] Limited Legal Services Programs – [Adoption]

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows* that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows* that another lawyer associated with the lawyer in a law firm* is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Comment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable* under the

circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1) and Rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows* that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows* that another lawyer in the lawyer's law firm* would be disqualified under Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows* that any lawyer in the lawyer's firm* would be disqualified under Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm* or preclude the lawyer's law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 [1-400] Communications Concerning a Lawyer's Services – [Public Comment]

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar

matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising – [Adoption]

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.

(b) A lawyer shall not compensate, promise or give anything of value to a person* or entity for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,* except that a lawyer may:

(1) pay the reasonable* costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if

(i) the reciprocal referral arrangement is not exclusive, and

(ii) the client is informed of the existence and nature of the arrangement;

(5) offer or give a gift or gratuity to a person* or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given 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.

(c) Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

Rule 7.3 [1-400] Solicitation of Clients – [Adoption]

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person* contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person* being solicited has made known* to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.

(e) As used in this Rule, the terms "solicitation" and "solicit" refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.

Comment

[1] A lawyer's communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of

informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with Rules 7.1, 7.2, and 7.3(b). See also Rules 5.4 and 8.4(a).

Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization – [Adoption]

(a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

(1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and

(2) the name of the certifying organization is clearly identified in the communication.

(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

Rule 7.5 [1-400] Firm* Names and Trade Names – [Adoption]

(a) A lawyer shall not use a firm* name, trade name or other professional designation that violates Rule 7.1.

(b) A lawyer in private practice shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates Rule 7.1.

(c) A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm* or other organization unless that is the fact.

Comment

The term "other professional designation" includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 [1-200] False Statement Regarding Application for Admission to Practice Law – [Public Comment]

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows* to be false or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false .

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known* by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Comment

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by Rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

Rule 8.1.1 [1-110] Compliance with Conditions of Discipline and Agreements in Lieu of Discipline – [Adoption]

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068(k) and (l).

Rule 8.2 [1-700] Judicial Officials – [Adoption]

(a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics. For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.

(c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Comment

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

Rule 8.4 [1-120] Misconduct – [Public Comment]

It is professional misconduct for a lawyer to:

(a) violate these Rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;

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

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, "judge" and "judicial officer" have the same meaning as in Rule 3.5(c).

Comment

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

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

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

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] This Rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation – [Public Comment]

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this Rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This Rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State

Bar Court proceeding relating to a violation of this Rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this Rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law – [Adoption]

(a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. *See e.g.*, Business and Professions Code § 6049.1.

Attachment 2 includes the following:

- Executive Summaries
- Proposed Rules Recommended for Additional Public Comment Circulation
- Redline to Public Comment Draft of the Proposed Rule (if applicable)
- Redline to the Current California Rule (if applicable)
- Redline to the ABA Model Rule (if applicable)
- Public Comment Synopsis Table with Commission's response (if applicable)

The following rules are being recommended for an additional public comment circulation and are included in Attachment 2:

- Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct
- Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
- Rule 1.3 Diligence
- Rule 1.5 [4-200] Fees for Legal Services
- Rule 1.7 [3-310] Conflict of Interest: Current Clients
- Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client
- Rule 1.8.3 [4-400] Gifts from Client
- Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
- Rule 1.8.7 [3-310(D)] Aggregate Settlements
- Rule 1.8.10 [3-120] Sexual Relations with Current Client
- Rule 1.9 [3-310(E)] Duties To Former Clients
- Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
- Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
- Rule 1.13 [3-600] Organization as Client
- Rule 1.14 Client with Diminished Capacity
- Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
- Rule 1.16 [3-700] Declining or Terminating Representation
- Rule 1.17 [2-300] Sale of a Law Practice
- Rule 1.18 Duties to Prospective Client
- Rule 2.1 Advisor
- Rule 3.1 [3-200] Meritorious Claims and Contentions
- Rule 3.3 [5-200] Candor Toward The Tribunal
- Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees and Jurors
- Rule 3.9 Advocate in Nonadjudicative Proceedings
- Rule 4.2 [2-100] Communication with a Represented Person
- Rule 4.3 Communicating with an Unrepresented Person
- Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
- Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
- Rule 7.1 [1-400] Communications Concerning a Lawyer's Services
- Rule 8.1 [1-200] False Statement Regarding Application for Admission to Practice Law
- Rule 8.4 [1-120] Misconduct
- Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-100 (Rules of Professional Conduct, In General) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. 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). This proposed rule 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.

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

[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.

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 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 public comment, the Commission made no changes to the text of the rule but did make two amendments to the rule Comments. In Comment [4], the phrase "sources of guidance" was replaced with the word "authorities." Comment [4] explains subparagraph (b)(2) of the rule and that subparagraph refers to binding law (the State Bar Act and "opinions of the California courts"). Accordingly, the Commission revised Comment [4] to use the word "authorities" as that is more accurate than "sources of guidance" in describing the State Bar Act and California case law.

In Comment [5], regarding voluntary pro bono as a professional responsibility, the Commission added a new sentence clarifying that a lawyer may fulfill their pro bono responsibility by providing financial support to organizations providing free legal services. In the course of discussing Comment [5], the Commission discussed the concept of mandatory reporting. One member of the Commission supported this approach and previously recommended a new paragraph (d) found in his dissent below.

Although the Commission did not take a position on mandatory reporting as an attorney regulatory concept, it did not believe that recommending a rule is appropriate at this time given that the Charter limits the Commission to Rule of Professional Conduct amendments. The Commission believed that further study of such a system is necessary, including the experiences of other jurisdictions that have implemented mandatory reporting. The Commission observed that some of the other jurisdictions place mandatory reporting obligations in their Rules of Court or State Bar rules, and not in their Rules of Professional Conduct. In doing so, these jurisdictions typically address a member's failure to report as an administrative enforcement process (similar to failure to report Continuing Legal Education compliance) rather than as a disciplinary matter. Ultimately, the Commission did agree that the concept of mandatory reporting as an issue for a separate and broader State Bar regulatory study would be appropriate to include in the Commission's final report.

(Staff note: The dissent below was submitted in connection with the Commission's original public comment version of proposed rule 1.0.)

Commission Member Dissent to the Recommended Adoption of Comment [5] to Proposed Rule 1.0, Submitted by Daniel E. Eaton

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. 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.

Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct (Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct (Commission's Proposed Rule Adopted on October 21–22, 2016 – Redline to Public Comment Draft Version)

(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. ~~*Id*~~*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 ~~sources of guidance~~ 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 ~~(financial support for programs providing pro bono legal services)~~.

Rule 1.0 [1-100] Purpose and Function of the Rules ~~Of~~of Professional Conduct~~, In General~~

(Redline Comparison of the Proposed Rule to Current California Rule)

(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.

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

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-1	Barnes, Scott (06-30-16)	No	D		The Bar has failed the people of California by making rules and not having the integrity to enforce them. Making rules with no accountability or enforcement is worthless…	Enforcement practices and policies are beyond the scope of the Commission's project to revise the rules. It should be noted, however, that pursuant to its Charter, the Commission is proposing new and amended rules that continue the function of the rules as disciplinary standards. The Commission has further made a deliberate effort to address ambiguities in rule language and to reconcile rules with developments in professional responsibility that have occurred since the rules were last revised. The Commission believes this approach will contribute to the effective enforcement of the rules by the State Bar.
X-2016-43b	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Y	M	Comment	COPRAC opposes moving the reference to ethics opinions from the main body of the rule to a comment. This provision has been part of the main body of Rule 1-100 for over 25 years. Including reference to ethics opinions in the main body of the rule informs lawyers that they have an obligation to understand their ethical duties and not merely	The Commission disagrees. Ethics opinions are advisory only. There is no duty to consult bar association ethics opinions. Moreover, the language used in current rule 1-100 is "should," which is not mandatory but aspirational. To include reference to bar association ethics opinions in the rule text is inconsistent

[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
					avoid violating the narrow letter of the rule. We believe removal from the main body of the rule sends a signal to lawyers that ethics opinions are less important under the new rules.	with the Commission's Charter.
X-2016-46	Johnson, Maxine (08-16-16)	No	M		I have a lawyer as a neighbor and he and his wife have gone throughout the neighborhood suing other neighbors. A lawyer should never have the ability to sue on behalf of a person he or she is either married to or having sex with prior to the lawsuit and benefitting from using the spouse or girlfriends name.	The conduct described in the comment pertains to proposed Rule3.1, which prohibits a lawyer from "bring[ing] or continu[ing] an action, conduct[ing] a defense, assert[ing] a position in litigation, or tak[ing] an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person. "
X-2016-37	Wade, Margena (08-10-16)	No	A		No lawyer should have sexual relations or a personal relationship with a client, unless that relationship is well established before or well after the case. Otherwise, there is too much gray area to allow this.	The substance of the comment pertains to proposed Rule 1.8.10. Please refer to the public commenter table for Rule 1.8.10 for the RRC response.
X-2016-67a	Orange County Bar Association (OCBA) (Friedland) (09-16-16)	Yes	D	1.0 Comment [5]	Although the Orange County Bar Association (OCBA) applauds the aspirational goal of having lawyers provide service to the public, including in the form of pro bono legal work for indigent clients, we do not believe that this aspirational goal belongs in the Rules of Professional Conduct,	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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					which are disciplinary rules. Indeed, we find it to be contradictory to tell lawyers they must follow the Rules under threat of discipline, but then carve out certain rules as being only aspirational and, thus presumably voluntary. In addition, we suggest that any specific reference to pro bono legal services should recognize that circumstances may vary widely between lawyers including new lawyers faced with a large amount of debt. To the extent that the Commission wants to include some aspirational aspect to Comment [5], the OCBA suggest that Comment [5] end after the phrase "for those who because of economic or social barriers cannot afford or secure adequate legal counsel."	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.
X-2016-76a	Los Angeles County Bar Association (LACBA) - Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC) (Schmid) (09-24-16)	Yes	M	Comment [2] and [5]	1. PREC believes that the language of Comment [2] of Proposed Rule 1.0 which states, in pertinent part, that "a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity" is overly broad and does not apply to all the rules. For example, Proposed Rules 7.1 [Communications Concerning A Lawyer's Services], 7.2 [Advertising] and 7.3 [Solicitation of Clients] may apply	1. The Commission disagrees that the cited language is overly broad. The sentence does not state "a violation of ***any*** rule can occur even when a lawyer is not practicing law or acting in a professional capacity." It states "a violation of ***a*** rule may occur even when a lawyer is not practicing law or acting in a professional capacity." That means that a rule, not every rule, may be

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					to services provided by lawyers outside of the practice of law. As a result, PREC recommends that the quoted language be revised to read "a violation of *some* rules *may* occur even when a lawyer is not practicing law or acting in a professional capacity."	violated in a non-lawyer capacity.
				Comment [5]	2. In addition, we note that at the Rules Revision Commission's January 22, 2016 meeting, the Commission determined that a proposed California version of ABA Model Rule 6.1 [Voluntary Pro Bono Publico Service] should not be adopted, and instead encouraged the drafting committee for that rule to (among other things) consider adding a new comment to Proposed Rule 1.0 emphasizing the importance of voluntary pro bono service. We understand that, in response, the drafting committee proposed the following new Comment [5]. While PREC continues to support the goals and aspirations encompassed in Model Rule 6.1, PREC believes that the above Comment [5] to Proposed Rule 1.0 clearly articulates the obligations of each lawyer to be aware of the needs for pro bono legal services and encourages members of the bar to devote at	2. 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.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					least 50 hours to pro bono legal services. For that reason, PREC strongly supports the adoption of Comment [5].	
X-2016-78	Legal Aid Association of California (LAAC) (Kline) (09-26-16)	Yes	M	Comment [5]	1. The State Bar's rules and regulations should include a formal statement that underscores this professional duty is essential if the State Bar is to effectively activate its membership to perform pro bono service. However, we believe that relying upon a *comment* to a Rule of Professional Conduct in order to achieve this higher level of pro bono activation, in this case the proposed Comment [5] to proposed Rule 1.0 is not enough to show the importance of this ethical obligation. ***Relegating what we believe is a major ethical duty to a comment of a rule undermines the State Bar's goal of elevating the Bar membership's awareness and commitment tofulfilling its pro bono responsibility.*** LAAC urges this body to adopt ABA model rule 6.1 as a separate rule in California's rules of professional conduct, rather than referring to the professional responsibility in a comment. Nearly every state in the nation has adopted a similar rule, and this would bring California in line	1. The Commission understands the concerns expressed by the commenter but continues to believe that a recommendation to adopt a rule patterned on ABA Model Rule 6.1 would be in direct conflict with its Charter principle to draft only mandatory rules that provide minimal disciplinary standards. The Commission believes that the inclusion of Comment [5] in proposed Rule 1.0, which sets forth the purpose and function of the Rules as a whole, will provide similar encouragement to lawyers to engage in the provision of pro bono legal services.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					with other jurisdictions. California law and the State Bar already both recognize the professional responsibility of voluntary pro bono legal services. We understand that there may be a concern that the rules of professional conduct include only "mandatory" rules for enforcement purposes, rather than aspirational rules. To the extent this is a concern, it can be easily addressed by making clear that the responsibility set forth in the rule is not enforceable through disciplinary process. 2. If the State Bar would like to limit the rules to only enforceable rules, we would support the State Bar passing a mandatory pro bono reporting rule, similar to rules adopted in many other states, recently by New York. We understand that best practices in other states include: 1. Requiring all active members (as opposed to a subset of the bar's active membership) to report their pro bono activity; 2. Ensuring there is no public disclosure of individuals' pro bono activity or contributions; 3. Ensuring the state bar only develops anonymous, aggregated data pertaining to	2. The Commission has discussed the concept of mandatory reporting. However, it does not believe that recommending such a rule would be appropriate at this time. The Commission believes that further study of such a system is necessary, including the experiences of other jurisdictions that have taken such an approach. The Commission also notes that in most jurisdictions, the provision is in Rules of Court or State Bar rules, not in the Rules of Professional Conduct. Further, a mandatory reporting requirement is beyond the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					members' pro bono activity and contributions; 4. Ensuring the state bar receives information pertaining to whether or not an individual member complied with the required pro bono reporting so that it can determine whether or not to impose consequences upon the individual for any failure to report; 5. Ensuring that aggregate anonymous data received by the state bar is made public and categorized by area of law, state bar district or county, practice setting, and other metrics in order to allow for ongoing assessment of needs, resources, and effectiveness; 6. Ensuring the required reporting periods are aligned with existing MCLE reporting or state bar dues cycles. Required pro bono reporting can be the catalyst for systemic change in California's justice system. It would bring to the forefront each lawyer's ethical duty to provide pro bono to the indigent, converting pro bono service from an aspirational directive to a professional responsibility of the utmost importance.	scope of the Commission's charge because it raises financing, budgetary, administrative and implementation considerations similar to CLE, that the Commission is not in a position to evaluate. However, the Commission will include in the Report on the proposed Rules this possibility when it is submitted to the Supreme Court.
X-2016-104a	Office of Chief Trial Counsel (OCTC)(Dresser) (09-27-16)	Yes	A		1. OCTC supports this rule. 2. OCTC supports Comments 2,	1. No response required. 2. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					3, and 4. 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. 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.	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. Please see response 2 to LACBA, X-2016-76a, above.
X-2016-102	Bar Association of San Francisco (BASF) Justice & Diversity Center (JDC) (Jackson) (09-27-16)	Yes	NI		[We] urge the Commission… to include Model Rule 6.1 in its proposed amendments…. If the State Bar and Supreme Court adopts Rule 6.1, it has the potential to exponentially increase pro bono services in California. It will empower legal services organizations, such as the JDC, in their efforts to recruit, train, and support pro bono	Please see response 1 to Legal Aid Association of California, X-2016-78, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					attorneys to represent our State's most vulnerable.	
X-2016-127	State Bar of California Standing Committee on the Delivery of Legal Services (SCDLS) (Wong) (09-27-16)	Yes	M		1. SCDLS commends the Commission for continuing to define pro bono service as an integral part of each lawyer's professional responsibilities. SCDLS similarly agrees that the inclusion of a formal statement in the State Bar's rules and regulations that underscores this professional duty is essential if the State Bar is to effectively activate its membership to perform pro bono service. However, SCDLS submits that relying upon a comment to a Rule of Professional Conduct in order to achieve this higher level of pro bono activation, in this case the proposed Comment [5], may not be the most effective way to acknowledge this critical professional obligation. SCDLS advises that relegating this responsibility to a comment beneath a Rule risks characterizing pro bono as an afterthought amongst many others rather than a central component of each lawyer's ethical obligation. 2. Accordingly, and in the event that Comment [5] is adopted,	1. Please see response 1 to Legal Aid Association of California, X-2016-78, above. 2. The Commission agrees with some of the suggested

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					SCDLS has dedicated its time and expertise to clarifying the language of the proposed Comment by recommending amendments that strengthen its wording without altering its substance. These recommended amendments are set forth in the attached enclosure.	changes and has implemented them in a revised draft of Comment [5].

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 the American Bar Association ("ABA") counterpart, 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). This proposed rule 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.

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 public comment, 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.

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean 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) 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] 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] 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.

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not ~~advise or knowingly*~~counsel a client to engage, or assist a client in ~~the~~conduct that the lawyer knows* is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal~~* unless the lawyer believes* in good faith that such law, rule, or ruling is invalid. A lawyer may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal~~.

(b) ~~A lawyer shall not advise or knowingly* assist a client in a fraudulent* act.~~ Notwithstanding paragraph (a), a lawyer may:

(~~c~~1) ~~A lawyer may~~ 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 ~~Rule 1.6 and~~ 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 (~~c~~b) 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] 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] 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.

Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Redline Comparison of the Proposed Rule to Current California Rule)

(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.

[4] Paragraph (b) 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] 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] 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 1.2.1 [3-210] Advising or Assisting the Violation of Law
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
X-2016-43aw	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-8-16)	Y	M	Cmt. 4	Comment 4 creates ambiguity with regard to the meaning of paragraph (c). Suggests that advice regarding consequences is permissible in only limited circumstances which conflicts with (c).	The Commission did not make any change in response to this concern. Comment [4] does not limit paragraph (c), it explains how to apply (c) and offers an example.
X-2016-32l	Law Professors (Zitrin) (07-25-16)	Y	M	1.2.1	Assisting a crime should also be prohibited under 1.2.1(b). While it is addressed in the comment, it should be a part of the rule too.	The Commission agreed in concept that the application of the proposed rule to assisting in a crime needed clarification. The Commission revised the language of paragraph (a) to use the comparable language in Model Rule 1.2(d).
X-2016-52l	Law Professors (Zitrin) (08-24-16)	Y	M	1.2.1	See X-2016-32l Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32l Law Professors (Zitrin) dated July 25, 2016.
X-2016-68l	Law Professors (Zitrin) (09-21-16)	Y	M	1.2.1	See X-2016-32l Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32l Law Professors (Zitrin) dated July 25, 2016.
X-2016-67b	Orange County Bar Association (OCBA) (Friedland) (09-16-16)	Y	M	1.2.1	Questions whether it is wise to include the phrase “knowingly assist” as part of the rule as it is vague and possibly subjects lawyers to discipline.	The Commission revised the language of paragraph (a) to use the comparable language in Model Rule 1.2(d). While the new language does use “”knows,” it does not use the phrase “knowingly assist.”

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

Proposed Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
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
X-2016-104e	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (09-27-16)	Y	M	1.2.1, cmt. 1	Proposed rule fails to prohibit attorney from attempting to violate rules.	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.

Proposed Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
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
					First sentence of comment 1 should be stricken as contrary to established case law.	The Commission did not make the requested deletion because it provides needed 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.
					Comment 3 incomplete because an attorney must first openly refuse to comply with the order before challenging it.	The Commission did not make the requested change because the openly refuse requirement might not be available in all circumstances.
X-2016-115h	Lamport, Stanley (09-27-16)	N	M		Rule needs a comment that will allow lawyers to assist clients with complying with California law when California law and federal law conflict, such as with respect to California's marijuana laws. This concept is consistent with Los Angeles County Bar Association Ethics Opinion 527 and an opinion promulgated by the San Francisco County Bar Association.	The Commission did not include a reference to marijuana laws as that example is particularly vulnerable to possible changes in the law. However, the Commission did add a new Comment [6]. This comment is an explanation of new paragraph (d) that permits advising on California laws so long as advice also is provided on potentially conflicting 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 for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 1.3 (Diligence) and relevant California disciplinary case law concerning the issue of diligence. The evaluation was made 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. Although the proposed rule has 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). This proposed rule 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.

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

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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.

Model Rules) in order to help promote a national standard[3] with respect to professional 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.

[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).

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 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.

[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.

Rule 1.3 Diligence
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.3 Diligence
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not intentionally, repeatedly, recklessly~~,~~ or with gross negligence~~, or repeatedly~~ 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 ~~without just cause,~~ 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.

Rule 1.3 Diligence
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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).

Proposed Rule 1.3 Diligence
Synopsis of Public Comments

TOTAL = 8	***A = 4***
	D = 1
	M = 3
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
2016-32c	Law Professors (Zitrin) (07-25-16)	Yes	A	1.3	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 MR 1.3 by adding the phrase "gross negligence" to the rule itself.	No response required.
X-2016-43f	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	M	(b)	COPRAC supports the concept of the Rule and its comments, but has suggested revisions in syntax for subsection (b). As to proposed Rule 1.3(b), it now provides: 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 without just cause, unduly delay a legal matter entrusted to the lawyer.** (*Emphasis added*). COPRAC worries that the provision, as drafted, could be read as providing that there could be "just cause" to "unduly delay"	The Commission agrees with the commenter's recommendation and has made the suggested change.

[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
					a legal matter. We believe that what we understand the intent of subsection (b) to be could be better expressed by a revision of the language as set forth below. COPRAC's Suggested Revised Rule 1.3: (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.	
2016-52c	Law Professors (Zitrin) (08-24-16)	Yes	A	1.3	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 MR 1.3 by adding the phrase "gross negligence" to the rule itself.	No response required.
X-2016-66b	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	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	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					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.	
X-2016-75b	Kerins, Steve (09-25-16)	No	M		In my opinion, gross negligence should not be a basis for attorney discipline; the existing bases of intentional, reckless, and repeated conduct are more than adequate for public protection. Please note that this comment is submitted solely in my personal capacity, and not in any representative capacity.	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
X-2016-68c	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-52c Law Professors (Zitrin) dated July 25, 2016 for comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-52c for Commission's response to the Law Professors' comments
X-2016-76c	Los Angeles County Bar Association (LACBA) - Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC) (Schmid) (09-24-16)	Yes	D		1. As Proposed Rule 1.1 defines competence to include diligence, PREC believes Proposed Rule 1.3 [Diligence] is unnecessary and inappropriate. 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."	1. Rule 1.1 does not define competence to include 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-2016-104f	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-2016)	Y	M		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.	1. 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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						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.	2. 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5
(Current Rule 4-200)
Fees For Legal Services

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 4-200 (Fees for Legal Services) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 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). This proposed rule 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.

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

[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.

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 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 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.

Rule 1.5 [4-200] Fees for Legal Services
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.5 [4-200] Fees for Legal Services
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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 ~~enter into an arrangement~~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 ~~as long as the lawyer performs the agreed upon services~~. A flat fee is a ~~fee which~~fixed amount that constitutes complete payment for ~~legal fees to be performed in the future for a fixed sum~~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.

[~~2~~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

[~~3~~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.

Rule 1.5 [4-200] Fees for Legal Services
(Redline Comparison of the Proposed Rule to Current California Rule)

(~~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.

Proposed Rule 1.5 [4-200] Fees for Legal Services
Synopsis of Public Comments

TOTAL = 15 *A = 1* *D = 6* *M = 8* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-4	Schrag, Frederic (07-01-16)	No	M	1.5	The proposed rule should be modified to allow lawyers to contract with clients to work on a specified matter for a minimum fee to be billed hourly at a specified rate of pay.	The Rule is not designed to regulate specific variants of fee agreements.
X-2016-5	Frieder, Linda (07-01-16)	No	D	1.5	Clarify Subdivision (e) of the proposed rule to address whether a flat fee must be deposited into a client trust account and disbursed only when the work is completed, or whether fees are earned for future services when paid by the client and need not to be deposited into a client trust account.	These issues are addressed in Rule 1.15.
X-2016-6	McCready, Zack (07-01-16)	No	D	1.5	The proposed rule does nothing to create or improve consumer protection and will most likely increase the cost of legal services in California. Flat fees protect clients from the very common and unethical practice of lawyers "churning" fees by filing frivolous motions, doing excessive amounts of discovery, reading and re-reading information solely for the purpose of increasing fees.	The Rule does not prohibit flat fees. It also does not prohibit nonrefundable fees under certain conditions.
X-2016-32m	Law Professors (Zitrin) (07-25-16)	Yes	D	1.5	1. The Commission has insisted, repeatedly and counter-intuitively, in retaining the word “unconscionable” to define the	1. The issue was considered by the Commission in its prior deliberations. As set forth in its Report and Recommendation,

[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
					propriety of fees. The ABA uses the far more intelligible word "unreasonable." California's own Business & Professions Code, in evaluating fee recoveries without written contracts, also uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective. Thus, the California rule would perpetuate use of a difficult-to-define, archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act. 2. The Commission should remove the word unconscionable and replace it with "unreasonable."	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. Retaining the unconscionable standard reserves a disciplinary remedy for those situations where the fee charged by a lawyer reflects unfitness to practice law.
2016-43i	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-17-16)	Yes	M	1.5	COPRAC suggests a limited exception to the currently proposed prohibition of contingent fees in criminal matters set forth in Proposed Rule 1.5(d)(2). This subsection	The Commission did not make the suggested change. An asset forfeiture proceeding is civil in nature.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					should be amended to provide the following language; "however, a lawyer may charge and collect a contingent fee for representation in an asset forfeiture proceeding if not otherwise prohibited by law."	
2016-48	Brain, Robert (08-18-16)	No	M	1.5	1. The prohibition against making an arrangement for, or collecting, an "unconscionable or illegal" fee should be changed to a prohibition against collecting, or seeking to collect an "unreasonable" fee. 2. A prohibition against making an arrangement for, or the collection of, "unreasonable expenses" should be added. 3. The provision prohibiting lawyers from entering into contingent fee arrangements in criminal matters should be deleted.	1. See response to Law Professors (Zitrin), X-2016-32m, above.) 2. The Commission did not make the suggested change. Whether an expense is unreasonable should not be the subject of discipline but should be addressed in fee arbitration. 3. The Commission did not make the suggested change. The Commission believes there are important policy reasons implicating an accused's Sixth Amendment rights that warrant including this provision in the rule. 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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						interests of the client, in light of the evidence, warrant the client entering a plea.
2016-52m	Law Professors (Zitrin) (08-24-16)	Yes	D	1.5	See X-2016-32m Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, X-2016-32m, above.
X-2016-66d	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	1.5	We support the proposed rule with the following comments. For purposes of lawyer discipline, we support the proposed rule's continued adoption of California's traditional "unconscionable fee" standard as opposed to the ABA's "reasonable fee" standard, especially given the former's long-standing support in California Supreme Court case law. We support the additional factors to be considered when determining unconscionability. We welcome and support the inclusion of subsections (c), (d), and (e).	No response required.
X-2016-68m	Law Professors (Zitrin) (09-22-16)	Yes	D	1.5	See X-2016-32m Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, X-2016-32m, above.
X-2016-71	Hoffman, Nathan (09-23-16)	No	D	1.5	That opens a huge can of worms about what it means for a "flat fee" to be "earned." Also, consider the situation	The Commission understands the commenter's concerns but it is the law that a lawyer may not retain a fee that is not fully earned because the promised

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					(which may occur often in estate planning) where the client pays a "flat fee" that is now required to be deposited into the attorney's trust account but then the client drops the ball in the follow-through to get the job finished, notwithstanding attorney's efforts to "complete" the assignment. At some stage, the attorney should be paid at his/her hourly rate for the time spent in the initial interview; file startup tasks and other proper work done for this client and presumably then refund to them the difference. This rule sets up a new dispute area between clients and counsel assuming that the clients do not agree with counsel as to the amount of fee requested and what it means for a flat fee to be earned. There is no incentive to meet the client's' request for a flat fee and only bill them hourly so that the attorney is timely paid for his/her work for the client.	services have not been provided. Only a true retainer as defined in paragraph (d) is earned upon receipt. A lawyer can mitigate the occurrence of a dispute over when a flat fee is earned by drafting a fee agreement that identifies benchmarks that describe when services have been provided. The lawyer also has other remedies including quantum meruit where the client's actions prevent the lawyer from completing the work
X-2016-81	Melchior, Kurt (09-26-16)	No	M	1.5	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	[Although filed under Rule 1.5.1, the commenter's submission appears to be directed at proposed Rule 1.5.] The timing of payment (i.e., prepayment or payment after

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					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 -- 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.	services are rendered) is distinct from whether a fee is a true retainer, a flat fee, or compensation for hourly services. When a client deposits money with a lawyer intended for the payment of fees, the timing of the deposit does not affect the characterization of the money as a true retainer, a flat fee or as advance deposit against hourly billings. The terms of the fee agreement determine the nature of the compensation arrangement between client and attorney. The Rule is not designed to address all possible variants of fee agreements.
X-2016-104j	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	1.5	1. OCTC finds the term "unconscionable fee" vague, difficult to understand, confusing, and very difficult to enforce. 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	1. See response to comment #1 of Law Professors, X-2016-32m, above. 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
					the same fee for these non-legal services at the legal services rate. 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. 4. OCTC believes that Comment 1 should be in the rule, not a Comment.	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. 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.
X-2016-96a	Bar Association of San Francisco (BASF) (Banola) (09-27-16)	Yes	M	1.5	1. The Commission's use of the term "overreaching" in subsection (b)(1) is ambiguous. We recommend that the Commission either define the term or eliminate the term altogether. 2. The clause "as long as the lawyer performs the agreed upon services" in subsection (e) creates some uncertainty as to when the fees are earned and how to determine the amount due under a flat fee arrangement when services are not fully completed. We recommend striking this clause or adding a comment that addresses these uncertainties.	1. The Commission has not made the suggested change. The term overreaching is well-understood. *Warner v. State Bar* (1983) 34 Cal.3d 36, 43 2. The Commission agrees and has revised paragraph (e) to remove the ambiguity.
X-2016-125a	California State Bar Committee on Mandatory Fee Arbitration (Harper) (10-04-16)	Yes	M	1.5	As to the proposed definition of a flat fee, we recently drafted language for the Sample Fee Agreements on this point that was approved by the Board of Trustees and is posted on our webpage. We suggest that the following definition of a flat fee be	The Commission has not made the suggested but has revised paragraph (e) to remove the implied concern that it might cause confusion. The Commission questions, however, whether a definition of flat fee should include a

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					incorporated in the proposed rule: A flat fee is fixed and does not depend on the amount of work performed or the results obtained.	statement that the fee "does not depend on … the results obtained." The Commission believes such a statement is overbroad as there may be situations where the client agreed to the payment of the flat fee with the expectation of a certain result. Sample Fee Agreements are also subject to revision to conform to the Rules, not the other way around.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 20-23 of the public hearing transcript.)	Yes	M		The use of the term "unconscionable" is a bizarre term because it doesn't really have any purpose for an intelligible meaning. If "unconscionable" means "unreasonable," according to case law and to the Fee Arbitration Committee, then change the word to "unreasonable." Unconscionable does nothing, other than confuse the situation and throw in a term that is ill defined in the literature.	See response to Law Professors, X-2016-32m, above.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.7
(Current Rule 3-310(B), (C))
Conflict of Interest: Current Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("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).

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

Following consideration of public comment, 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.

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean 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:

(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 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. 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, claim, controversy, 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 (a) and (b) do 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 a legal position on behalf of a client might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter does not alone 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.

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
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~~, including when:~~.

(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:~~

~~(i) knows* the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~

~~(ii) knows* or reasonably should know* the previous relationship will materially limit the lawyer's representation; or~~

~~(3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person* or entity the lawyer knows* or reasonably should know* will be affected substantially by resolution of the matter; or~~

~~(4) the lawyer has or had, or knows* that another lawyer in the lawyer's firm* has or had, a legal, business, financial, or personal interest in the subject matter of the representation that the lawyer knows* or reasonably should know* will materially limit the lawyer's representation; or~~

~~(5) the lawyer knows* or reasonably should know* that there is a reasonable* likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.~~

(~~c~~2) ~~A~~the lawyer ~~shall not represent a client in a matter in which~~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~~, unless the lawyer informs the client in writing* of the relationship~~.

(d) Representation is permitted under this Rule only 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.

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 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. 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] Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless the interests of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the interests of one or more of the clients would be adversely affected, thus requiring that the clients provide informed written consent* under paragraph (a), 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.~~

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, 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 (a) ~~does~~and (b) do 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 ~~or~~, 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 a legal position on behalf of a client might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter does not alone 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.

[~~6~~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.

[~~7~~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].)

[~~8~~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.

[~~9~~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).

[~~10~~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.

Rule 1.7 [3-310] ~~Avoiding the Representation of Adverse Interests~~
Conflict of Interest: Current Clients

(Redline Comparison of the Proposed Rule to Current California Rule)

(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:

(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) occurs 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. 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, claim, controversy, 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 to~~b) apply to all types of legal ~~employment~~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 ~~an ante-nuptial~~a 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 obtain~~If 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 subparagraph~~under paragraph (~~C)(2~~a).

~~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 ~~member~~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, ~~subparagraph (C)(3) is not intended to~~paragraphs (a) and (b) do 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. That advocating a legal position on behalf of a client might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter does not alone 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].)~~

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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:

~~(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) occurs 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 ~~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. 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, claim, controversy, 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, paragraphs (a) and (b) do 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~~6] 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~~ That 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 not alone 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.

Proposed Rule 1.7 [3-310] Conflict of Interests: Current Clients
Synopsis of Public Comments

TOTAL = 17 *A = 5* *D = 0* *M = 10* *NI = 2*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32d	Law Professors (Zitrin) (07-25-16)	Yes	M	(b), (c)	Generally agree with the Commission's decision to recommend adoption generally of the ABA's approach to current client conflicts and requiring informed written consent concerning paragraph (b) [3-310(B)] conflict situations. However, suggests two changes: 1. Paragraph (b): Proposed rule 1.7(b)(3) states in pertinent part that a lawyer may not represent a client without informed consent where the lawyer has a relationship with someone known to "be affected substantially by resolution of the matter." Use of the word "resolution" is a vestige of the current 3-310(b). It is, however, too limited a term. This subsection should more simply require informed written consent should the person "be affected substantially by the matter," whether it is the matter's resolution or some other interlocutory issue. Moreover, some matters, such as wills and trust modifications, are never truly "resolved," or finally completed.	No response required. 1. Paragraph (b): The Commission has removed subparagraph (b)(3) from the proposed rule. See response to COPRAC, X-2016-43l, below.

[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. Paragraph (c): by adding MR 1.7(c), the commission has folded in another existing rule, Rule 3-320, into the basic conflicts rule. However, this rule, which deals with conflicts relating to a lawyer's family or "intimate" relationships, only requires "inform[ing] the client in writing." This level of disclosure is insufficient and poorly defined. This paragraph should be moved and included as a sub-part of Rule 1.7(b), requiring informed consent.	2. Rule 1.7(c). The Commission has changed the standard in paragraph (c) to a "written disclosure" requirement.
X-2016-43I	Committee on Professional Responsibility and Conduct (COPRAC) (08-12-16)	Y	M	(a) (b)	COPRAC supports the restriction on direct adversity conflicts contained in paragraph (a) of the Rule and agrees that informed written consent is the appropriate standard for waiving such conflicts. 1. COPRAC does not support adoption of proposed rule 1.7(b) in its current form. COPRAC strongly supports adoption of the "significant risk of material limitation" ("SRML") conflict concept, which fills a gap in California's current conflict law with the national standard set out in Model Rule 1.7(a)(2). COPRAC also agrees that informed written consent is the appropriate standard for waiving	After further consideration, the Commission largely agrees with the commenter's assessment and has made changes to the proposed Rule in accordance with many of the commenter's suggestions. 1-2. The Commission has made changes to paragraphs (b) and (c) that it believes address most of the commenter's concerns. The changes and reasons for the changes are as follows: Because Rule 1.7(b) requires a significant risk of material limitation, it does not encompass what is covered in current rule 3-310(B)(1) or

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					such conflicts. Our concern with paragraph (b) lies in subparagraph (1) – (5), which purport to provide a non-exhaustive "checklist" of situations covered by the SRML concept. COPRAC agrees that, depending on the specific circumstances, each of the situations described could trigger the rule. But except for that described in subparagraph (5) (reasonable likelihood of conflict between clients being represented in the same matter), none fits squarely into the SRML concept. The result is that the "checklist" is too broad in some respects, too narrow in others, and potentially misleading as well. [examples of the rule being overbroad in some circumstances, and unduly narrow in others, are included in the letter] None of the other states that have adopted Model Rule 1.7 have included examples of SRML conflicts in the text of the Rule. To the extent that practicing lawyers need to be reminded that SRML conflicts can arise from their own personal interest in the subject matter, or from their past	(B)(4) or rule 3-320, all of which currently require written disclosure of certain relationships or interests without regard to whether there is such a significant risk. Consequently, the Commission has removed all of the subparagraphs from paragraph (b). Thus, paragraph 1.7(b) now more closely approximates Model Rule 1.7(a)(2) but with California's heightened "informed written consent" standard. The Commission has included current rule 3-310(B)(1) in paragraph (c) as (c)(1). Paragraph (c) has been further modified to include current rule 3-320 as paragraph (b)(2). To address concerns expressed by the commenter and a member of the Commission, the Commission has added prefatory language to paragraph (c) to make clear that the paragraph applies to the described situations even if there is not a significant risk of a material limitation on the relationship. Put another way, although a situation as

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					or present relationships with parties, witnesses and other affected persons, that can and should be done in the Comments to the Rule. One suggestion for addressing this issue would be to eliminate subparagraphs (1) – (5). Everything that is worth saving in the five subparagraphs can be captured by including additional language in the Comment making clear that the SRML standard should be applied in analyzing conflicts arising from personal interests or present or former relationships.	described in paragraph (c)(1) can create a significant risk of a material limitation, there may be instances where it does not. Nevertheless, in the interests of public protection, the Commission determined that the lawyer should at a minimum provide the client with written disclosure as is required in the current rule. Finally, the Commission has added new Comment [6] to emphasize the point that if, under the particular circumstances, the relationships covered by 1.7(c) do create a significant risk of material limitation, informed written consent under 1.7(b) will be required.
				(c)	2. COPRAC agrees that for the protection of the public the situations described in Rule 1.7(c) always require at least written disclosure. We are concerned, however, that as currently drafted the Rule could be read as eliminating any further requirement of informed written consent in cases where a relationship covered by the Rule gives rise to an SRML conflict. While some lawyer to lawyer relationships may not give rise to a significant risk of material limitation, surely many will do so. Logically there is no reason to	

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					treat these potential conflicts differently from the other ones discussed above (in subparagraph (b)). If, in fact, the relationship between the lawyer and the opposing lawyer is such as to give rise to a significant risk of material limitation, then Rule 1.7(b) should be triggered, and informed written consent should be required. Our proposed new Comment [5] would make that clear [COPRAC provided a redline of rule attached to letter].	
				(d)	3. COPRAC supports the adoption of proposed Rule 1.7(d).	3. No response required.
				Comment [2]	4. Comment [2] deals with positional conflicts based on advocating a position on an issue of law for one client that is inconsistent with another client's position on the same issue. It states that "Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless the interests of any of the clients would be adversely affected by the resolution of the legal question." We have several concerns with the language of this proposed Comment.	4. The Commission agrees with the commenter's concerns and has made changes to address them: It has deleted the first sentence of Comment [2] and moved the second sentence of that comment into new Comment [7], which is derived from MR 1.7, cmt. [24].

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					First, the national authorities recognize that the vast majority of positional conflicts are not direct adversity conflicts, but rather SRML conflicts. See, ABA Formal Opinion 93-377 n. 4. Suggesting that such conflicts should be analyzed principally or exclusively under part (a) of the Rule is therefore misleading. Second, the proposed comment is open to an interpretation that substantially broadens the concept of positional conflict. Comment [24] of the ABA Model Rule is focused on a lawyer taking inconsistent legal positions on behalf of different clients in different matters—in short, on the lawyer actively advocating for both positions. The language of Comment [2] is potentially broader, since it focuses on the client's positions and does not expressly state that it applies only when the lawyer is advocating both those positions. When coupled with the Comment's further suggestion that the Rule is violated whenever one of the clients is "adversely affected," the comment is open to potentially unfortunate interpretations. Suppose, for example, that litigators at a large firm with a	

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					transactional practice representing issuers of tax free bonds have been asked to represent, on a pro bono basis, a civil rights plaintiff in a suit against a non-client municipality. The case presents an important issue concerning the liability of municipalities under federal civil rights law. The firm knows that its municipal bond clients have an "antagonistic" position on the issue, and that a decision against the non-client municipality will set an adverse precedent for its municipal bond clients—which would seem to be an "adverse effect." Yet treating this as a "direct adversity" conflict under paragraph (a) would seem to allow the bond clients to intervene to disqualify the firm from representing the civil rights plaintiff, sue the firm for malpractice and perhaps to seek forfeiture of attorney fees. The Committee is not aware of any authority that would support that outcome. Moreover, there is reason to believe that such a sweeping definition of positional conflicts would have a severe effect on clients' choice of counsel, and particularly on firms' willingness to undertake pro bono representation. Cf. Norman	

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					Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*¸ 50 Stan.L.Rev. 1395 (1998). To address these issues, COPRAC proposes a rewrite, based in substantial part on Comment [24] to the Model Rules, to avoid the current comment's potentially overbroad definition of positional conflicts, its misleading focus on direct adversity conflicts, and to focus on the more common and more important question of when positional conflicts trigger paragraph (b) of the Rule. Consistent with this new focus, COPRAC also suggests that the Comment be placed after the discussion of SRML conflicts.	
				Comment [8]	5. Comment [8] deals with informed written consent to a future conflict. COPRAC agrees that such consents should be permitted by the Rule and that the key criterion should be whether the client understands the risks involved. COPRAC also believes, however, that consistent with Model Rule 1.7, Comment [22], national authorities (ABA Formal Opinion 05-436), and basic principles of	5. The Commission agrees and had added those factors to what is now Comment [10].

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					contract and fiduciary law, the Comment should recognize that the experience and sophistication of the client, including whether the client is independently represented by counsel in giving consent, is relevant to determining whether or not the understanding required to enforce the waiver is present. Our proposed Comment [9] reflects that change.	
2016-52d	Law Professors (Zitrin) (08-24-16)	Yes	M	(b), (c)	The comment is the same as that of Law Professors (Zitrin), X-2016-32d, above.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 23-24 of the public hearing transcript.)	Yes	M	1.7(c)	What does informing the client in writing mean? It's not defined anywhere in the Rules. It's an odd term that doesn't appear anywhere else. It's a simple fix. You should require the same informed written consent for (c) that you do for (b) and (a). It's a very simple fix.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 61-62 of the public hearing transcript.)	Yes	M		Principally, we don't have any problem with this rule, so long as in addition to a 1.7 Rule, Rule 1.10 is also adopted. With respect to 1.7(c), our office policy is not to inform clients in writing about things like this, we just don't accept representation when issues of conflict like this arise. We would recommend a	The Commission has added a knowledge requirement (knows or reasonably should know) to proposed Rule 1.7(c)(2).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					knowledge requirement be added to the Rule. If the Rule was rephrased to say, "The lawyer shall not knowingly represent" any of the people that are positioned as the rest of Rule 1.7 suggests. So if that knowledge requirement was added, we think that would resolve what is potentially a large number of conflicts. And that arises for us because there are lawyers within our office that are married or are involved in relations, either prosecutors or other people that are in a relationship, and it would be encompassed within this rule.	
X-2016-67o	Orange County Bar Association (Friedland) (09-16-16)	Y	M	(b)	The checklist provided in proposed subsection (b)(1)-(5) seems too broadly worded in that not all of the scenarios identified in the list always give rise to a "significant risk" as provided in (b). For example, (b)(1) references the situation in which a lawyer or member of the lawyer's firm has a business or financial relationship with a party or witness. This broad language would encompass an attorney who files suit against a bank with which an associate at an attorney's firm maintains a small checking account. Such a	Please see response to COPRAC, X-2016-43l, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					situation may not impose a significant risk that the lawyer's representation may be materially limited. In light of this, one suggestion to remedy this ambiguity is to remove subsections (1)-(5) from the text of the proposed rule and move them to the comments as possible examples of instances that may pose a significant risk which would require informed written consent from each affected client. Including the checklist in the comments allows lawyers to review possible instances that may give rise to a significant without identifying them as they are proposed now in a manner that leads lawyers to believe that any of these instances automatically requires "informed written consent."	
X-2016-66g	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We approve the proposed rule and in particular the requirement for the client's informed written consent in subsections (b)(1)-(5) where current Rule 3-310(B)(1)-(4) would require only written disclosure to the client. We recognize that "material limitation" will require judgment on the part of lawyers—and arguably time and additional authoritative guidance, including	Please see response to COPRAC, X-2016-43l, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					judicial decisions, to understand in what circumstances such a material limitation might arise—but we believe that the proposed rule is not only an improvement on the current Rule 3-310 but also on the articulation in ABA Model Rule 1.7.	
X-2016-68d	Law Professors (Zitrin) (09-21-16)	Y	M		The comment is the same as that of Law Professors (Zitrin), X-2016-32d, above.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
X-2016-72	Law Firm General Counsel Group (Hendricks) (09-23-16)	Y	A		1. As commercial law practice has increasingly become a national rather than local profession, lawyers and law firms like ours whose practices overlap multiple jurisdictions have long struggled with variances between California's Rules and the rules of other jurisdictions that more closely follow the ABA Model Rules on critical issues often involving interstate commerce such as ethical conflicts. The adoption of your draft will be a dramatic step in the direction of harmony among the states with regard to the ethical rules that govern lawyers. In short, we enthusiastically support the proposed Rules and hope that they will swiftly be adopted.	1. No response required.
				Comment [8]	2. We specifically write in support of Comment 8 to proposed Rule 1.7. Comment 8	2. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					recognizes – as have California courts – that a lawyer may ethically obtain an "advance waiver" from a client, and that a client can validly consent to conflicts of interest that may arise in the future. In the area of commercial legal practice that forms the bulk of the legal services provided by the firms of the undersigned, advance waivers provide greater certainty to both law firms and their clients. Advance waivers help law firms sort through complex, current-client conflict scenarios, and, most importantly, they provide greater assurance to clients that their chosen outside counsel will be available to them when the need arises. Advance waivers have long been recognized by courts in California and elsewhere as an acceptable term of the attorney-client relationship, and it is important that the proposed Rule recognizes this. We have had an opportunity to review the Commission's latest draft of Comment 8, which includes new language noting that the sophistication of the client is a factor to consider when assessing whether the client's consent is adequately informed.	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					With this additional language, we believe proposed Comment 8 is an accurate statement of the law and useful guidance for California lawyers. We believe Comment 8 in this latest form should be adopted.	
X-2016-79	Association of Corporate Counsel (Blatch) (09-26-16)	Y	A		1. We support the California approach to advanced waivers over the ABA Model Rule approach. We fully support proposed Comment [8] to proposed rule 1.7, which does not explicitly condone the use of "general and open-ended" advance waivers against sophisticated clients. 2. However, to add further clarity to the enforceability of advanced waivers, the State Bar should incorporate the *Visa* factors into Comment [8] of proposed rule 1.7. The factors used in *Visa U.S.A. v. First Data Corp*. to evaluate whether the client signed an informed waiver of future conflicts are: (1) the breadth of the wavier; (2) the temporal scope of the waiver; (3) the quality of the conflict discussion between the attorney and the client; (4) the specificity of the waiver; (5) the nature of the actual conflict; (6) the sophistication of the client; and	1. No response required. But see response 5 to COPRAC, X-2016-43l, above. 2. The Commission has not added the *Visa U.S.A.* factors but has made additions to the Comment (now Comment [10]). See response 5 to COPRAC, X-2016-43l, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					(7) the interests of justice. Notably, under the *Visa* factors, the sophistication of the client is but one factor of many to be considered in the enforceability of an advanced waiver. We think this strikes a reasonable balance between accommodating clients' interest in their attorneys' duty of loyalty and allowing lawyers to craft appropriate advanced waivers that allow them to be less restricted in the clients whom they can serve.	
X-2016-87a	Attorneys Liability Assurance Society (ALAS) (09-27-16)	Y	NI		ALAS agrees with the Commission on two threshold issues: (1) that adopting the multiple-rule framework used by the ABA Model Rules of Professional Conduct should facilitate compliance with an enforcement of conflicts of interest principles by promoting a national standard, and (2) that the rule should explicitly acknowledge the continued availability of advance conflicts waivers in California. Before the recent revisions, however, we were concerned that the proposed rule was confusing and ambiguous. We also were concerned by the failure to include key factors in Comment [8] that had been recognized in	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the analogous Comment to the Model Rule counterpart, specifically, the client's sophistication and the client's representation by independent counsel. We are pleased to see that the Commission addressed those issues in the draft circulated in advance of its Sept. 30th meeting, which deleted a checklist included in the prior draft and added the relevant factors to Comment [8]. These changes bring the Proposed Rule closer to ABA Model Rule 1.7, thus further facilitating compliance and enforcement by promoting a national standard.	
X-2016-93b	Los Angeles County Public Defender (Brown) (09-23-16)	Y	M		We see nothing in this rule that is *likely* to affect our current conflict policies. However, there is a comment that indicates that where a witness and a party are both represented by defense counsel, and that cross-examination of the witness is likely to cause the witness "embarrassment" (even if not legal trouble), that this would be a conflict requiring written waiver by the clients. The word embarrassment is insufficiently defined and could cause difficulty (e.g., if the witness is	The Commission has not made the suggested change to define "embarrassment." The duty of undivided loyalty requires that a lawyer not do anything to harm a *current* client, to which the rule applies. The Commission continues to recommend proposed Rule 1.10. The Commission has added a knowledge requirement to paragraph (c)(2) [paragraph

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					"embarrassed" to be asked questions – does that qualify as a conflict?). We would not oppose this Rule if: a) it were passed concurrently with Rule 1.10; b) the comment section were clarified to better define "embarrassment," and; c) the word "knowingly" were added to establish the required mens rea.	(c) in the public comment version of the Rule].
X-2016-96c	Bar Association of San Francisco Legal Ethics Committee (Banola) (09-27-16)	Y	M		The Committee is concerned that the hybrid approach will create confusion. In particular, it is not clear that the "checklist items" in proposed rule 1.7(b)(1)-(5) are merely intended to be examples of potential conflict situations that could give rise to a material limitation conflict under certain circumstances, as opposed to per-se material limitation conflicts. In addition, the "checklist items" are unnecessary as the general explanation of a "material limitation" conflicts in subsection (b) sufficiently captures the wide variety of conflicts of interest that could impair a lawyer's independent professional judgment and duty of loyalty. The "material limitation" standard in subsection (b) provides a	Please see responses to COPRAC, X-2016-43l, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					commonly understood standard that is used in the ABA Model Rules and many other state rules of professional conduct. Most other jurisdictions and the Restatement of the Law Governing Lawyers have adopted the same or a substantially similar standard the Committee favors a uniform approach. The Committee also believes subsection (c) creates unnecessary confusion. Subsection (c) appears to create a lower disclosure standard for certain types of potential conflicts. A lawyer's relationship with another party's lawyer, however, could create a material limitation conflict under certain factual circumstances. If a material limitation conflict exists, the same informed written consent standard should apply as in subsection (b). Separately requiring written disclosure of only certain relationships with another party's lawyer creates confusion as to which standard applies in the event that the relationship creates a material limitation conflict. Therefore, the Committee recommends that subsection (c) be deleted from the proposed rule as it is only one	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					example of a situation that could give rise to a material limitation conflict that requires informed written consent.	
X-2016-104m	Office of Chief Trial Counsel (Dresser) (09-27-16)	Y	A		1. OCTC supports this rule. 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. 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. 3. If subsection (d) is revised as indicated above, the Commission might want to reconsider Comment 7.	1. 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. No response required. 3. No response required.
X-2016-115e	Lamport, Stanley (09-29-16)	N	M		Proposed Rule 1.7 should be revised as shown on the attached redline. The attached redline addresses two points: 1. that the "significant risk the lawyer's representation of the client will be materially limited" standard in proposed Rule 1.7(b), should be incorporated into each	1. The Commission has not made the suggested change. The commenters' request concerning paragraph (b) is moot in light of the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					of the subparts to proposed Rule 1.7(b), and 2. That the substance of Comment [6] should be stated in the Rule.	Commission's removal of paragraph (b)'s subparts. See Response 1-2 to COPRAC, X-2016-43l, above. 2. The Commission did not make the suggested change. The Commission believes that Comment [8] (formerly Comment [6]) is appropriate as a comment because it clarifies that the disclosure required to obtain the clients' informed written consent under paragraphs (a) and (b), or to comply with the lawyer's duty to provide written disclosure under paragraph (c), is limited by the lawyer's duties under Rule 1.6 and Bus. & Prof. Code § 6068(e). The limitation is not a separate requirement for representation.
X-2016-120b	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		We support the proposed revisions to this rule.	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-131a	Treat, Judge Charles (10-06-16)	N	NI		1. In comment [8]: Examples (4) and (5), near the end of this comment, are difficult to read because it takes some study to sort out the difference between "the lawyer" (meaning the person whose ethical conduct is under discussion) and "a lawyer" (meaning someone else). The problem is compounded by the fact that the preceding three examples (which don't involve "a lawyer") all start out with "the lawyer", while these two start out "a lawyer". I suggest inverting the order. Thus, (4) should be: "the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm has a lawyer-client relationship with a lawyer or law firm representing a party or witness in the matter". 2. I would also suggest adding "other than the lawyer's client". There is no reason to apply this to co-counsel for the same client. 3. Syntax aside, example (5) is unnecessary and logically flawed. a. The comment calls for disqualification of a lawyer if opposing counsel is the lawyer's own spouse, parent, or sibling. But it calls for	The Commenter appears to have commented on proposed Rule 1.7 as recommended by the first Commission. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					disqualification if opposing counsel is the romantic partner not only of the lawyer in question, but also of any other lawyer in his or her firm. That is internally inconsistent; surely we should be at least as concerned (probably more so) if opposing counsel is the spouse of the lawyer's firm colleague, than if opposing counsel is only a romantic partner of the colleague. b. The latter part of example (5) is also too categorical. Presumptive disqualification on this ground (including spouses, parents, siblings, or children) makes sense if we're talking about a small law office where everyone is likely to know the families or romantic partners of all the other lawyers in the firm. It makes no sense if we're talking about much larger firms. Even within a single office, if there are hundreds of attorneys it is dubiously probable that each attorney has a substantial acquaintance even of the spouses of all the other attorneys, let alone their parents or siblings. And when	

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					they work in different cities (or states or countries), it becomes downright unlikely. c. However, I propose to delete example (5) altogether, perhaps substituting a cross-reference to comment [11]. The issue of family or personal relationships is addressed with far better coherence and nuance in the latter. And when a colleague's family or household relationships really do pose a danger of materially affecting the representation (as in the two-lawyer office), that is picked up by more the more general breadth of Rule 1.7(a)(2), and the flexible provisions of Rule 1.10 – the same as if opposing counsel were the lawyer's best friend, or some other close relationship. d. I would also add "child" to spouse, parent, or sibling. If a lawyer is disqualified because the opposing counsel is his or her parent, the parent should likewise be disqualified because opposing counsel is his or her child. 4. Comment [20A] should	

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					clarify that if a contingency is fairly covered by a consent to future conflict (as addressed in Comment [22]), the actual arising of that contingency is not a "material change" requiring a new consent. 5. Comment [21] should clarify that the client, in revoking consent, cannot thereby force the lawyer to cease representation of another client in mid-stream. Of course a client can revoke consent in the sense of firing the attorney from representing the client itself. But it will typically be the case that the lawyer and Client B, in entering into their own attorney-client relationship, have acted in direct and reasonable reliance on Client A's having consented to the lawyer's representation of Client B. If Client A can pull the plug on the representation of Client B at will, that will unjustifiably harm Client B's legitimate interests and reasonable expectations. Worse, it puts Client A in a position to extort unjustified advantage from Client B, on threat of withdrawing the consent.	

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 for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-300 (Avoiding Interests Adverse to a 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 the 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 American Bar Association (ABA) counterpart, 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). This proposed rule 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.

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

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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 artide is posted at: http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf .

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 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

[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."

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 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 public comment, 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.

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client (Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean 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 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.

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client (Commission's Proposed Rule Adopted on October 21–22, 2016 – 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 transaction or acquisition and its terms are fair and reasonable* to the client and the ~~terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted~~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 ~~would~~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 ~~the terms of the~~ acquisition, and to the lawyer's role in it.

Comment

[1] ~~This 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.~~ 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).

[45] 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.

[56] 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 1.8.1 [3-300] ~~Avoiding Interests Adverse to~~ Business Transactions with a Client and Pecuniary Interests Adverse to a Client
(Redline Comparison of the Proposed Rule to Current California Rule)

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 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 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 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.~~

Proposed Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client
Synopsis of Public Comments

TOTAL = 9 ***A = 1*** ***D = 6*** ***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-2016-32n	Law Professors (Zitrin) (07-25-16)	Y	D	1.8.1	1. The rule is lawyer-protective and anti-client. 2. The comment is unclear as to compliance with the rule relating to modifications of fee contracts. The only possible justification is lawyers' self-interest - - allowing lawyers to modify fee agreements mid representation. 3. Compliance with the rule would not be required if the client has an independent lawyer. Having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.	See response to Law Professors, Public Hearing, below.
X-2016-43m	COPRAC (Baldwin) (8-12-16)	Y	M	(a), (c)	1. Change "should" to "would" in paragraph (a) with regard to what the client understands b/d "would" is subjective and "could" is objective. 2. Suggests language which would make paragraph (c) clearer. 3. Whether modification of an existing fee agreement implicates the rule should be addressed.	1. The current rule uses "should" and the Commission agrees there is no reason to change it. 2. The Commission agrees and has edited paragraph (c) for clarity. 3. The Commission did not achieve a strong consensus on whether,

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

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						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.
X-2016-52n	Law Professors (Zitrin) (08-24-16)	Y	D	1.8.1	See X-2016-32n Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, Public Hearing, below.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 18-20 of the public hearing transcript.)	Y	D	1.8.1, Cmt. [1]	1. The Rule is most anti-client, lawyer-protective rule. Lawyer shouldn't be able to modify an existing fee contract without satisfying rule.	1. 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.

Proposed Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client
Synopsis of Public Comments

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. Gives an example of how the "independent lawyer" provision doesn't provide the client protection.	2. This comment is premised on the possibility that the other lawyer will have been hired by the client for a different purpose, but paragraph (b) is specific that it applies only when the client is "represented in the transaction or acquisition [by an independent lawyer]." The Rule is not satisfied merely because the client is represented by a lawyer on other matters.
X-2016-68n	Law Professors (Zitrin) (09-21-16)	Y	D	1.8.1	See X-2016-32n Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, Public Hearing, above.
X-2016-104n	Office of Chief Trial Counsel (OCTC) (09-27-16)	Y	D	1.8.1, Cmt.	1. OCTC believes there should be a Comment that fee modifications would and should normally apply to this rule. 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.	1. See response to Law Professors, Public Hearing, above. 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

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						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.	3. 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 closing 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

Proposed Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client
Synopsis of Public Comments

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						transaction or acquisition. (See also response to Polish, X-2016-120c, below.)
					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.
X-2016-82f	LGBT Bar Assoc. of L.A. (King) (09-27-16)	Yes	A	1.8.1	Supports adoption of proposed Rule 1.8.1.	No response required
X-2016-120c	Polish, James (09-27-16)	No	M	1.8.1	On its face, this rule applies only to transactions with a client. Nevertheless, at least one California case stated, arguably in dictum, that a predecessor to the current rule can also apply to transactions with a former client. *Hunniecutt v. State Bar*, 44 Cal.3d 362 (1988). This is a trap for the unwary. If the rule can apply to transactions with former clients, it should so state. If not, there is ample protection for former clients, including seeking relief based on	The Commission agrees that a lawyer can be subject to professional discipline for failing to meet the standards of this Rule when engaging in a business transaction with or obtaining a pecuniary interest adverse to a former client. See, *Hunniecutt v. State Bar* (1988) 44

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					fraud or undue influence.	Cal.3d 362, 371-72 ("Since the duty of fidelity and good faith arising out of the confidential relation of attorney and client is founded, not on the professional relation *per se*, but on the influence which the relation creates, such duty does not always cease immediately upon the termination of the relation but continues as long as the influence therefrom exists."). The opinion in Hunniecutt relies in part on *Beery v. State Bar* (1987) 43 Cal.3d 802, 812. Accordingly, the Commission has added a new Comment [4] to clarify this point.
X-2016-132(a)	Zitrin, Richard (10-18-16)	N	D		Comment [5] is a confused and confusing statement that does not meet the requirements of the Law Professors' letter, nor the requirement of public protection. My recommendation, which would meet the goal of the ethics professors, is to simply clarify the original comment of paragraph [1] in current Rule 3-300 as follows: "[This Rule] is not intended to apply to	See response to Law Professors, Public Hearing, above.

Proposed Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client Synopsis of Public Comments

TOTAL = 9 ***A = 1*** ***D = 6*** ***M = 2*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the agreement by which the member is <u>*originally*</u> retained by the client <u>*in an arms-length transaction*</u> unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client." This language declines to deal with modifications, and states the "arms" length rule clearly and concisely. This single sentence is not only a more accurate statement of California case law, but is far easier to understand than the current changes.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.3
(Current Rule 4-400)
Gifts From Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 4-400 (Gifts From Client) in accordance with the Commission Charter, 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 Commission also considered the American Bar Association ("ABA") counterpart, 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). This proposed rule 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.

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.

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 public comment, 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.

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(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:

(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].

Rule 1.8.3 [4-400] Gifts From Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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).

Rule 1.8.3 [4-400] Gifts From Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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, ~~or~~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).

Rule 1.8.3 [4-400] Gifts From Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(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~~lawyer or a person* related to the lawyer, unless the lawyer or other recipient of the gift is related to the ~~member.~~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~~Discussion~~

[1] A ~~member~~lawyer or a person* related to a lawyer may accept a gift from ~~a member's~~the 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,~~ 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 ~~occurred, discipline is appropriate. (~~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).

Proposed Rule 1.8.3 [4-400] Gifts from Client
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-2016-43ax	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M		COPRAC recommends the following changes in the proposed rule: 1. COPRAC opposes the substitution of the word "solicit" for "induce." Although "solicit" is used in other states, the word "induce" encompasses a far wider range of actions that could cause a client to make an inappropriate transfer than "solicit," which requires a very specific type of action. Retaining the word "induce" would better protect the public. 2. COPRAC opposes the elimination of the exception for attorneys to induce family members to make a bequest or gift in paragraph (a)(1). We note that the Model Rule includes a specific exception for family members of the attorney. See Model Rule 1.8(c).	1. The Commission considered the language of the Model Rule and the current California rule, and concluded that "induce" in the current rule is too ambiguous to employ as a disciplinary standard, and that "solicit" created a clearer and more defined standard by which to judge attorney conduct. Therefore, the Commission believes that the "solicit" is preferable to "induce" in the proposed rule. 2. The Commission agrees and has made the suggested change.
X-2016-104p	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A		Supports adoption of proposed Rule 1.8.3.	No response required.

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

Proposed Rule 1.8.3 [4-400] Gifts from Client
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-2016-120e	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		Supports adoption of proposed Rule 1.8.3.	No response required.

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 for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 4-210 (Payment of Personal or Business Expenses Incurred by or for a 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 American Bar Association ("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). This proposed rule 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.

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.

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[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.)

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 public comment, the Commission made only two revisions. In paragraph (b)(2), the Commission updated 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.

(Staff note: The dissent below to the Commission's original public comment version of proposed rule 1.8.5 should be considered in light of the Commission's material changes to proposed rule 1.7.)

Commission Member Dissent to the Recommended Adoption

of Proposed Rule 1.8.5, Submitted by Robert L. Kehr

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 part of our current Rules as rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with rule 3-310(B) 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, the exception permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. Current rule 4-210 treats a lawyer's loan to a client is a business transaction within the meaning of current rule 3-300 (which will be Rule 1.8.1 under the new numbering system). However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to what currently is rule 3-310(B).

Current rule 3-310(B) contains four subparagraphs. The only one 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).[2]

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 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.

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[2] 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;"

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 clients without any client protection benefit. Given the frequency with which many lawyers represent their social 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).

There is three-fold mischief of the Rule 1.8.5 reference to rule 3-310(B). First, to the extent the reference is recognized as altering the meaning of rule 3-310(B), it will lead to “disclosures” that have no client benefit and make the lawyer and the legal system appear foolish. Second, it is unlikely that practitioners looking at the conflict rules would be sophisticated enough to see that Rule 1.8.5 might have inferentially amended rule 3-310(B)(4), and this would create a trap for unwary lawyers that would leave them vulnerable to later attack. Third, there would be a conflict between the words of rule 3-310(B)(4) and the inferential meaning of Rule 1.8.5 that would lead to uncertain results.

I would remove from Rule 1.8.5 the reference to what currently is rule 3-310(B) but otherwise would adopt Rule 1.8.5 as drafted by the Commission.

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Redline to Public Comment Draft Version)

(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 ~~or pro bono client~~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.

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(~~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.

Proposed Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
Synopsis of Public Comments

TOTAL = 4 *A = 4* *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-2016-43o	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-17-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-104q	Office of Chief Trial Counsel (OCTC) (Dressor) (09-27-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-120f	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-121d	California Commission on Access to Justice (CCAJ) (Hartston) (10-03-16)	Yes	A	1.8.5	CCAJ supports the exemption in proposed Rule 1.8.5 to allow lawyers to pay costs or expenses to promote the interests of an indigent or pro bono client in a matter in which the lawyer represents the client. Such monetary assistance to indigent clients can make a material difference in a client's ability to arrive timely and prepared at a hearing.	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 1.8.7
(Current Rule 3-310 (D))
Aggregate Settlements

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310(D) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the American Bar Association ("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). This proposed rule 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.

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 public comment, 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.

Rule 1.8.7 [3-310] Aggregate Settlements
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.8.7 [3-310] Aggregate Settlements
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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.

Rule 1.8.7 [3-310~~(D)~~] ~~Avoiding the Representation of Adverse Interests~~ Aggregate Settlements
(Redline Comparison of the Proposed Rule to Current California Rule)

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~~(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.

Proposed Rule 1.8.7 [3-310(D)] Aggregate Settlements
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-2016-43az	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	M		COPRAC generally supports the proposed rule with one suggested change. Rule 1.8.7 replaces what is currently Rule 3-310(D), and is based on Model Rule 1.8.7(g). The proposed rule requires a lawyer to obtain informed consent for any aggregate settlement of claims against two or more clients or an aggregate settlement as to guilty or nolo contendere pleas in a criminal matter. Unlike Model Rule 1.8(g), however, the proposed rule does not specify whether informed consent requires disclosure to the clients of all the claims or pleas involved and how the settlement will affect each of the joint clients. Model Rule 1.8(g) states: "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." In addition, Model Rule 1.8 includes Comment [13], which states that "before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the	The Commission agrees with the commenter and has added the second sentence from Model Rule 1.8(g).

[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
					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." For client protection, COPRAC recommends that the commission include an express disclosure requirement such as set forth above in either the rule or a comment or both. Simply mandating that the lawyer obtain informed consent does not clearly convey to lawyers that they must disclose all of the terms of the proposed settlement. COPRAC does not believe that the commission intends to omit a requirement of full disclosure from the rule, and would not support such a deviation from the Model Rule.	
X-2016-82c	Polish, James (09-26-16)	No	M		Aggregate offers may be made or accepted in a settlement conference or mediation or during a trial. In these and presumably other situations it is not practical to obtain informed written consent before the offer is made or accepted. In such cases it should be permissible to obtain informed consent that is confirmed in writing as soon as is	The Commission did not make the suggested change. It is not convinced that such "after-the-fact" disclosures adequately promote the clients' right to make an informed decision about accepting the settlement offer. See proposed Rule 1.2.

Proposed Rule 1.8.7 [3-310(D)] Aggregate Settlements
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
					practicable thereafter.	
X-2016-104s	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 1.8.7.	No response required.
X-2016-120h	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		Supports adoption of proposed Rule 1.8.7.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.10
(Current Rule 3-120)
Sexual Relations With Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-120 (Sexual Relations With 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 the 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 American Bar Association ("ABA") counterpart, 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. This proposed rule 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.

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]

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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.

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 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 public comment, 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.

(Staff note: The dissent below was submitted in connection with the Commission's current version of proposed rule 1.8.10.)

Commission Member Dissent to the Recommended Adoption of Proposed Rule 1.8.10, Submitted by James Ham

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.

Rule 1.8.10 [3-120] Sexual Relations With Current Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.8.10 [3-120] Sexual Relations With Current Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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 ~~(Competence)~~, 1.7, ~~(Conflicts of Interest: Current Conflicts)~~ and ~~[~~2.1 ~~(Independent Judgment)]~~[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.

~~[1] The Rules Revision Commission has not made a recommendation to adopt or reject a counterpart to ABA Model Rule 2.1. This bracketed reference is a placeholder pending a recommendation from the Commission. Consideration of Model Rule 2.1 is anticipated for the Commission's August 26, 2016 meeting.~~

Rule 1.8.10 [3-120] Sexual Relations With Current Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(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 relationshipexisted 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.~~

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

TOTAL = 17 *A = 8* *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 A = 12 NI = 0
X-2016-2	Johnson, William (7-1-16)	N	D		This proposed rule change is terrible and may violate constitutional rights to privacy, sexual relations, free association and marriage. If a client and a lawyer fall in love, they can move in together, they can get married but they can't have sexual relations? This rule prohibits sexual relations between consenting adults when there is no apparent or actual abuse. This rule should be revised or withdrawn to avoid impinging on individual liberties and constitutionally protected rights.	The Commission considered overbreadth as well as other constitutional issues (such as freedom of association, privacy, and equal protection of the rights of the married and unmarried), but concluded a blanket prohibition was appropriate to protect the public. Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim. Another 13 have adopted a rule that is similar to MR 1.8(j), i.e., the rules in those states include an absolute ban but also includes additional language, e.g., a definition of "sexual relations." Four jurisdictions have language in the comments to another rule (e.g., Rule 1.7) that is similar to the comments to MR 1.8(j). Four jurisdictions have adopted a rule similar to the Cal. Rule, requiring that the lawyer have obtained sex through coercion, etc. or as a quid pro quo. The Commission is not aware of any published Federal or State Court opinion which has ruled on these constitutional issues in the context of this rule.

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

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

TOTAL = 17 *A = 8* *D = 6* *M = 3* *NI = 0*

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						However, the Commission changed the reference in the rule from "client" to "current client" and added an exception for spouses and registered domestic partners.
X-2016-3	Greenlee, Bruce (7-1-16)	N	D		I am not a fan of either the current rule or the proposed rule. The proposed rule of virtually total prohibition is overbroad. The key question to be asked is not whether [sexual relations] will interfere with an attorney's ability to perform services competently. The key question is whether the client comes to the attorney in a vulnerable position, from which a sexual relationship with the attorney will exploit that vulnerability. I recognize there are drafting challenges in defining the areas in which sex should be off limits without global prohibition. But to avoid unwarranted intrusion into both parties' right to privacy, the effort should made. It is not clear that the definition of "sexual relations" would prohibit oral sex as "touching" connotes only use of hands to most people.	(See response to the comment from William Johnson, X-2016-2, above.)
X-2016-7	Wilson, Ken (7-4-16)	N	D		The proposed rules goes beyond the professional relationship which ought to be the limits of the	(See response to the comment from William Johnson, X-2016-2, above.)

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
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					Bar Association and invades the private relationship of the individuals. The current rule adequately deals with this situation.	
X-2016-19a	Anderson, Mark (8-1-16)	N	A		We need a bright-line rule here. It is unprofessional to begin an intimate/romantic/sexual relationship with a client while still in the professional relationship. Trying to carve out exceptions only gives rise to endless arguments about them. We should join the vast majority of other states in simply barring these relationships.	The Commission agrees. The proposed rule adopts a bright line test that is based on the corresponding Model Rule 1.8(j), which has been adopted in a majority of jurisdictions. (See above response to the comment from William Johnson.)
X-2016-30	Grossman, Nicholas (8-3-16)	N	D		The proposed rule change is unnecessary. The current rule already protects the public from attorneys looking to sexually take advantage of clients. The proposed rule, preventing any sexual relations between attorneys and clients, is just plain ridiculous. Why is it anyone's business who an attorney sleeps with? There is nothing wrong if an attorney wants to date a client, provided legal work is not done in exchange for sexual services, which the current rule already covers.	(See response to the comment from William Johnson, X-2016-2, above.)
X-2016-34	Bryant, Barbara (8-9-16)	N	A		I strongly support this revision. I have handled, studied, researched, mediated and/or taught hundreds of cases	The Commission thanks the commenter for her support. With respect to the commenter's suggestion re

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					involving sexual harassment and the varying factual settings and techniques in/by which the sexual harassment was carried out. Most of the cases/situations involved people in positions of power harassing people who were dependent on them for some important benefit such as salary, a dwelling, a necessary service, or a favorable outcome to a legal right. Too many of those offenders were attorneys using their position of authority and safety to pressure the client for sex. Too many subterfuges and implicit threats of desertion led to the sexual conduct. It is absolutely unacceptable for this conduct to occur. There needs to be a strict bright line that no sexual conduct is acceptable, that the responsibility for the conduct rests 100% on the attorney to prevent it from happening. I request that the proposed rule be amended further to clearly prohibit "verbal conduct of a sexual nature and/or proposals for sexual conduct." It is often the case that a sexual harasser will start with blatant behavior to test the waters. This by itself puts	discriminatory and harassing conduct, please refer to proposed Rule 8.4.1.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response A = 12 NI = 0
					undue pressure and implicit threats on the client to go along or stay quiet in the face of sexual talk, or to agree to sexual relations once the representation has concluded.	
X-2016-39	Thomas, Kevin (8-14-16)	N	A		The status quo is awful. Disallowing sex with a client is a cost-free way to protect our most vulnerable citizens.	No response required.
X-2016-43a	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	D		1. COPRAC does not support adoption of the proposed rule because it is inconsistent with B&P Code § 6106.9. The statute expressly sets a different standard than the proposed rule for the imposition of discipline for a lawyer who engages in a sexual relationship with a client than the one set by the proposed rule. COPRAC believes this inconsistency creates a potential trap for a lawyer. COPRAC believes merely flagging the inconsistency in the Comment to the rule does not solve the problem because it relies on the lawyer looking at the rules rather than relying on the B&P Code.	1. The Supreme Court can establish rules of conduct independent from those established in the Business & Professions Code. See, e.g., *In re Lavine*, 2 Cal. 2d 324, 328, *reh'g denied and opinion modified*, 2 Cal. 2d 324 (1935). The proposed rule is not in conflict with B&P Code Section 6106.9. While Section 6106.9 prohibits sexual relations only under certain specified circumstances, the proposed rule bans sexual relations entirely, and is more strict than Section 6106.9. Further, subdivision (e) of that section applies only to a complaint made pursuant to subdivision (a), not to a complaint made pursuant to Rule 1.8.10. Therefore, the rules are not inconsistent.

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					2. In the event the Commission adopts the rule as proposed, at a minimum, COPRAC urges the Commission to revise Comment [3] to more clearly alert attorneys to the different standards under the rule and section 6106.9. 3. There was no consensus among the Committee members on the separate question of whether they would support adoption of the near blanket prohibition on sexual relations with clients expressed in proposed rule 1.8.10.	2. 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.") 3. No response required.
X-2016-44	Copi, Margaret (8-15-16)	N	A		An attorney and his or her client have unequal power in their relationship and the attorney has a fiduciary duty to take care of the interests of the client. It is not a mutual relationship in which the interests of both are equal. All such sexual activity is suspect as potentially coercive and must be avoided to preserve the integrity of the professional relationship. Both Sexual Harassment as a separate matter and consensual sexual relations must be avoided for the protection of the client. This has been standard in medical practice for many years and I find it difficult to understand	No response required.

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					that it is not also the standard in the practice of law. Dual-role relationships in any case are fraught with difficulties, but in this particular case must be forbidden absolutely for the ethical practice of law.	
X-2016-45	Peoples, Bernice (8-16-16)	N	A		This rule should have been written into the founding rules of conduct between Attorney and Client. A sexual relationship would compromise too many cases and cause the court to get bogged down in nonsense instead of real criminal cases. (emphasis in caps in original)	No response required.
X-2016-37	Wade, Margena (8-10-16)	N	A		No lawyer should have sex or personal relationship with a client, unless it's well established before or well after the case. There's too much gray area to allow this.	[Note: This comment was originally submitted for proposed Rule 1.0 but was subsequently moved to the 1.8.10 table because of the substance of the comment.] No response required.
X-2016-46	Johnson, Maxine (8-16-16)	No	M		I have a lawyer as a neighbor and he and his wife have gone throughout the neighborhood suing other neighbors. A lawyer should never have the ability to sue on behalf of a person he or she is either married to or having sex with prior to the lawsuit and benefitting from using the spouse or girlfriends name.	[Note: This comment was originally submitted for proposed Rule 1.0 but was subsequently moved to the 1.8.10 table because of the substance of the comment.] The comment does not raise any issues regarding proposed Rule 1.8.10. The comment appears to raise a concern

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						about a lawyer engaging in vexatious litigation practices. Please see proposed Rule 3.1 [3-200].
X-2016-58	Thompson, Irene (9-1-16)	N	A		It's shocking that this rule does not already exist. Attorneys having sex with clients? Are you kidding? What could possibly go wrong?	No response required.
X-2016-63	Edwards, Lisa (9-15-16)	N	M		I do not think clients and attorneys should be completely barred from dating or sexual relations. I had some incredible attorneys along the way both civil and family law. If down the road I wanted to date them who are you to tell me no. I believe at least 1 year preferably two and drop dead minimum 6 months waiting period from the time the case is completely done or another attorney hired should be in place. Now the married attorney who kissed me while working on my case or the one helping me defend myself from a stalker and telling me he could understand my stalker because he "wouldn't give me up for all the tea in China" need to be held accountable or retrained. I handled it another way but that behavior is abhorrent and clients should know what they can do for assistance.	The Commission changed the reference in the rule from “client” to “current client.” The proposed rule does not regulate sexual relations after the termination of the attorney-client relationship.

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

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X-2016-66h	San Diego County Bar Association (Riley) (9-15-16)	Y	A		1. We commend and support the Commission's adoption of a rule that prohibits a lawyer having a sexual relationship with a client, unless that relationship pre-existed the attorney-client relationship. Current Rule 3-120, with its "if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110," could be simply an excuse for the rationalization of conduct that should be prohibited unless the individuals had a personal relationship before the lawyer was engaged. 2. We observe, however, that neither the proposed rule nor any Comment addresses how long the prohibition lasts— until the conclusion of the matter for which the attorney is engaged; for some period after the attorney-client relationship ends; whether formal indicia of termination of the attorney-client relationship are required or preferred? We believe some guidance would be helpful, especially given the often volatile mix of professional and personal relationships.	1. No response required. 2. The Commission understands the commenter's request for further guidance on the duration of the rule's effect in prohibiting sexual relations between lawyer and client. However, the Commission's Charter directs the Commission to minimize the number of comments. The guidance issues raised by the commenter are better left for ethics opinions.
X-2016-76f	Los Angeles County Bar Association Professional Responsibility and Ethics	Y	M		1. PREC opposes the adoption of Proposed Rule 1.8.10 in its current form. While the proposed	1. See response to the comment from William Johnson, X-2016-2, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response A = 12 NI = 0
	Committee (PREC) (9-23-16)				rule is consistent with the ABA Model Rule, it is much more restrictive than our current rule on sexual relations (Rule 3-120), and prohibits ALL sexual relations with clients, except for those that existed at the time the attorney-client relationship commenced (contrasted with our current rule, which essentially prohibits coercion, intimation and undue influence in entering into sexual relations with a client). While such a bright line test might make sense in certain practice areas (e.g., criminal law and family law cases), it is patronizing to clients and unreasonably prohibitive where the client is sophisticated and not vulnerable. 2. Proposed Rule 1.8.10 is also inconsistent with the State Bar Act: Section 6106.9 of the California Business & Professions Code tracks with current Rule 3-120, and only provides (in subsection (a)) for the imposition of discipline where an attorney does any of the following (emphasis added): "(1) Expressly or impliedly *condition the performance of legal services for a current or*	2. See response to COPRAC, X-2016-43a, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					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. (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. 3. Further, as provided in Comment [2], the extension of the proposed rule in this form to all corporate clients – and especially in-house lawyers – is particularly unreasonable and unnecessary. These are not the situations where one would typically find the type of vulnerable clients this rule is intended to protect. Also, because the only exception to the application of the proposed rule is with respect to a consensual sexual relationship that exists	3. The Commission disagrees that a sexual relationship with a client should be equated with or treated the same as a business relationship with a client.

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					between the lawyer and the client "when the lawyer-client relationship commenced," the proposed rule would prohibit sexual relations between a client and a lawyer if the client and lawyer had been in a previous relationship but were no longer in the relationship at the time the representation commenced. Thus, discipline could be imposed under this strict bright line test if the client and lawyer reengage in sexual relations following a situation where the client seeks out the lawyer for legal advice. The rules regulating business relationships with a client are intended to ensure that the clients are treated fairly and the lawyers' judgment is not impaired. Under our current rule 3-300 (as well as ABA Model Rule 1.8), there is no strict prohibition on a lawyer entering into a business transaction with a client. These rules permit business relations so long as the relationship is fair and consensual (among other requirements). In our view, the rule relating to sexual relations should be similar: provided the relationship is consensual, and	

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					not based on coercion, undue influence or intimidation, and provided the lawyer is otherwise in compliance with the rules (e.g., with respect to competence and conflicts of interest), there should be no total prohibition on sexual relations. PREC believes that the rule should prohibit 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.	
X-2016-93c	Los Angeles County Public Defender (Brown) (9-23-16)			D	Current Rule 3-120 is nuanced and balanced, with an understanding of the nature of human relations. The proposed rule is a blanket prohibition on all sexual relations unless the consensual sexual relationship existed at the time the lawyer-client relationship commenced. The proposed rule may be easier to enforce, but it is unrealistic in the real world. The current rule correctly recognizes that sex does occur, and the rule prohibits sex that is	See response to the comment from William Johnson, X-2016-2, above.

Proposed Rule 1.8.10 [3-120] Sexual Relations with Client
Synopsis of Public Comments

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					non-consensual, is coerced, is a condition of representation, or results in incompetent representation. The Commission's real complaint is not that lawyers 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 oppose this revision.	
X-2016-104v	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A	Cmt. [3]	1. Supports adoption of proposed Rule 1.8.10. 2. Second sentence of comment [3] should be clearer as to meaning.	1. No response required. 2. 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.")
X-2016-120k	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		We support the proposed revisions to this rule.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.9
(Current Rule 3-310(E))
Duties to Former Clients

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("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).

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 public comment, the Commission deleted paragraph (c)(3) and added a new comment addressing when two matters are "the same or substantially related." The Commission believes that the concept contained in (c)(3) is 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).

Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean 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 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 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 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 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.

Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
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~~; or~~

~~(3) without the informed written consent* of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation~~.

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 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 ~~Rules 1.6, 1.9(c), and~~ 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 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 a firm* once a lawyer has terminated association with the firm.*

[~~3~~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.

[~~4~~6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [~~8~~10] ~~to Rule 1.7~~. With regard to 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.

Rule 1.9 [3-310(E)] ~~Avoiding the Representation of Adverse Interests~~ Duties To Former Clients

(Redline Comparison of the Proposed Rule to Current California Rule)

(~~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]. 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 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 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 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.

~~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.~~

Rule 1.9 [3-310(E)] Duties ~~to~~To Former Clients
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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]. 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 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 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 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.

~~[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

~~[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).~~

~~[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.~~

~~[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.~~

Proposed Rule 1.9 [3-310(E)] Duties to Former Clients
Synopsis of Public Comments

TOTAL = 13 ***A = 1*** ***D = 0*** ***M = 12*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
2016-32o	Law Professors (Zitrin) (07-25-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is "generally known." Although this tracks the ABA rule, the word "generally" is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is "generally *and widely* known."	The commenters' requested revision was not implemented because the Commission believes that "generally known" has the same meaning as "generally and widely known."
X-2016-43r	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin)	Yes	M	(c)(3)	COPRAC supports the proposed rule, with the exception of proposed subparagraph (c)(3). COPRAC believes that subparagraph (c)(3) should be deleted for two reasons. First, the problem that paragraph (c) is intended to address is likely to arise very infrequently. The substantial relationship test contained in paragraphs (a) and (b) is a very broad prophylactic rule. Accordingly, it will be a rare case in which a lawyer is not disqualified by the substantial relationship but still has any material confidential information. Second, in those cases the Committee believes that the absolute prohibitions on use or disclosure in subparagraphs	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." With this modification, the Commission agrees that the prohibitions set out in paragraphs (a) and (b), the prohibitions on use and disclosure of confidential information, and the existing case law recognizing the client's right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter provide adequate client

[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
					(c)(1) and (c)(2), coupled with the client's recognized right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter, provide adequate protection against harm to the former client. Accordingly, we respectfully suggest that the proposed rule be conformed to the approach of every other American jurisdiction by deleting subparagraph (c)(3).	protection against harm to the former client.
2016-52o	Law Professors (Zitrin) (08-24-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is "generally known." Although this tracks the ABA rule, the word "generally" is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is "generally *and widely* known."	The commenters' requested revision was not implemented because the Commission believes that "generally known" has the same meaning as "generally and widely known."
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 29-34 of the public hearing transcript.)	No	M	(c)(3) Comment 1 (ii)	What the rule articulates is that "A former client with whom we've obtained confidential information, we cannot now represent a new client." The Office of the Public Defender (PD) has a written conflict policy which is used as a model for other PD offices around the state. Our written policy says that "if a former client is a prosecution witness or a victim	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes that paragraph (c)(3) carried forward current rule 3-310(E) nearly verbatim. The

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					and we are looking at whether to represent a current client, we are not permitted to use any of the information from the former client that will create a conflict, but mere possession does not create a conflict." That's the line that the office policy draws. There's no ethical problem from having information that's not being used. The problem is using it. The distinctions between possession and use acquired is the word that the draft Commission rules articulate. The significance of that point is there are a very large number of cases where former clients are prosecution witnesses. I suspect that if the rule is that possession is enough to disqualify us in cases, my office will never handle another gang case because somebody in the prosecution's case is going to be a client of mine. The number of cases we would be required to conflict on would be substantially large. Many PD offices around the state are in precarious positions because their Board of Supervisors don't like it. They consider the PD office liberal. These offices survive only because they're so much	Commission also notes that proposed paragraphs (a) and (b) impose the same obligations on lawyers as does current rule 3-310(E). The Commission also notes that the commenter's statement that "mere possession [of material confidential information] does not create a conflict" may be inconsistent with case law regarding disqualification. See, e.g., *Costello v. Buckley* (2016) 245 Cal.App.4th 748, 755 (in a case where a lawyer could have acquired confidential information from a former client that can be used to the former's client's disadvantage in a current case, the lawyer "is not only prevented from actually using the confidential information, but also is prevented from accepting subsequent employment representing an adverse party to the former client when he may be called upon to use such information." [citing *Kraus v. Davis* (1970) 6 Cal.App.3d 494, 489, 85 Cal.Rptr. 846.) Thus, the possession by a lawyer of confidential information of a former client that is material in a current

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					cheaper than the private party. The more conflicts we have to declare, the worse acquisition becomes, and eventually we're going to hit a point where it's going to endanger the PD offices throughout the state. There is actually an inconsistency between the proposed rule and the comments. The rule says "acquiring information" but the comment says "use". We urge this Commission to adopt the comments which correctly cites the "*Wachumna*" case. One final collateral thought. What if we only represent a client at an arraignment where we ask questions regarding: true name, birthdate, family, work information and prior criminal history. All of these are clearly confidential. They have nothing to do with anything. Why would that be a conflict. Well, it's not, unless the rule is "acquiring information". We would be satisfied with the rule by the Commission adding the language from the comments which says the use of information precludes the representation of the client.	matter in which the lawyer represents a client with interests adverse to the former client prohibits the lawyer from accepting or continuing the current representation. Nevertheless, a court might conclude that a lawyer in the prohibited lawyer's firm can represent the client if the prohibited lawyer is timely and effectively screened. See, e.g., *In re Charlisse C* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597].

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Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 62-64 of the public hearing transcript.)	Yes		(a) (c)(3)	The rule talks about representing people where you have an adverse relationship as a result of representing somebody else. The current rule talks about the subject matter of the former client's representation. The new rule should add that the adverse aspects of the relationship are adverse as it relates to prior representation of that client, not simply that it's adverse to the client. The difficulty is that we have an enumerable number of (often gang involvement) cases where as a result of our representation, clients/former clients don't like the fact that we represent those people. Representing a new person, can potentially put that person at risk, simply by virtue of our representation, which we think is something adverse to that client's interest but not adverse to the former client's interest in the particular matter in which we represented them --- which is what we think the language of new rule should include. We would like language in the new rule which limits the conflict of interest "the same matter that was the subject of the former representation,"	The Commission did not make the suggested change. To limit prohibitions to the "same matter" in which a lawyer represented the former client is at odds with well-settled law. See, e.g., *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877 (Applying substantial relationship test); *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (same).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-66i	San Diego County Bar Association (SDCBA) (Riley)	Y	A		Supports the adoption of this proposed rule as a significant improvement over current Rule 3-310(E)—while maintaining client protections of the current rule—in that it incorporates the judicially developed "substantial relationship" test and addresses the increasing issue of potential conflicts arising from lawyers moving from one firm to another. We further believe the Comments provide valuable guidance to lawyers.	No response required.
X-2016-67d	Orange County Bar Association (OCBA) (Friedland)	Y	M	1.9(c)(1) Comment [3]	Believes that Proposed Rule 1.9 should not include the exception in subsection 1.9(c)(1) that allows lawyers to "use information… to the disadvantage of the former client… when the information has become generally known," or the corresponding Comment [3]. The provisions in this Rule should be consistent with the provisions of Proposed Rule 1.6 regarding the confidentiality obligations of lawyers. The current version of Proposed Rule 1.6 does not include any exception for information that is "generally known," so there should not be a backdoor exception to lawyers' confidentiality obligations in this Rule 1.9. By way of this comment, the OCBA takes no	The Commission disagrees that paragraph (c)(1) would provide a "back door" exception to proposed Rule 1.6 [3-100]. The provision only permits the *use* of the former client's confidential information that has become generally known; the lawyer is still absolutely prohibited from revealing a former client's confidential information under paragraph (c)(2) and is absolutely prohibited from using confidential information to a *current* client's disadvantage by proposed Rule 1.8.2. Thus, for example, a lawyer could use information of a *former* client that was confidential when learned but

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					position on whether the confidentiality provisions of Rule 1.6 should or should not include an exception for information that is "generally known."	is now generally known to make investment decisions. The lawyer could not do the same with information from a current client, or reveal that information.
X-2016-65a	Carroll, Dan	No	M	Comment [2]	Opposes adoption of Proposed Rule 1.9 in its present form, but would support its adoption if inclusion of the concept of conflicts due to "substantially related matters" were removed. 1. There is absolutely no discussion in either the proposed rule or the comments as to how a lawyer is to determine whether matters are "substantially related." The word "substantial" is defined in Proposed Rule 1.0.1(l), but not in a fashion that is helpful to this inquiry. 2. The referenced lack of discussion includes absolutely no discussion as to whether the proposed rule is or is not intended to be evaluated under California case law concerning the "substantial relationship rule" as applied by courts in lawyer disqualification cases. Similarly, there is no discussion as to	The Commission has not made the suggested change. The inclusion of the term "substantially related" is necessary to capture those situations under which a lawyer might have obtained confidential information material to the present matter. 1. The Commission has added a comment discussing when two matters are "the same or substantially related." 2. See response to comment 1, above. Further, when courts apply the substantial relationship test in a disqualification motion, they nearly always use current rule 3-310(E) as a starting point. The Commission notes that paragraphs (a) and (b) impose the same obligations on

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					whether the proposed rule intends to create a new and different concept of "substantially related" to be applied for the purposes of lawyer discipline, These two issues are bound to lead to confusion in both lawyer analysis of the proposed rule as written and state bar disciplinary evaluation. Conflict of interest based on matters being "substantially related" should be left to be addressed by the courts in disqualification motions, not the disciplinary process. While I urge that the proposed rule be revised to remove all reference to "substantially related matters," if those references remain, I strongly urge the Committee include a specific comment clarifying whether lawyer disqualification "substantial relationship" case law should be consulted in analyzing conflicts under the proposed rule. I urge the Committee to state that lawyer-disqualification "substantial relationship" case law does not apply to analysis under this rule. The court-created "Substantial Relationship Test" was not adopted for the purpose of attorney discipline. 3. Finally, notes Comment [2] to	lawyers as does current rule 3-310(E). 3. The Commission disagrees

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the proposed rule is inconsistent with the proposed rule's content. Proposed Rule 1.9(b) forbids knowing representation of a person "in the same or a substantially related matter" in which a lawyer's former firm represented a client. Comment [2], however, inconsistently declares "the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by" lawyer-client confidentiality. That is not what Proposed Rule 1.9(b) states. Rather, the proposed rule states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are "substantially related."	with the commenter's assertion that paragraph (b) "states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are 'substantially related.'" Subparagraphs (b)(1) and (b)(2) must both be satisfied for paragraph (b) to apply. Under subparagraph (b)(2), it must be shown that "the lawyer *had acquired information* [about the former client] protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter." (Emphasis added.)
X-2016-68o	Law Professors (Zitrin) (09-21-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is "generally known." Although this tracks the ABA rule, the word "generally" is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is "generally *and widely* known."	The commenters' requested revision was not implemented because the Commission believes that "generally known" has the same meaning as "generally and widely known."

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X-2016-86a	United States Department of Justice (US DOJ) (Ludwig)	Yes	M		1. Supports the adoption of proposed Rule 1.9. 2. However, as drafted, proposed Rule 1.9 provides lawyers with no guidance regarding two of the Rule's key concepts: (1) what constitutes a "matter" and (2) when matters are substantially related." We think that it is important to define these terms and recommend doing so in the proposed Rule or its commentary using language consistent with that found in Comments [2] and [3] to Rule 1.9 of the American Bar Association's Model Rules of Professional Conduct . We also think that it would be helpful for the Commission to explain how a lawyer, without personally representing a client, may have "acquired information protected by B&P Code § 6068(e) and Rules 1.6 and 1.9(c)" about that client that generally would disqualify the lawyer from "knowingly represent[ing] a person in the same or a substantially related matter" under proposed Rule 1.9(b). Although proposed Comment [2] makes clear that, under proposed Rule 1.9(b), "[a] lawyer has a conflict of interest only when the	1. No response required. 2. In response to public comment, the Commission has added comments discussing what constitutes a "matter" and when two matters are "the same or substantially related." The Commission is not adding a comment to provide guidance on matters such as the "water cooler effect" because it believes such a comment would be practice guidance inconsistent with the Commission's Charter.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					lawyer involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and B&P Code § 6068(e)," we do not think that it sufficiently alerts lawyers to the circumstances in which they might obtain actual knowledge of such information outside of a direct attorney-client relationship—e.g., the "'water cooler' phenomenon" To provide such guidance and maximize the protection of former clients, we recommend that the Commission incorporate the language of Comment [6] to Model Rule 1.9 into the proposed Rule's commentary.	
X-2016-87b	Attorneys Liability Assurance Society (ALAS) (Garland)	Yes	M		Paragraphs (a) and (b) of Proposed Rule 1.9 are the same as ABA Model Rule 1.9 except that they incorporate California's more client-protective requirement for obtaining a client's "informed written consent" and refer to B&P § 6068(e). Due to their similarity to the ABA Rule, adopting paragraphs (a) and (b) of Proposed Rule 1.9 will facilitate compliance and enforcement by promoting a national standard.	No response required.
X-2016-104x	Office of Chief Trial Counsel (OCTC) (Dresser)	Yes	M		1. OCTC generally supports this rule.	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. 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. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness …warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability. 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	2-3. 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.

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					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. 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 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 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. 4. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2).	3. The commenter does not explain whether it believes the use of term "materially adverse" would result in a difference in how the current rule is applied. The Commission believes that absent evidence that the rule is different from the current standard, Rule 1.9 should move toward the national standard of "materially adverse." 4. No response required.

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					5. OCTC has concerns about Comments 1 and 2. They do not elucidate the rule but, instead, give a philosophical basis for the rule. 6. OCTC supports Comment 3. 7. OCTC has no position on Comment 4's discussion of advanced waivers.	5. 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. 6. No response required. 7. No response required.
X-2016-93e	Los Angeles County Public Defender (Brown)	Yes	M		The text of Proposed Rule 1.9(c)(3) and the Comment to that Rule are inconsistent. The text of the Rule bars representation where the lawyer "acquires" information, but the Comment only bars representation where the lawyer "uses" previously acquired information. We contend that the Comment correctly states the rule.	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes, however, that it disagrees with the commenter's assertion that the former proposed subparagraph (c)(3) and the Comment were inconsistent. The comment does not state that a lawyer is prohibited from representation only where the lawyer "uses" protected information.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-115c	Lamport, Stanley	No	M		1. Proposed Rule 1.9(a) and (c)(3) have overlapping and potentially conflicting standards that will not be understood by the average practitioner and are unlikely to be applied consistently by the courts. Clients pay for this rule in the sense that the subject matter of this rule is frequently litigated in disqualification motions and breach of duty cases. 2. Changing the standards will inevitably result in the courts having to reconsider settled principles under the current rule. The current rule is not broken. There is no need to create a new rule with a hodgepodge of different standards with overlapping application that produces unnecessary litigation at the inevitable cost to clients.	1. The Commission agrees and has deleted paragraph (c)(3) while adding a comment discussing when two matters are "the same or substantially related for purposes of paragraph (a). 2. The Commission disagrees that "changing the standards will *inevitably* result" in settled principles being reconsidered by the courts. (Emphasis added). Paragraphs (a) and (b) will accomplish the same result but provide clearer guidance on when a conflict situation will arise, thus enhancing compliance with the rule. Further, substituting paragraphs (a) and (b) will remove an unnecessary difference between California and a preponderance of the jurisdictions, consistent with the Commission's Charter.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					3. Suggested Revision Replaces Proposed Paragraph (a) With Paragraph (c)(3) Paragraph (c)(3) in the Proposed Rule is based on current rule 3-310(E) [which] eloquently and correctly states the duty. In practical terms, the current rule means that a lawyer cannot accept a representation in circumstances where the lawyer could potentially use or disclose the former client's confidential information in a manner that would be contrary to the former client's interests. Proposed paragraph (a) ties adversity to the interests of the lawyer's current client. The rule should be instructing the profession to view protection of a former client's interests in confidentiality from the former client's perspective and not from the perspective of the lawyer's new client. There is no reason to have two rules (paragraphs (a) and (c)(3) in the Proposed Rule) that cover the same subject, particularly when one of those rules (proposed paragraph (a)) is under inclusive.	3. The Commission has not made the suggested change. It believes that the standards set out in paragraphs (a) and (b), coupled with the new comment discussing when two matters are "the same or substantially related," provide a clearer explanation of determining when a conflict with a former client arises. See response to comment 1, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					4. Paragraph (c) in the Proposed Rule applies to a lawyer's present or former firm. While this tracks Model Rule 1.9, California courts have held that the imputation rules do not extend to a lawyer who has terminated an association with a firm. That lawyer only has duties with respect to the information the lawyer actually acquired at the former firm. The reference to "former firm" in paragraph (c) does not account for the foregoing limitation. It should be removed from paragraph (c). *5. The Suggested Revision Expands Paragraph (b) To Apply To Any Use Or Disclosure Of Confidential Information* Proposed paragraph (b) in the Proposed Rule (as well as the Model Rule) addresses the duty with respect to information a obtained by a lawyer while formerly associated with a firm, but proposed paragraph (b) relates only to paragraph (a) in the Proposed Rule. However, proposed paragraph (a) only relates to use or disclosure of confidential information in representational settings. It does not extend to use and disclosure	4. The Commission disagrees with the commenter's concern and notes that both (c)(1) and (c)(2) require the lawyer him or herself to have acquired protected information by virtue of the prior representation – this Rule does not impute to the lawyer information known to others within the present or former firm. Imputation is covered by Rule 1.10. 5. The Commission did not make the suggested change. Aside from creating an unnecessary difference in the rules between California and a preponderance of the jurisdictions that have adopted the Model Rule provision, the Commission notes that California courts have had no trouble in applying Model Rule 1.9(b). See *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) (applying "modified substantial relationship test" as set forth in

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					of confidential information in non-representational circumstances, even though the lawyer's duty is the same and the rules limiting imputation with respect to a lawyer's former firm should be the same. The Suggested Revision attempts to address this in paragraph (b) by stating that a lawyer who is formerly associated with a firm must comply with all of paragraph (a) and (c) if the lawyer received confidential information while associated with the former firm. Given that (b) would refer to both (a) and (c), it would make sense to move (b) to the end of the Rule and move paragraph (c) in the Proposed Rule to paragraph (b). *6. The Suggested Revision Adds Reference To Information Acquired By The Lawyer Or The Lawyer's Firm* Paragraphs (c)(1) and (c)(2) in the Proposed Rule refer to information "acquired by virtue of representation of the former client" without specifying whether the acquisition is by the lawyer or the firm or both. To provide clarity, the Suggested Draft revises those paragraphs to state that the information was acquired	*Adams*); *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (same). 6. The Commission has not made the suggested change.

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					by "the lawyer or firm" by virtue of the representation of the former client. *7. The Substantial Relationship Test Should Not Be In The Rule* Under Rule 3-310(E), the focus is on whether the lawyer acquired material confidential information by virtue of representing a former client. That is the relevant inquiry. It is more inclusive in that it focuses on the information the lawyer received rather than the nature of the matter in which the lawyer represented the client. The "same or a substantially related matter" language is an evidentiary standard that is unique to lawyer disqualification motions. The substantial relationship test was not intended to be and does not operate as a substantive rule of law. It is a rule of evidence created specifically for disqualification motions …. The ABA formulation, from which the "same or a substantially related matter" language is derived, has lead courts in other states that have Model Rule 1.9 to fashion an ongoing duty of loyalty to a former client. By adopting an ABA standard, we run the risk of importing this case	7. The Commission disagrees. The substantial relationship test has been used in discipline cases. See, e.g., *In the Matter of Lane*, 2 Cal. State Bar Ct. Rptr. 735 (1994).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					law into the California court's construction of the new rule. These cases blur the distinction between the duty to maintain a client's confidential information and not do anything injurious with respect to the matter in which the lawyer represented the former client on the one hand and a duty of loyalty that is not connected to those two duties. There is no functional reason for extending the duty of loyalty to beyond the two duties that the California Supreme Court has repeatedly stated since the 1930s. Changing the current standard in Rule 3-310(E) to the "same or a substantially related matter" is likely to be viewed by some as a new and different standard. It unnecessarily invites litigation at client expense of settled principles based on the new formulation. There is nothing wrong with the current formation in Rule 3-310(E), which is retained in proposed paragraph (c)(3). There is no reason to change the 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 for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("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).

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.

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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 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 public comment, 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.

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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).

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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).

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Redline to Public Comment Draft Version)

(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 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* ~~[in accordance with Rule 1.0.1(k)]~~ 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* ~~[in accordance with Rule 1.0.1(k)]~~ 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).

~~(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.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[~~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.

[~~3~~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).

[~~4~~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.

[~~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. 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].

[~~6~~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.

[~~7~~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.

[~~8~~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).

[~~9~~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).

Rule 1.11 Special Conflicts of Interest for Former ~~&~~and Current Government ~~Officers &~~Officials and Employees
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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.

[56] 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 isare governed by paragraph (dparagraphs (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 [96]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[67] 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'slawyer'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.

[98] 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.~~

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
Synopsis of Public Comments

TOTAL = 5 ***A = 3*** ***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-2016-43bd	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Y	M		1. As COPRAC recommended with respect to proposed Rule 1.10, we recommend that the Commission add a comment providing guidance as to the meaning of "participated substantially" as used in subparagraphs (a)(2), (d)(2)(i), and (d)(2)(ii). We also note that the phrase "participated substantially" is slightly different than the term "substantially participate" used in proposed Rule 1.10, yet there is no indication how or whether the Commission intended these terms to be construed differently.	1. The Commission has added a comment providing guidance as to when participation is personal and substantial as follows: "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,

[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
						recommendation, investigation or the rendering of advice in a particular matter." 2. The Commission has made the suggested change to "participated personally and substantially" to provide uniformity with the ABA Model Rule, as well as with various government statutes and regulations that use the same phrase. See, e.g., 18 USC 208; 5 CFR 2640.103.
					2. In addition, we recommend that the Commission use the phrase "participated ***personally and*** substantially," which is the phrase used in Model Rule 1.11(a)(2). Inclusion of "personally" would conform California's rule to the national standard, which we understand is one of the goals of the Commission. We recognize that the Commission felt that the inclusion of "personally" is redundant, but we think that conforming to the national standard is a worthwhile benefit that outweighs that concern.	
X-2016-89b	League of California Cities (Leary) (09-27-16)	Y	A		1. I write in support of Proposed Rule 1.11 on behalf of the City Attorneys' Department of the League of California Cities ("League"). 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	1. No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					California State Bar's Board of Trustees ("Board"). 2. 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.	2. The Commission believes the term public officer implies a limitation to public officials of a certain level that should not exist, and that the Rule should extend to any public official or government employee.
X-2016-104z	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M	(b), Cmts. 3, 4	1. Supports rule but concerned with use of "knowingly" in paragraph (b). 2. Supports cmts. 1, 2, 5, 6, 7, 8 & 9. 3. Comment [3] does not clarify rule and should be deleted.	1. 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. No response necessary. 3. The Commission believes this comment provides

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					4. Concerned with use of "knowingly" in Comment [4].	important guidance regarding paragraph (a)(1)'s incorporation of Rule 1.9(c) as applicable to government employees. 4. 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.
X-2016-120m	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		Supports the adoption of proposed Rule 1.11.	No response required.
X-2016-121b	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		The Access Commission supports proposed Rule 1.11. By establishing that imputation of a conflict of interest is the default situation, it could protect the many Californians who interact with the justice system without sophisticated knowledge of the system. It will bring California into line with the conflict rules of every other jurisdiction which has adopted some version of Model Rule 1.11. This will help to ensure that out-of-state lawyers will know the rule. We appreciate that the proposed rule protects clients better than the Model Rule by requiring informed written consent which requires written disclosure of the potential	No response required.

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
Synopsis of Public Comments

TOTAL = 5	*A = 3*
	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
					adverse consequences of the client consenting to a conflicted representation.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.12
(No Current Rule)
Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("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).

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.

[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.

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.

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,

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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.

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) 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 public comment, 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.

[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.

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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~~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), ~~but not by virtue of previous service as a mediator or settlement judge, 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 prohibited lawyer is timely screened* ~~[in accordance with Rule 1.0.1(k)]~~ 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.

(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] ~~For purposes of this Rule, the term "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, 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)(~~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.

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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)(12) 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.

Proposed Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
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
X-2016-43bl	Committee on Professional Responsibility and Conduct (COPRAC)	Y	M		COPRAC supports the concept of the rule and its comments, but has some suggested revisions.	
				(a)	1. Section (a) regulates the conduct of a lawyer who has "participated substantially" as a judge, or other judicial officer. As we have suggested in our comments to proposed Rules 1.10 and 1.11, COPRAC believes that it is important to provide guidance on what the term "participated substantially" means. This is not a term that exists in the current California rules. We note that the meaning of the word "substantially" is discussed in Comment [1]. However, we do not believe its provisions provide sufficient clarity. Comment [1] now provides: "For purposes of this Rule, the term "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	1. The Commission has substituted the term "personally and substantially" for "substantially" and revised Comment [1] to clarify with more specificity what is meant by that term in proposed Rule 1.12.

[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
					representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information." While it appears this comment is generally derived from Comment [1] to Model Rule 1.12, there is an uncharacteristic triple negative in the above sentence, which makes it difficult to understand. We read Comment [1] as saying that "substantially participated" describes those situations in which the lawyer participated in some manner in the matter, and "acquire[d] material confidential information" in doing so. If so, COPRAC believes that concept could be stated more simply in the comment.	
				(b)	2. COPRAC also believes a change to Rule 1.12(b) is warranted. Under Model Rule 1.12(b), a law clerk need only notify his or her judge before she interviews with a party or a law firm with a matter pending before the court. Presumably, the judge would thereafter take the clerk off any case involving that party or law firm, thus eliminating any	2. The Commission has not made the suggested change. The Commission continues to believe that the judge must provide approval to engage in negotiations, which it expects would be given in nearly every circumstance. However, there may be occasions when it would be improper, e.g., because of the sensitivity of

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					potential conflict. However, under proposed Rule 1.12(b), a law clerk would not just have to notify the judge, but would also have to obtain the judge's "approval" before any interview with such individuals or entities could take place. As written, the proposed Rule would allow the judge to withhold "approval," and thus "veto" the law clerk's employment choices, and deny him or her an opportunity to interview to join certain firms, during the tenure of the law clerk's employment. COPRAC believes notice by the law clerk alone, without the subsequent judicial "approval," sufficiently protects the public and is the better rule.	the issues in the matter before the court or the notoriety of the case, where the judge should have input on the timing of the negotiations, even if that results in the staff attorney or law clerk losing the employment opportunity.
X-2016-76aa	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M		Paragraph (b) states, in pertinent part, "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 clerk is participating substantially, but only with the approval of the court." We	The Commission 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
					recommend that the second reference to "clerk" in this sentence be changed to "judicial staff attorney or law clerk" to make clear that this provision applies to both positions.	
X-2016-104aa	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	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 this 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." 2. No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.13
(Current Rule 3-600)
Organization as Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-600 (Organization as Client) in accordance with the Commission Charter, 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. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, 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). This proposed rule 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.

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 public comment, 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].

Rule 1.13 [3-600] Organization as Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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 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 for purposes of the authorized matter.

[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 1.13 [3-600] Organization as Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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 ~~violate his or her duty of protecting all~~reveal information protected by Business and Professions Code § 6068(e)~~(1)~~.

(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 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. ~~Any~~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.

[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 ~~Rule 1.4 and~~ 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 ~~Rule 1.6 and~~ 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] ~~This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement.~~ 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 ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

Rule 1.13 [3-600] Organization as Client
(Redline Comparison of the Proposed Rule to Current California Rule)

(~~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 ~~constituent~~official 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 for purposes of the authorized matter.

[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.~~

Proposed Rule 1.13 [3-600] Organization as Client
Synopsis of Public Comments

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43be	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	(c)	Paragraph (c) should refer simply to 6068(e), not specifically (e)(1).	The Commission agrees that in this instance, reference to subdivision (e) is appropriate and has made the change.
X-2016-56	Brown, David (8-31-2016)	N	NI	1.13	Commenter cites two examples where government lawyer placed the interests of the governing body and their staff above those of the constituents. If attorneys aren't acting as fiduciaries for their real clients (the public) then government money is at risk. Attorneys should serve the right master and be held accountable if they don't.	The Commission recognizes that it can be more difficult in the governmental than the private setting to identify the "client" or those authorized to speak for the "client". Rather than attempting to create governmental-specific definitions, which the Commission does not think would be possible, it has referred to the complexity of this issue in proposed Comment [1]. Nevertheless, the starting point is that the client of a lawyer for a public agency is the agency itself, not its constituents, not the voters or the public, and not what the lawyer believes is in the best interests of the voters or the public. If the lawyer believes that agency is acting inappropriately he or she proceed as provided under paragraph (b) and may resign, as lawyers for private clients are able to do in certain

[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
						situations.
X-2016-86b	U.S. Department of Justice (Ludwig) (9-27-16)	Y	M	Cmt. 1	Limit definition of "constituent" to this rule so it doesn't conflict with Rule 4.2(b).	The Commission has revised the last sentence of Cmt. [1] to clarify that constituent has the stated meaning "for purposes of this Rule."
X-2016-104ab	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(b), cmts. 2-5	1. 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. 2. 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	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." 2. The Commission has not made the suggested change because it continues to believe that competence, diligence, and supervision should be set

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					competence, diligence, and supervision. 3. 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. 4. Comment 5 appears to cover the same issues as Comment 2 and, thus, is unnecessary and should be stricken.	forth in separate rules. 3. See response to comment 1. 4. 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."

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.14
(No Current Rule)
Client With Diminished Capacity

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has 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 American Bar Association ("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. The evaluation was made with an understanding that the Rules of Professional Conduct are intended as a disciplinary standard and that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. 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). This proposed rule 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.

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. Following consideration of public comment, 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."

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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. ~~Neither a~~A lawyer who ~~takes~~does not take protective action as ~~authorized by~~permitted by paragraph (b) does not violate this Rule~~, nor a lawyer who chooses not to take such action, is subject to discipline~~.

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, ~~often has~~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 ~~Probate~~Prob. Code §~~§~~ 810~~—813~~.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer ~~may~~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 ~~Rule 1.6(b) and~~ 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.

[~~5~~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.*

[~~6~~7] ~~This Rule~~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; ~~Welfare and Institutions~~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.

Rule 1.14 Client with Diminished Capacity
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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.

[63] In determining the extent of the client'swhether 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, thethe 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.

[85] 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. WhenIn taking protective action pursuant toas 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.~~

Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments

TOTAL = 21	A = 10
	D = 2
	M = 9
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-10	Kauffman, Kenneth (07-19-16)	No	M	1.14	ABA Comment [6] should be incorporated into the final rule in its entirety. Full incorporation provides the factors that should be considered and balanced in making a determination of diminished capacity. Providing that lawyers may rely on an outside medical provider "leaves it as a free-for-all with respect to how attorneys will determine diminished capacity."	The factors in ABA MR 1.14, Cmt. [6] are too amorphous to provide useful guidance to lawyers. Inclusion of that comment would not advance client interests. Nevertheless, although the Commission does not agree with the commenter's premise that reference to outside medical providers will result in a "free-for-all" determination of diminished capacity, the Commission has recommended revisions to proposed Comment [2] that reference factors in Probate Code §§ 811 and 812 that provide specific guidance in making a determination as to a client's capacity.
X-2016-24	Rosenblatt, Carolyn (08-01-16)	No	A	1.14	I totally support proposed rule 1.14. It is about time that the State Bar clearly permitted lawyers who encounter financial elder abuse to take protective action. The only phrase with which I take issue is the piece that says one is supposed to "maintain a normal attorney-client relationship with a client who has diminished	No response required. The Commission disagrees. The commenter has focused on the phrase without the important qualifier, "as far as reasonably possible." The

[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
					capacity. This sounds like fantasy. The words "normal attorney-client relationship" should be omitted. Those words are outdated, given what we now know about diminished capacity.	issue is client autonomy. California recognizes that even persons who suffer from mental or physical disorders may still have capacity to make decisions. See Probate Code § 810.
X-2016-29	Musser, Elaine (08-02-16)	No	M	1.14	In my opinion, the proposed rule does not go far enough in permitting an attorney to protect a client with diminished capacity who is at risk. Under the proposed rule, the attorney is required to obtain consent from a client with diminished capacity before being able to take any protective action – even if the client is in imminent danger. The reality is that a client with diminished capacity may be incapable of making a reasoned decision to give consent. ABA Model Rule 1.14, which permits a lawyer to take action regardless of client consent, is a much better rule.	In drafting proposed Rule 1.14, the Commission was guided by a deep appreciation 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. At the same time, , the Commission recognized that California's duty of confidentiality, as reflected in Business & Professions Code § 6068(e)(1) and current rule 3-100, does not permit a rule as 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. Consequently, proposed Rule 1.14 is necessarily narrower in scope than the model rule.

Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments

TOTAL = 21	*A = 10*
	D = 2
	M = 9
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32f	Law Professors (Zitrin) (07-25-16)	Yes	A	1.14	The commission has wisely avoided the pitfalls of the similar ABA rule by developing a nuanced position that protects the sanctity of the attorney-client confidential relationship while at the same time providing alternatives to help deal with serious dangers to clients who are not fully able to make decisions by themselves. The ABA should take note of this commendable approach.	No response required.
X-2016-52f	Law Professors (Zitrin) (08-24-16)	Yes	A	1.14	The commission has wisely avoided the pitfalls of the similar ABA rule by developing a nuanced position that protects the sanctity of the attorney-client confidential relationship while at the same time providing alternatives to help deal with serious dangers to clients who are not fully able to make decisions by themselves. The ABA should take note of this commendable approach.	No response required.
Public Hearing	Stern, Peter (Provided oral public hearing testimony on July 26, 2016. See pages 10-14 of the public hearing transcript.)	No	M	Section 8 (B1) (C)	There is no discussion in the executive summary of the rule that was developed for 1.14 by the first Rules Revision Commission (RRC1). If the Commission chooses to step away from the concept in that earlier rule of implied authority for action by an attorney to protect a client, it would be helpful to	The Commission does not recommend the suggested changes to the proposed rule, nor does it believe that revisiting the first Commission's proposed rule would be productive. The Commission believes the proposed rule conforms to the Commission's charge which is

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					provide context to the evolution of the currently proposed rule 1.14. I fear that the current rule does not afford adequate protection for the client who is significantly disabled and is about to be harmed by an action. And attorneys are not authorized to protect that person unless we have the consent of the client. I hope the Commission might be willing to take another look at RRC1's version of this rule and perhaps take a big step and try to go from the implied authority until such time as 6068 (e) can be amended. One technical difference between RRC1's version of the rule and the current rule has to do with paragraphs (b)(1)-(3) of RRC1's rule and subparagraphs (i) to (iii) in (b)(1) of the proposed rule. The linkage in RRC1's rule made it clear that there was a causal consequence between a client who has significantly diminished capacity so that the client cannot make decisions to protect him or herself. And then, as a result of the diminished capacity, was at risk for ... harm and cannot adequately act in his or her own interest. The causal linkage is no	not the same as the charge to the first Commission. The proposed rule strikes an appropriate balance between the lawyer's duty to act competently on behalf of a client with significantly diminished capacity and the duty of confidentiality under existing California law. The concept of "implied authorization" found in Model Rules 1.6 and 1.14(c) is not a part of the current California rules, which is the starting point for the Commission, or in State Bar Act. The absence of "causal linkage" the commenter refers to in paragraph (b) and subparagraphs (b)(1) – (3) of the proposed rule is for a reason. While it may be true that not every client with significantly diminished capacity may be able to make a reasoned decision to give consent, it have been empirically shown that lawyers representing clients with significant diminished capacity can and often are able to obtain client consent to take protective action even where

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					longer present in the current rule. And I believe the Commission might want to consider putting the causal linage back into the rule. Next, since the rule is predicated on client consent, either prospective or simultaneous to the awareness of the problem, a number of the restrictions in the rule do not really make sense to me. For example, I have a client who comes to me clearly impaired, yet is listening, willing to accept my advice and give his consent to what I propose. There doesn't seem to be a need, in my mind, to restrict the actions that I can take as long as I am working with consent of my client (in notifying the people that he is willing to have me notify, for instance). It looks like the very restricted scope of action that I could take under RRC1, has been superimposed on the situation where, with client consent, such restriction would not be necessary. In obtaining client consent, I agree with the comments that it often would be difficult to surmise how the client with significant	the client is in imminent danger under the provisions in the proposed rule. See Comment [2]. The Probate Code also recognizes that this is the case. Paragraph (b) applies to clients with significantly diminished capacity and would not apply in the example the commenter gives where the impaired client is capable of listening, understanding and making an adequately considered decision.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					diminished capacity can actually give informed consent. And, of course, without that informed consent, I would not be able to act.	
					Paragraph (c) of the proposed rule raises a very serious issue of inconsistency. Under (c), the lawyer can disclose: "No more information than is reasonably necessary to protect the client… by going to a third party to help get the client's consent." This is essentially what we were able to do without the client's consent under the old rule. Here it is introduced as a mechanism for obtaining the client's consent. We, the attorneys, can go to third parties and make disclosures of the minimal information necessary to try to get help for the client. But that itself is a violation of 6068(e). And the comment notes that if we give such information disclosure, whoever we give it to is bound by 6068 (e) not to disclose it. But, of course, the information may be given to non-attorneys not bound by our Rules.	The Commission does not agree that paragraph (c) raises an issue of inconsistency. Comment [6] explains that lawyers are able to obtain assistance from another person in communicating with and furthering the interests of a client without violating the attorney-client privilege and §6068(e).
					There are a number of issues raised regarding "advanced informed written consent". My	A lawyer who has complied with the requirements of paragraph (d) in obtaining a

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					question is this: If I have obtained the client's consent when the client is fine, then what duty do I have to inform the client when the client is not fine, that he or she has given this advanced consent and then offer them the opportunity to revoke it.	client's advance informed consent to take protective action is not required to inform the client who subsequently has significantly diminished capacity that he or she previously consented to take protective action that the client can revoke it before taking protective action under paragraph (b). In summary, the Commission believes that although the rule does not afford a lawyer the same broad discretion as Model Rule 1.14, the rule will achieve greater public protection under current California law.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 17-18 of the public hearing transcript.)	Y	A		When I was chair of COPRAC, the question was asked: "Can't we have some way of saving people from themselves so that they're not giving their estates to the gardener… And we said, "unfortunately, no". We can't do anything about it according to the legislature." The reasons are many. One of them is the limitations of 6068(e). Another is the need for client autonomy and the fact that we do not as lawyers, have the right to superimpose our determination of what's in the client's best interest	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					when we have a fiduciary duty to the client to act of what he or she says is his or her best interest. This rule is terrific because it is: nuanced, allows for consent, allows for limited disclosure under limited circumstances. It's an improvement over the ABA rule and the ABA ought to take a look at the California draft and think about adopting it into the ABA rule.	
X-2016-66k	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Yes	D		We believe that California lawyers would be better off if the State Bar did not adopt this discipline rule as drafted with respect to dealing with a client with diminished capacity. We recognize that, in light of Business and Professions Code section 6068, subdivision (e)(1), California cannot adopt wholesale the ABA Model rule 1.14. If, however, the Commission believes that it should adopt the proposed rule, we recommend that the Commission consider making the following changes to subsection (c): 1. Change the heading to: "*Attempt to Obtain* Consent To Take Protective Action;"	The Commission appreciates the commenter's recognition of the constraints imposed by Bus. & Prof. Code § 6068(e). However, the Commission believes that the rule strikes an appropriate balance among the various policy interests, including confidentiality, client autonomy and public protection. See also response to ALAS, X-2016-87c, below. 1-4. The Commission did not make the suggested changes. While the commenter

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. Add: "*as far as reasonably possible, attempting to*" before "obtaining" in (ii); 3. Substitute: "*attempting to obtain*" for "seeking" before "the consent" in (2); and 4. Add: "*if attempting to obtain the consent of the client*," before "the lawyer" in the first sentence of Comment [5]. [Proposed new language in italics.] Our reasons for the suggested changes are to give lawyers the flexibility to act to protect a client who is being, or at risk of being, victimized and may be unable to consent to the lawyer's action, either because he/she is so diminished and/or because he/she is unable to exercise their own free will due to the control of the abuser. The strict requirement of client consent, in many instances, could result in the lawyer being unable to take any action to protect a client.	suggested language might at first glance appear to be more precise, the Commission believes including the qualifying language would create confusion over whether an attempt to obtain the client's consent was sufficient to enable taking protective action. In fact, the commenter's position that lawyers should have more "flexibility" to assist a client with significantly diminished capacity creates a substantive problem with the proposed Rule. It would in effect sanction a lawyer's conduct that is contrary to section 6068(e) and accordingly, inconsistent with the Commission's Charter.
X-2016-43b	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	M		1. COPRAC generally supports the proposed rule, however we offer the observation that the discussion of "consent" under paragraph (c) might be more accurately cast as one of "lawful consent."	The Commission has not made the suggested change. The Commission appreciates the commenter's recognition that the consent described in the proposed rule does not completely align with the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The consent envisioned by the proposed rule, as elaborated upon in Comment [2] through its references to Probate Code §§ 810-813, appears to differ from the concept of "informed consent" as the term is defined in Rule 1.0.1(e). 2, The Committee also notes that while the proposed rule provides protection to clients who currently have apparent capacity to provide informed written consent as protection against future incapacity (subsection (d)) and those who may be demonstrating signs of diminishing capacity but still meet the standard for capacity established pursuant to Probate Code Sections 810-813, it provides no mechanism for addressing the problem of a client whose capacity has fallen below that latter standard. In those instances, the proposed rule provides none of the protections of Model Rule of Professional Conduct 1.14, and leaves this class of clients unprotected. 3. The Committee recognizes that the Commission believes existing confidentiality statutes preclude it from proposing such a	"informed consent" standard as defined in 1.0.1(e). However, the Commission believes that importing a new term, "lawful consent," into the Rule would cause more confusion than assistance to a lawyer seeking guidance from the Rule. 2. Please see response to SDCBA, X-2016-66k, above, and ALAS, X-2016-87c, below. See also proposed Comment [5] of the revised public comment rule draft. 3. The Commission appreciates the commenters' recommendation and intends to emphasize the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					rule, and therefore recommends that the Commission urge modification of the statute to make protection of these clients possible.	confidentiality constraints in the proposed rule when the Rules are submitted to the Supreme Court.
X-2016-68f	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-52f Law Professors (Zitrin) dated August 24, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-76g	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	M	Paragraph (g)	Paragraph (g) attempts to clarify that a lawyer will not be subject to discipline for taking, or choosing not to take, protective action authorized by this Rule. However, as written this statement is far too broad and incorrect. For example, some of the provisions of this Rule are mandatory (not permissive), and the lawyer should not have the option to choose not to follow such requirements. Further, even where the provision is permissive, taking or choosing not to take action may subject the lawyer to discipline under other rules – e.g., competence. As a result, PREC recommends changing the word “authorized” to “permitted” and making clear that the statement is limited to discipline for violation of this Proposed Rule, such that paragraph (g)	The Commission agrees with the first suggested change and has substituted “permitted” for “authorized.” The Commission, however, did not make the second suggested changes. Instead, the Commission has revised paragraph (g) to parallel similar safe-harbor language in current rule 3-100(E).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					would be revised to read as follows: "(g) Discipline. Neither a lawyer who takes protective action as ~~**authorized**~~ **permitted** by this Rule, nor a lawyer who chooses to not take such action, is subject to discipline **pursuant to this Rule**."	
x-2016-72	Ascher, Yvonne (09-23-16)	No	A	Paragraph (c)	In speaking to colleagues, a question has arisen as to whether an attorney who has obtained advance consent must reconfirm that consent under the provisions of paragraph (c) before relying on such consent. Requiring that the Lawyer reconfirm consent at a time when a client's capacity may be diminished seems to defeat the protection afforded by an advance consent, given when a Client was clearly competent and adequately informed. The proposed clarification is warranted to ensure that Lawyers may, in such limited situations as are outlined in paragraph (b), rely on an advanced consent. If advance consent is to be meaningful, the Lawyer should not have to comply with the provisions of paragraph (c) at a future date. To clarify the intent	The Commission cannot identify the source of the commenter's concern in the rule. The proposed rule does not require that the lawyer obtain further consent from the client under the stated circumstances. A lawyer who has complied with the requirements of paragraph (d) in obtaining a client's advance informed consent to take protective action is not required to inform the client who subsequently has significantly diminished capacity that he or she previously consented to take protective action that the client can revoke it before taking protective action under paragraph (b).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					of the proposed Rule, I suggest either or both of the following: Adding the following language to paragraph (c)(1): If no advance consent as specified in Paragraph (d) has been obtained, or if such consent has been revoked, before taking protective action… Adding the following language to paragraph (d) after the first sentence: A lawyer may rely upon an advanced consent that complies with this paragraph unless the client affirmatively revokes that consent in writing.	
X-2016-87c	Attorney's Liability Assurance Society, Inc. (ALAS) (Garland) (09-27-16)	Yes	M		Unlike ABA Rule 1.14, the Proposed Rule does not allow lawyers to act to protect their clients' interests if action required disclosing client confidential information without consent.	The Commission recognizes the difference between Model Rule 1.14 and the proposed Rule. The difference is occasioned by two considerations. ***First***, unlike other jurisdictions that have adopted the Model Rule framework and MR 1.14, California's duty of confidentiality is set forth in a statute, which contains neither an exception that recognizes a lawyer's implied authority to take actions to advance the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						client's interest, nor an express exception to disclose confidential information without client consent specifically to assist a client with diminished capacity. A rule of professional conduct cannot create an exception for, or modify, the statute. ***Second***, the Commission believes that MR 1.14 is too broad and not sufficiently protective of a client's interests and autonomy.
X-2016-94a	Disability Rights California (Mudryk) (09-27-16)	Yes	M		We support the Commission's language requiring attorneys to obtain the consent of clients before taking protective action, protecting the confidentiality of any information disclosed, and limiting the information that may be disclosed. We urge amendments to better ensure that the proposed Rule would not inappropriately compromise clients' personal autonomy and confidentiality in situations where it is not warranted or when there are other less intrusive options, as follows: 1.In evaluating whether to maintain other than "a normal	The Commission thanks the commenter for endorsing the approach the Commission has taken in drafting proposed Rule 1.14. The Commission, however, has not made the specific suggested changes, but has made other revisions to the Rule to address the concerns raised. 1. 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
					lawyer-client relationship with the client," consider the lawyer's responsibility to provide reasonable accommodations to clients with disabilities to assist them with decision-making and to clearly communicate their wishes, pursuant to the Americans with Disabilities Act, The obligation to provide reasonable accommodations should include the lawyer permitting, with the client's consent, the use of a third party selected by the client to assist with decision-making or communication and ensure the confidentiality and privilege of those communications. 2. When taking protective action on behalf of a client with diminished capacity, the Rule should do the following: Make clear that the protective action can only be taken when the	Although the proposed Rule states the general rule that a lawyer must maintain as far as reasonably possible a normal lawyer-client relationship, the Commission believes that identifying specific means to do so is beyond the scope of the Rules and the principles in its Charter to recommend rules of professional conduct that set forth a clear and enforceable articulation of disciplinary standards and to use Comments sparingly.[2] With respect to prohibitions on a lawyer discriminating against clients on the basis of disability, see proposed Rule 8.4.1 [2-400]. 2. The Commission has not made the suggested change. Whether a set of circumstances creates a significant risk is fact-specific. The Commission does not

[2] Commission Charter, Principle #2, states:

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.

Commission Charter, Principle #5 states in pertinent part:

5. * * * 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.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					significant risk of harm is the result of action by a third party, either by more clearly defining the standard of "significant risk that the client will suffer substantial physical, psychological, or financial harm" or referencing a standard in current law such as the abuse and neglect standards defined in the California Elder Abuse and Dependent Adult Civil Protection Act, used by other professionals including financial advisors. 3.When taking protective action on behalf of a client with diminished capacity or when seeking the assistance of a person to communicate with the client under Paragraphs (b)(2)and (c)(2), change the standard from "best interest" to "expressed interest." In other words, the attorney should take direction based on the client's expressed wishes rather than on what the attorney thinks is in the client's best interest. If the interest cannot be ascertained, even with reasonable accommodations, the attorney could use a best interest standard.	believe it is possible to draft a succinct explanation of "significant risk." It has considered this in relation to other rules, e.g., proposed Rule 1.7(b), and has ultimately decided not to do so. 3. The Commission has not made the suggested change. However, it has added a new comment [5], which is intended to clarify the term "best interests" as used in the rule: [5] In taking protective action as authorized by paragraphs (b) and (c), 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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						ascertain the client's expressed interests and objectives.
					4.Regarding (d), Obtaining Advance Informed Written Consent to Take Protective Action, the Rule should include safeguards to ensure that clients fully understand what they are agreeing to, much in the same way that the Health Care Decisions Law.	4. The degree of specificity suggested by the commenter is not appropriate to a disciplinary rule and it would be inconsistent with the Commission's Charter.[3] However, the Commission has added a further requirement to paragraph (d) that the advance informed written consent "must be in a separate writing signed by the client" to provide assurance that the disclosures required are not hidden in a lengthy engagement agreement.
X-2016-104ac	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		1. OCTC supports this rule as a good compromise on this complicated and difficult issue. 2, OCTC supports Comments 3,4,5 and 6 although Comment 5 is missing the word "of" in the first line. 3. Comments 1 and 2 are more appropriate for treatises, law review articles, and ethics opinions.	1. No response required. 2. No response required as to first observation. The Commission has added the missing word to Comment [5]. 3. The Commission disagrees with the commenter's assessment. Comment [1] explains the policy

[3] See note 2, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						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.
X-2016-93e	Los Angeles County Public Defender (Brown) (09-23-16)	Yes	A		The vast majority of Rule 1.14 does not affect the practice of the Public Defender and Alternate Public Defender. The only portion that does affect our practice is subdivision (a), which requires a lawyer to maintain as far as possible a normal lawyer-client relationship with the client. We support the adoption of proposed Rule 1.14.	No response required.
X-2016-103-CA	Advocates for Nursing Home Reform (Chicotel) (09-27-16)	Yes	D		Proposed Rule 1.14 is a watered down but still highly objectionable version of the ABA Model Rule 1.14. The proposed rule gives ethical clearance to attorneys to take actions their clients oppose by packaging those actions in the guise of client consent. In that regard the model rule has two main provisions:	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					• Permitting attorneys to take "protective action" with a client's contemporaneous consent; • Permitting attorneys to take "protective action" through a pre-arranged written waiver of confidentiality. 1. The first provision seems entirely unnecessary. Clients with capacity have always been free to waive their confidences. We fear this provision may be interpreted by some attorneys as an endorsement of taking protective action for clients who have no capacity to understand the possible risks, benefits, and alternatives of such action. It strains common sense to think a client could be "unable to understand and make adequately considered decisions regarding potential harm" but have the capacity to understand and make adequately considered decisions about abstract concepts such as attorney-client confidentiality, duty of loyalty, and protective actions.	1. The Commission disagrees with the commenter's assessment of the provision that permits – but does not require – a lawyer to take protective action on the client's behalf. The Commission understands the apparent paradox but believes that an initial determination that a client has significantly diminished capacity should not end the lawyer's attempts to serve the client's best interests. The provision does not permit the lawyer to take protective action unless the lawyer is able to obtain the client's consent. If that consent cannot be obtained, even with the assistance of a trained professional, the lawyer may not proceed further. The Commission believes it would be a breach of loyalty to simply walk away from such a client.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						It also believes that the proposed rule, while not perfect, provides an appropriate balance between the lawyer's duty to act competently on behalf of a client with significantly diminished capacity and the duty of confidentiality under existing California law.
					2. The second provision, permitting an advance waiver of an attorney's central duties, is an unwelcome and distasteful concept for at least three reasons.	2. The Commission disagrees with the Commenter's assessment of paragraph (d), the advance *consent* provision. The Commission initially observes that the provision does not provide for an advance waiver, i.e., a "relinquishment of known rights," that is not revocable. On the contrary, the consent contemplated in paragraph (d) is revocable "*at any time*" by the client. The Commission believes, supported by ALAS and trusts and estates attorneys, that the advance consent provision strikes an appropriate balance between protecting an impaired client from significant harm and protecting the client's autonomy.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						The Commission also responds to each of the commenter's points, below:
					a. We doubt that most clients would read or understand the advance waiver clause in their multi-page attorney retainer agreements. We expect that most advance waivers would be reduced to a boilerplate clause as with pre-dispute arbitration agreements: important rights lost and waived without consideration, mixed among inscrutable legalese.	a. The Commission recognizes this concern and has added a further requirement to paragraph (d) that the advance informed written consent "must be in a separate writing signed by the client" to provide assurance that the disclosures required are not hidden in a lengthy engagement agreement.
					b. Advance waivers could end up as leverage for attorneys to compel clients into certain acts or omissions. Once the client has agreed to a waiver, an attorney might threaten "protective actions," like calling Adult Protective Services or revealing confidences to family members, in order to get the client to do as the attorney has recommended. What's meant as a client's shield from harm could be turned into a sword for attorneys.	b. A lawyer who attempts to use the rule as a "sword" for gaining "leverage" over a client would be in violation of numerous statutes and rules and Bus. & Prof. Code §§ 6068(e) and 6106, as well as proposed Rules 1.6, 1.7, 1.8.2 and 1.9. An advance consent would not provide "cover" for a lawyer who engages in the kind of conduct that the commenter describes. Further, as noted, the consent is revocable "at any time." See also paragraph (b)(2).
					c. Finally, advance waivers of fundamental attorney	c. The Commission disagrees. With appropriate disclosures,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					requirements just seem inappropriate. As previously mentioned, the duty of loyalty and confidentiality are at the heart of what attorneys do. To subject this fundamental duty to the whims of negotiation between attorney and client as they formalize their relationship renders the duty dispensable. We feel it is indispensable. 3. Most Attorneys Are Poorly Suited to Assess a Client's Capacity. If proposed Rule 1.14 is adopted, a prerequisite for an attorney taking self-directed "protective action" would be the attorney's determination that the client lacks sufficient capacity to protect himself from harm. Nothing in American legal education prepares an attorney to make such a determination. If physicians trained and experienced in assessing cognitive capacity produce largely unreliable capacity	including those required by paragraph (d) and those required under proposed Rule 1.0.1(e),[4] a person should be permitted to provide informed advance consent. 3. The proposed rule does not mandate that the lawyer take steps to protect the client's interests as provided in the rule but only permits the lawyer to do. As to the assertion that lawyers are ill-equipped to evaluate clients, the Commission notes the lawyer must have a reasonable belief (see Rule 1.0.1(h) and (i)). This means having an objectively reasonable belief. Comments (2) and (3) provide some guidance. A possible additional protection of

[4] Proposed Rule 1.01(e) provides:

(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.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					assessments, we are certain that assessments by attorneys will be entirely untrustworthy. Having such untrustworthy assessments used as a central justification for disregarding the most fundamental tenet of the attorney-client relationship is foolhardy.	requiring a certificate of significant diminished incapacity from a qualified and trained medical professional may not always be available or practical if the client faced with imminent harm. Further, as noted below in response to the commenter's suggested changes to the rule, there are protections written into the rule.
					4. <u>Guidance to Representing Clients with Diminished Capacity is Needed</u>. Despite our objections to the concept of attorneys taking "protective action" on behalf of clients, webelieve proposed Rule 1.14 would be helpful to attorneys if it did the following: a. Clarify that the default position for any attorney is that their clients have both autonomy in decision-making and that the attorney has a nearly absolute duty to maintain client confidentiality, regardless of the client's perceive capacity.	4. The Commission has responded to each of the commenter's suggestions below. a. This is already abundantly clarified in the Rule. Concerning confidentiality, see paragraph (b)(2) and Comments [3] and [6]. Concerning autonomy, see paragraph (a) and new Comment [5].

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					b. Remind attorneys of their duty to provide disability-related accommodations to clients with physical and mental impairments. •c. Promote the use of supported decision-making, with the client's consent, allowing the client to choose supporters to help them make and communicate choices and ensure the confidentiality and privilege of those communications.	b. See response #1 to Disability Rights California, X-2016-94, above. c. The proposed rule already addresses the concept of seeking assistance with obtaining consent in (c)(2). To the extent the commenter is suggesting that the lawyer must obtain the client's consent to retain the assistance of a trained professional, however, the Commission disagrees that is necessary to protect confidentiality. See Evid. Code § 952.[5] Otherwise, a potential "Catch 22" would be created. A lawyer who could not obtain the client's consent without the assistance of a trained professional could never obtain the client's consent to retain the trained professional in the first instance.

[5] Evid. Code § 952 provides:

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-98	Justice in Aging (Christ) (09-27-16)	Yes	M		We support the Commission's language requiring attorneys to obtain the consent of clients before taking protective action, protecting the confidentiality of any information disclosed, and limiting the information that may be disclosed. We urge amendments to better ensure that the proposed Rule would not inappropriately compromise clients' personal autonomy and confidentiality in situations where it is not warranted or when there are other less intrusive options, as follows: 1. In evaluating whether to maintain other than "a normal lawyer-client relationship with the client," consider the lawyer's responsibility to provide reasonable accommodations to clients with disabilities to assist them with decision-making and to clearly communicate their wishes, pursuant to the Americans with Disabilities Act… 2. The obligation to provide reasonable accommodations should include the lawyer permitting, with the client's consent, the use of a third party selected by the client to assist with decision-making or	The Commission thanks the commenter for its conditional approval of the Commission's approach for this Rule. It addresses each of the commenter's suggested amendments below. 1. See response #1 to Disability Rights California, X-2016-94, above. 2. See response 4.c. to Advocates for Nursing Home Reform, X-2016-103-CA, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					communication and ensure the confidentiality and privilege of those communications. 3. When taking protective action on behalf of a client with diminished capacity, the Rule should do the following: Make clear that the protective action can only be taken when the significant risk of harm is the result of action by a third party, either by more clearly defining the standard of "significant risk that the client will suffer substantial physical, psychological, or financial harm" or referencing a standard in current law such as the abuse and neglect standards defined in the California Elder Abuse and Dependent Adult Civil Protection Act... used by other professionals including financial advisors. 4. When taking protective action on behalf of a client with diminished capacity or when seeking the assistance of a person to communicate with the client under Paragraphs (b)(2) and (c)(2), change the standard from "best interest" to "expressed	3. The Commission did not make the suggested changes. It does not believe that the rule should be limited to situations where the harm to a client with significantly diminished capacity is from another person. It also does not believe that the term "significant risk" needs clarification. The term is also used in proposed Rule 1.7, which is taken from Model Rule 1.7 and the Commission is not aware of any problems that have arisen from its use. Further, "substantial" is defined in Rule 1.0.1(l) and is used in Rules 1.6 [which carries forward the relevant language of current rule 3-100), 1.13 and in other rules without reported problems. 4. The Commission has not made the suggested change. However, it has added a new comment [5], which is intended to clarify the term "best interests" as used in the rule. See Response 2 to Disability Rights California, X-2016-94a,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					interest." In other words, the attorney should take direction based on the client's expressed wishes rather than on what the attorney thinks is in the client's best interest. If the interest cannot be ascertained, even with reasonable accommodations, the attorney could use a best interest standard. 5. Regarding (d), Obtaining Advance Informed Written Consent to Take Protective Action, the Rule should include safeguards to ensure that clients fully understand what they are agreeing to, much in the same way that the Health Care Decisions Law…provides protections.	above. 5. See Response 2 to Advocates for Nursing Home Reform, X-2016-103-CA, above.
X-2016-108a	Law Foundation of Silicon Valley (Morris) (9-27-16)	A	M	(b)(1)(i), (c), (d)	Proposed rule as written could lead to attorneys substituting their own judgment for that of their clients, acting against their client's expressed and legal interest in order to promote the attorney's view of what is "best" for the client. Commenter proposes following changes to rule: 1. Rule should explicitly reference duty to provide reasonable accommodations.	[Note: This comment was originally submitted for proposed Rule 1.4 but was subsequently moved to the 1.14 table because of the substance of the comment.] 1. See response See Response 2 to Disability Rights California, X-2016-94a,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						above.
					2. Term "significant risk" should be more clearly defined.	2. See Response 3 to Justice in Aging, X-2016-98, above.
					3. References to "best interest" are confusing. Client's express interest as opposed to attorney's view of client's best interest should prevail.	3. The Commission has not made the suggested change. However, it has added a new comment [5], which is intended to clarify the term "best interests" as used in the rule. See Response 2 to Disability Rights California, X-2016-94a, above.
					4. Subsection (d) should be deleted. A rule that would allow attorneys to act contrary to their clients' expressed interest when they perceive their clients' decision-making capacity to be "diminished," would effectively discriminate against people with disabilities in the attorney-client relationship.	4. The Commission disagrees. See Response 2 to Advocates for Nursing Home Reform, X-2016-103-CA, above.
X-2016-120n	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		Supports adoption of proposed Rule 1.14	No response required.
X-2016-121c	California Commission on Access to Justice (CCAJ) (Hartston) (09-23-16)	Yes	A	(b)(2), (c)(2)	We support the proposed rule, but offer suggestions for strengthening it. The following amendments would ensure that clients' personal autonomy and right to confidentiality are not	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					compromised when there are less intrusive options: 1. A client with diminished capacity should be provided with disability related accommodations. A client who consents should be permitted to use supported decision-making, through the assistance of a third party selected by the client. 2. A client's consent should be required when obtaining the assistance of a third party to assist in communicating with and furthering client interests pursuant to Proposed Rule 1.14 (c)(2). 3. The standard of "significant risk that the client will suffer substantial physical, psychological, or financial harm" should more clearly be defined. For example, it may be appropriate to use the standards in the California Elder and Dependent Adult Abuse Civil Protection Act, Welfare & Institutions Code §§ 15630-15632. 4. Change the standard from "best interest" to "expressed interest" in Proposed Rule 1.14	1. See response See Response 2 to Disability Rights California, X-2016-94a, above. 2. See Response 4.c. to Advocates for Nursing Home Reform, X-2016-103-CA, above. 3. See Response 3 to Justice in Aging, X-2016-98, above. 4. The Commission has not made the suggested change. However, it has added a new

Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments

TOTAL = 21 *A = 10* *D = 2* *M = 9* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					(b)(2) and (c)(2), when that interest can be ascertained, and then only if it cannot be ascertained to best interest.	comment [5], which is intended to clarify the term "best interests" as used in the rule. See Response 2 to Disability Rights California, X-2016-94a, above.

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) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered American Bar Association ("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). This proposed rule 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.

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

[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]."

(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.

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

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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.

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 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 public comment, 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.

[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]).

Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons (Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean 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 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.

(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.

(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.

Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons (Commission's Proposed Rule Adopted on October 21–22, 2016 – 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 ~~labelled~~ 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) ~~The~~ 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.

(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.

(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.

Rule 1.15 [4-100] ~~Preserving Identity of~~ Safekeeping Funds and Property of ~~a Client~~Clients and Other Persons
(Redline Comparison of the Proposed Rule to Current California Rule)

(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.

(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.

(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.

Proposed Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Perso
Synopsis of Public Comments

TOTAL = 9 *A = 4* *D = 0* *M = 5* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bm	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-09-16)	Yes	A	1.15	1. COPRAC supports the adoption of proposed Rule 1.15, with one suggestion for the Committee's consideration. COPRAC particularly supports the clarification provided by the proposed Rule as to payment of advance fee funds into trust, and believes that the correct balance is struck with respect to flat fee payments. Making clear in the black letter of the rule that the duties owed to a client may extend to other persons, such as statutory lien holders with claims against funds held by the lawyer, raises awareness of such duties, which may otherwise be found in less readily available sources. 2. There may be an unintended consequence of including within proposed Rule 1.15 a requirement that advance fee payments be placed into trust. We recognize that such requirement is consistent with the ABA Model Rule; however, if required to be placed into a client trust account, advance fee payments, like advance payments of costs under the	1. No response required. 2. The Commission has not made the suggested change. The Commission does not agree that advance fee payments could not be made by credit card under the proposed rule. After the issuance of COPRAC Opinion 2007-172, credit card processing companies began to offer attorneys options to assign credit card

[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
					present rule 4-100, will not be able to be made by credit card. (See COPRAC Formal Opinion 2007-172.) Our concern is that clients who do not have the ability to pay a fee retainer in cash, but could do so by credit card, will be unable to retain counsel of their choosing or, in some cases, perhaps be unable to retain counsel at all. COPRAC raises this point for the Commission's consideration. Perhaps advance payments for fees made by credit card should be exempted from the requirement that advance fee payments be deposited into a trust account. Such an exemption would be in the interests of more financially challenged clients and promote access to justice for such clients.	chargebacks and credit card merchant fees to an operating account or to a non-client trust account. Therefore, the Commission believes that requiring that advance fees be placed into a client trust account will not prohibit credit card transactions.
X-2016-66l	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	1.15	We commend and approve this proposed rule, which makes significant changes to Rule 4-100. The proposed rule, subsection 1.15(a), makes it clear that unearned advanced fees are included within definition of funds held for the benefit of the client that must be held in trust. New subsection 1.15(b) provides that a flat fee for services to be rendered need not be placed in trust if the lawyers disclose to the client in a writing signed by the	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					client that the client has a right to have that flat fee placed in trust until it is earned and a right to the unearned portion of that flat fee if services are not completed. New subsection 1.15(d)(4) explicitly contains the requirement that a lawyer account in writing for funds held for the benefit of clients, a requirement until now contained only in disciplinary case law.	
X-2016-76h	Los Angeles County Bar Association (LACBA) (Schmid) (09-26-16)	Yes	M	1.15	We take exception to the addition of the word "fees," which is not included in current Rule 4-100. The proposed requirement that fees paid in advance (as distinguished from advances for costs and expenses, which are included in the current rule) would mandate that all routine retainers (which are customarily required as advance deposits on fees for a new client engagement) be deposited into a trust account. 2. If the change is implemented, then it is important that the effective date of the rule's enforcement be delayed to allow sufficient time for the lawyers subject to the rule become familiar with its requirements and implement the necessary procedures and measures in their	1. The Commission disagrees with the commenter's assessment. Requiring that advance fees be placed in trust is a public protection measure. That current rule 4-100 speaks in terms of funds received for the benefit of client and not "fees" is not a valid objection to the rule's requirement that fees be placed in trust until they are earned. 2. The Commission believes that advance warning to practitioners and what to do about advance fees that are currently in the lawyer's commercial account are easily resolvable implementation issues if the Supreme Court decides to adopt the rule.

TOTAL = 9 *A = 4* *D = 0* *M = 5* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					firms.	
X-2016-104ad	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.15	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.	No response required.
X-2016-111	The American Immigration Lawyers Association -NorCal (AILA) (Lee) (10-03-16)	Yes	M	1.15	We recommend two amendments to better balance that public interest against the stated purpose of the proposed amendment, which is to protect the ability of clients to obtain a refund of unearned fees. 1. First, we recommend that the rule explicitly state that it does not apply to funds paid in advance for a consultation by a potential client. 2. Second, an advanced flat fee should be exempt from the trust account requirement if the total anticipated fee for the matter	1. As to the commenter's first suggestion, the Commission notes that funds paid in advance for a consultation with a prospective client could be made as flat or fixed fees. If the lawyer complies with paragraph (b)'s requirements, the lawyer will not have to deposit such fees in the trust account. 2. As to the second suggestion, the Commission has revised paragraph (b) so that the client's agreement in

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					does not exceed $1,000.	writing to the arrangement is not required unless the advance fee exceeds $1,000. The Commission is circulating a revised proposed rule for public comment.
X-2016-117	The American Immigration Lawyers Association -NorCal (AILA) & California Attorneys for Criminal Justice (CACJ) (Lee) (10-03-16)	Yes	M	1.15	See X-2016-111 The American Immigration Lawyers Association -NorCal dated October 3, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to AILA, X-2016-111, above.
X-2016-125b	California State Bar Committee on Mandatory Fee Arbitration (Harper) (10-04-16)	Yes	A	1.15	We support the changes set forth in the proposed rule. In particular, we support the language that would require that fees be deposited in client trust accounts unless the attorney and client agree in writing.	No response required.
X-2016-134	American Immigration Lawyers Association (AILA) (10-20-16)	Yes	M	1.15	We would like to find a reasonable way to adopt the proposed rule that makes sense when working with low-income populations, especially in cases where obtaining signed consents as provided under paragraph (b) of the proposed rule is an impossibility. Moreover, we would like to explore ways of adopting this rule that will not dramatically increase accounting costs at a time when changes to immigration law will likely occur and impact this vulnerable population.	See Response 2 to AILA, X-2016-111, above.

Proposed Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Perso
Synopsis of Public Comments

TOTAL = 9 *A = 4* *D = 0* *M = 5* *NI = 0*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-135	California Attorneys for Criminal Justice (CACJ) (10-20-16)	Yes	M	1.15	Flat fees are a viable and cost-effective option for many individuals facing criminal charges. Although formal court process may be similar for clients, each case is unique and attorneys must be given the freedom to explore each and every option to zealously defend our clients and their rights. There is no real way to predict at the outset of a case the vast array of motions that may become necessary to file. A flat fee gives our clients some assurance that we will do any and all things necessary to put up a defense, and our legal strategy evolves with the progress of the case. It is virtually impossible to identify natural points of progress as triggers for payments. Nor do we want to open the door to pay as you go service that could leave a person unable to pay for further legal representation.	Requiring that advance fees be placed in trust is a public protection measure. The Commission does not believe that the commenters' stated concerns warrant discarding those protections. The Commission notes that nearly every jurisdiction in the United States requires that advance fees paid in advance of services being performed must be placed in a trust account. It is unaware that criminal defense lawyers in other jurisdictions have been unable to conform their conduct to those requirements. The Commission is confident that criminal defense lawyers and clients in California will be able on a case-by-case basis to structure a suitable arrangement that identifies when fees are earned under a flat fee agreement.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.16
(Current Rule 3-700)
Declining or Terminating Representation

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-700 (Termination of Employment) in accordance with the Commission Charter, 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. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, 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). This proposed rule 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.

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 public comment, 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.

Rule 1.16 [3-700] Declining Or Terminating Representation
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.16 [3-700] Declining Or Terminating Representation
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(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 ~~employment~~ 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 ~~statutory limitation~~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 ~~Rule 1.6 and~~ 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).

[~~4~~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.

[~~5~~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.

Rule 1.16 [3-700] ~~Termination of Employment~~ Declining Or Terminating Representation
(Redline Comparison of the Proposed Rule to Current California Rule)

(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 member~~the lawyer knows* or reasonably should know* that ~~continued employment~~the representation will result in violation of these ~~rules~~Rules or of the State Bar Act; ~~or~~

(3) ~~The member's~~the 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:~~

(~~1~~4) ~~The~~the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(~~a~~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~~, or~~;

(~~b~~2) 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;*

(~~c~~3) the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal or that is prohibited under these rules or the State Bar Act, or~~criminal or fraudulent;*

(~~d~~4) the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer to carry out the ~~employment~~representation 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.

Proposed Rule 1.16 [3-700] Declining or Terminating Representation
Synopsis of Public Comments

TOTAL = 6	A = 2
	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
X-2016-25b	McCue, Martin (08-2-16)	N	NI	1.16	Bar members need an affirmative statement that a lawyer can decline to undertake representation of a client. Perhaps there should be a duty to advise the person seeking representation of that decision so that they can seek representation elsewhere. That statement may need to be conditioned so that the lawyer is not otherwise acting in violation of law, such as engaging in prohibited discrimination. The freedom to decline representations is at the heart of professional practice.	Proposed rule 1.16 does not state that a lawyer is prohibited from declining to accept a client's representation. Therefore, the revision requested by the commenter could be viewed as practice guidance and not appropriate under the Commission's Charter requiring that comments be used sparingly and only for the purpose of explicating a rule. Regarding the commenter's suggestion for a duty to affirmatively communicate a lawyer's decision to decline representation, that obligation is arguably subsumed within a lawyer's general duty to communicate as interpreted by the California Supreme Court. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients."]

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

Proposed Rule 1.16 [3-700] Declining or Terminating Representation
Synopsis of Public Comments

TOTAL = 6	*A = 2*
	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
X-2016-43bn	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M	(a)(2)	1. Rule should follow model rule and require withdrawal or denial of representation when the representation will result in violation of law, not just the ethics rules. 2. Rule should follow model rule by requiring withdrawal or denial of representation when the condition materially impairs ability to represent the client.	1. The Commission declines to make the requested change. A violation of law is subsumed under a violation of the Rules or the State Bar Act. See, e.g., proposed Rule 1.2.1 and 8.4(a), and Bus. & Prof. Code § 6068(a). 2. The Commission declines to make the requested change. After discussion, the Commission concluded that the language in current rule 3-700 adequately described the situation under which withdrawal is mandated and carried forward that language. The Commission is not aware that the current rule's language has caused problems in applying the rule.
X-2016-66m	San Diego County Bar Assocation (SDCBA) (Riley) (9-15-16)	Y	A	Cmt. 1, 3	Supports adoption of proposed Rule 1.16. Comments 1 and 3 are particularly important guidance for lawyers	No response required. (Note that a new Comment [3] was added by the Commission and Comment [4] contains the text that was previously found in Comment [3] of the public comment draft of the rule.)
X-2016-93f	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(a)(1), (e)(1)	1. Paragraph (a)(1) should be clarified to permit criminal defense attorney to make all valid arguments on client's behalf.	1. Paragraph (a)(1) carries forward current rule 3-700(B)(1) verbatim. The Commission is not aware of any problems this provision has caused criminal defense lawyers. In fact,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						proposed rule 3.1(b) provides: (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established. Although the Commission believes there is no need to revise the text of proposed Rule 1.16, it has added a clarifying comment, new Comment [3], referencing Rule 3.1(b).[2]
					2. Paragraph (e)(1) should be modified to exclude providing former clients with materials barred by prison administrative regulations	2. The Commission agrees and has made the change.
X-2016-104ae	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	1.16	Supports adoption of proposed Rule 1.16.	No response required.

[2] KEM: I think it would be reasonable to add a comment to the rule that contains a cross-reference to Rule 3.1(b). See attached rule.

Proposed Rule 1.16 [3-700] Declining or Terminating Representation
Synopsis of Public Comments

TOTAL = 6 *A = 2* *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
X-2016-131c	Treat, Hon. Charles (10-06-16)	N	M	1.16	At various places this Rule refers to withdrawing because continued representation would or could result in a violation of the RPC, such as a conflict arising. I propose to add language to the effect of "that the lawyer cannot reasonably avoid or prevent", and an explanatory comment clarifying that this means a lawyer can't drop a client due to a conflict that the lawyer has himself or herself created, or is proposing to create. This is what is colloquially called the "hot potato" rule, to the effect that you can't cure a conflict on a new engagement by firing the client on an existing one. Absent such clarification, I fear that attorneys will read this rule to allow exactly such "hot potato" withdrawals.	The Commission declines to make the suggested change because it is not necessary. *First*, a judge has inherent power ""[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 745, 218 Cal.Rptr. 24.) A lawyer will not be able to withdraw from a representation unless the court permits it. *Second*, if the conflict was not inadvertent but rather a designed or planned conflict created by the lawyer to permit the lawyer to withdraw from the representation, the judge could report the lawyer to the State Bar and OCTC could proceed under 6068(d). Third, if there is a concurrent conflict between two current clients, then the lawyer has violated 3-310(C) [proposed rule 1.7(a)) and could be disciplined under that rule. Fourth, if the commenter is

TOTAL = 6 *A = 2* *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
						concerned with the hot potato situation, there is case law on this. See *Truck Ins. Exchange v. Farmers Fund Ins. Co.* (1992) 6 Cal.App.4th 1050 [8 Cal.Rptr.2d 228]. The Commission does not think a codification of that "rule" is necessary as it a straightforward application of basic conflicts principles.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.17
(Current Rule 2-300)
Sale of a Law Practice

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased) in accordance with the Commission Charter, 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. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, 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). This proposed rule 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.

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 public comment, 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.

Rule 1.17 [2-300] Sale of a Law Practice
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

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).

Rule 1.17 [2-300] Sale of a Law Practice
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

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] ~~The sale may not be financed by increases in fees charged to the client of the law practice. Existing~~Under paragraph (a), the purchaser must honor existing arrangements between the seller and the client as to fees and scope of work ~~must be honored by the purchaser. Any modifications of existing~~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 ~~between the purchaser and the client after the sale must comply with~~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).

Rule 1.17 [2-300] Sale ~~or Purchase~~ of a Law Practice ~~of a Member, Living or Deceased~~

(Redline Comparison of the Proposed Rule to Current California Rule)

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).

Proposed Rule 1.17 [2-300] Sale of Law Practice
Synopsis of Public Comments

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32g	Law Professors (Zitrin) (07-25-16)	Yes	M	1.17	Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase of the practice. The word "solely" should be stricken in order to make the fee increase absolute in accordance to the ABA rule.	The Commission did not make the requested change. There are valid reasons for a purchaser to increase fees. See Comment [2] to the Rule.
X-2016-43s	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-17-16)	Yes	D	1.17	The proposed rule seeks to limit the sale of a law practice to "all or substantially all" of that practice, and expressly prohibits the sale of only certain areas of practice or the sale of only specific geographic areas. We believe the better approach is the one taken by the ABA in Model Rule 1.17, which allows the sale of distinct practice areas or geographic areas, even if they constitute less than the entire practice.	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.
X-2016-52g	Law Professors (Zitrin) (08-24-16)	Yes	M	1.17	See X-2016-32g Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32g for the Commission's response to the Law Professors' comments.
X-2016-68g	Law Professors (Zitrin) (09-22-16)	Yes	M	1.17	See X-2016-32g Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32g 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 1.17 [2-300] Sale of Law Practice
Synopsis of Public Comments

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-104af	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.17	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.	See response to COPRAC, X-2016-43a, above. 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.18
(No Current Rule)
Duties to Prospective Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") reviewed and evaluated American Bar Association ("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. 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. 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. A final recommended rule will follow the public comment process.

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

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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.

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, 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).

Rule 1.18 Duties To Prospective Client
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(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.

Rule 1.18 Duties To Prospective Client
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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.~~

PROPOSED RULE OF PROFESSIONAL CONDUCT 2.1
(No Current Rule)
Advisor

EXECUTIVE SUMMARY

American Bar Association ("ABA") Model Rule 2.1 (Advisor) was not studied by the Commission for the Revision of the Rules of Professional Conduct ("Commission") in time to be included with the Commission's request for public comment authorized by the Board last June. The Commission has now studied Model Rule 2.1, a rule that has no direct California counterpart, as well as relevant case law relating to the issues addressed by this rule. This 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 2.1 (Advisor). This proposed rule 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.

Proposed rule 2.1 requires lawyers to exercise independent professional judgment and to render candid advice. The proposed rule adopts the first sentence of ABA Model Rule 2.1 verbatim. It moves the concept incorporated in the second sentence of ABA Model Rule 2.1 to comment [2]. The professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. Adding this rule highlights the importance of these professional responsibility concepts and removes any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by current rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).

As stated above, the blackletter of proposed rule 2.1 provides that in representing a client, a lawyer must exercise independent professional judgment and render candid advice. The Commission has considered but ultimately declined to define or explain the term "independent professional judgment" because capturing all of the situations and nuances in which a lawyer's exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or a treatise.

Comment [1] clarifies that the rule does not impose in every case a duty to initiated investigation of a client's affairs nor give unwanted advice. Initiating such advice is required when doing so appears to be in the client's best interest.

Comment [2] provides that in rendering advice, a lawyer may consider factors other than the law such as moral, economic, and social factors relevant to the client's situation. This concept is a part of the blackletter of ABA Model Rule 2.1 but the Commission has moved it to the Comment [2] of the proposed rule because it can be regarded as an aspirational concept.

Rule 2.1 Advisor
(Commission's Proposed Rule Adopted on October 30, 2016 – Clean Version)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

~~Model~~ Rule 2.1 Advisor
(Redline Comparison of the Proposed Rule to ABA Model Rule)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. ~~In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.~~

Comment

~~*Scope of Advice*~~

[1] A ~~client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.~~lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

~~[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.~~

~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~

~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.~~

~~*Offering Advice*~~

~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.~~

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.1
(Current Rule 3-200)
Meritorious Claims and Contentions

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-200 (Prohibited Objectives of Employment) 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 American Bar Association ("ABA") counterpart, Model Rule 3.1 (Meritorious Claims and Contentions). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. This proposed rule 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.

Proposed rule 3.1 in context within the Rules of Professional Conduct.
Proposed rule 3.1 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

In general, proposed rule 3.1 carries forward the substance of current rule 3-200. Proposed paragraph (a) simplifies the language of the current rule by stating that: A lawyer shall not. . . ." The current rule uses language that refers to the acts of seeking, accepting or continuing

prohibited conduct, but the Commission believes that all of these elements are captured in the unambiguous statement that a "lawyer shall not." In addition, the specific concept of restricting a lawyer from continuing prohibited conduct is included in paragraph (a)(1) that refers to "continuing an action. . . ."

Proposed paragraph (a) also deletes the current phrase "knows or should know." In the context of this particular rule, the current phrase could imply a negligence standard which is not relevant to the determination of probable cause. In addition, the "knows or should know" standard is inconsistent with the malice standard in California law and might require standard of care testimony to prove a violation. It would also be a confusing deviation from the knowledge standards defined in proposed rule 1.0.1. Furthermore, including the "knows or should know" standard needlessly focuses the inquiry on a lawyer's ability to discern motivation rather than on the most important issue of whether a matter has merit.

Paragraph (b) is derived from Model Rule 3.1 and was added to clarify that the proposed rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established.

There is no Discussion section in the current rule and the Commission is not recommending the addition of any Comments.

Post-Public Comment Revisions

After consideration of public comment, the Commission revised paragraph (b) to expressly include involuntary commitments or confinements.

Rule 3.1 [3-200] Meritorious Claims and Contentions
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) 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, may nevertheless defend the proceeding by requiring that every element of the case be established.

Rule 3.1 [3-200] Meritorious Claims and Contentions
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) 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, may nevertheless defend the proceeding by requiring that every element of the case be established.

Rule 3.1 [3-200] ~~Prohibited Objectives of Employment~~ Meritorious Claims and Contentions

(Redline Comparison of the Proposed Rule to Current California Rule)

(a) A lawyer shall not:

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

~~(A)~~(1) ~~To~~ bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

~~(B)~~(2) ~~To~~ present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of ~~such~~the existing law.

~~(B)~~(b) 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, may nevertheless defend the proceeding by requiring that every element of the case be established.

Proposed Rule 3.1 [3-200] Meritorious Claims and Contentions
Synopsis of Public Comments

TOTAL = 5 ***A = 2*** ***D = 0*** ***M = 2*** ***NI = 1***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43v	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-22-16)	Yes	A	3.1	Supports adoption of proposed Rule 3.1.	No response required.
X-2016-93g	Los Angeles County Public Defender (Brown) (9-27-16)	Yes	M	3.1	1. We strongly urge that language forbidding *frivolous* claims be added to the proposed rule because a lawyer defending a criminal prosecution may be constitutionally obligated to bring motions where the facts have not been fully substantiated and can only be developed by discovery. 2. Paragraph (b) of the propose rule embraces the advocacy duties of a lawyer for a criminal defendant but does not fully appreciate the scope and variety of clients that we represent in addition to those in criminal proceedings or in proceedings wherein they may face incarceration.	1. The Commission has not made the requested change. Paragraph (a) carries forward current rule 3-200 nearly verbatim; the Commission is not aware that the current rule has resulted in discipline charges against criminal defense lawyers requiring the prosecution to establish every element of the alleged crime. 2. The Commission has revised paragraph (b) to expressly include involuntary commitments and confinements.
X-2016-104ai	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	3.1	Supports adoption of proposed Rule 3.1.	No response required.

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

Proposed Rule 3.1 [3-200] Meritorious Claims and Contentions
Synopsis of Public Comments

TOTAL = 5 ***A = 2*** ***D = 0*** ***M = 2*** ***NI = 1***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 64-66 of the public hearing transcript.)	Yes	M		1. We believe that often, as defense attorneys, we're required to present claims which there is no current reason, under the law, why we would present that claim other than to preserve that claim, oftentimes for cases that as a result for appellate review will not get resolved for well over 20 years, particularly, in death penalty cases. We ask that there be an addition in order to make this rule, as phrased, comport with what is our defense obligation under the Sixth Amendment. 2. We also request that the rule encompass noncriminal proceedings in which an individual's liberty might be restrained. Under Rule [3.1(b)],[2] insert the following language, "Or other proceedings that may result in an individual's liberty being restrained" so that it provides: "(b) A lawyer for the defendant in a criminal proceeding or other proceeding that can result in an individual's liberty interests being constrained, or the	1. The Commission believes that these concerns are addressed by paragraph (b)(2) which would allow a defense attorney to assert a defense that is not warranted under existing law but can be supported by a good faith argument for an extension, modification, or reversal of existing law. 2. The Commission believes that this concern is addressed by Paragraph 3.1(b) which extends the rule to "a proceeding that could result in incarceration," but has revised the rule to expressly recognize the rule applies to involuntary commitments and confinements.

[2] Although the transcript refers to "3.1(e)," it evidently is a transcription error. It should refer to "3.1(b)" as the commenter quoted rule 3.1(b) during his testimony on the rule.

Proposed Rule 3.1 [3-200] Meritorious Claims and Contentions
Synopsis of Public Comments

TOTAL = 5 *A = 2* *D = 0* *M = 2* *NI = 1*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established.	
Public Hearing	Castaneda, Jose (Provided oral public hearing testimony on July 26, 2016. See pages 82-87 of the public hearing transcript.)	No	NI		We have a great system, there are just a few bad apples (lawyers/judges) that make it really bad.	No response is required as the comment does not specifically address any perceived deficiency in the Rule or how the Rule is drafted.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.3
(Current Rule 5-200)
Candor Toward The Tribunal

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 5-200 (Trial Conduct) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("ABA") counterpart, Model Rule 3.3 (Candor Toward The Tribunal). 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 3.3 (Candor Toward The Tribunal). This proposed rule 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.

Proposed Rule 3.3 in context within the Rules of Professional Conduct. Proposed Rule 3.3 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The content, framework and numbering scheme of this subset of the Rules is generally based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate." Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules. However, in the case of proposed Rule 3.3, the Commission determined that a rule patterned on Model Rule 3.3 would be more appropriate as a disciplinary rule.

Recommendation that proposed Rule 3.3 be circulated for public comment. Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. (See National Backdrop – Adoption of Model Rule 3.3, below.) The drafting team believes that the Model Rule approach regarding a lawyer's duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that the rule is intended to regulate, an attribute preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Bus. & Prof. Code § 6068(d), a provision that has remained virtually unchanged since the California Legislature adopted the Field Code in 1872.[1] Paragraph (A) cautions a lawyer to "employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth," but provides no insight into what "such means" are consistent with the truth, and thus what "means" are not. Similarly, paragraph (B) prohibits a lawyer from "seeking to mislead the judge . . . by an artifice," but does not clarify what a prohibited "artifice" might be.

In sum, the Model Rule approach, under which specific prohibited conduct is identified, is preferable in a disciplinary rule. The greater detail of the proposed rule should enhance compliance by lawyers in performing the duties they owe the court as officers of the legal system, as well as facilitate enforcement. The need for increased detail in the rule is particularly evident regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding before a tribunal. That is because, contrary to Model Rule jurisdictions under which duties under their versions of rule 3.3 trump a lawyer's duty of confidentiality, the text of proposed Rule 3.3 expressly states that the lawyer's duty to take reasonable remedial measures is subordinate to California's strict duty of confidentiality under Rule 1.6 and Bus. & Prof. Code § 6068(e).

Text of Rule 3.3. The proposed Rule's language, based on the Model Rule, provides a clearer statement of what conduct is required and prohibited under the rule.

Paragraph (a)'s introductory clause incorporates a "knowledge" standard. The requirement of known falsity is important from a practical as well as a policy standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could render the lawyer a guarantor of the truth of the facts presented.

Subparagraph (a)(1) [based on Model Rule 3.3(a)(1)] provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law.

Subparagraph (a)(2) [derived from Model Rule 3.3(a)(2)], prohibits a lawyer from failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse" to the client's position. It states the lawyer's duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly defined duties in current rule 5-200(C) and (D). Nevertheless, to further clarify the provision's intent, the

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[1] Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

> (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The only change since 1872 has been to render the provision gender neutral.

Commission recommends adding language from rule 5-200(C), which provides a lawyer shall not "misquote to a tribunal the language of a book, statute, decision or other authority."[2] The Commission determined that a generalized statement of what is prohibited together with a specific example, is better than a narrowly-defined statement of prohibited conduct.

Subparagraph (a)(3) [based on Model Rule 3.3(a)(3)], states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence's falsity."

Paragraph (b) confronts head-on a lawyer's duty when the lawyer knows that a person *has* engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer's confidentiality duties under Rule 1.6 and Bus. & Prof. Code § 6068(e).

Paragraph (c) importantly delimits the duration of the lawyer's duties under the preceding three paragraphs. The lawyer's duties continue to the end of the proceeding and do not terminate upon discharge by the client or the lawyer's withdrawal.

Paragraph (d) proscribes appropriate conduct when a lawyer is appearing in an ex parte proceeding where the other side is not given notice or an opportunity to be heard.

There are seven comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied.

Comment [1] describes the scope of the rule's application, i.e., that it also applies to ancillary proceedings such as depositions, a concept that might not be apparent in a rule addressing conduct before a "tribunal."

Comment [2], as noted (see footnote 2), has been included to address concerns OCTC expressed in its 2010 Comment about the deletion of the language in current rule 5-200(C) [now incorporated into subparagraph (a)(2)] and (D). The comment incorporates nearly verbatim the language in current rule 5-200(D).

Comment [3], regarding the term "legal authority in the controlling jurisdiction," provides critical interpretative guidance for the term, which in some instances can encompass legal authority outside of the jurisdiction in which a court is physically located. The comment is not strictly a definition but instead explains how a strict interpretation of the term "controlling jurisdiction," i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.

Comment [4] provides a suggested course of conduct for a lawyer to preserve the integrity of the legal process by identifying preventive measures a lawyer might take to prevent another from engaging in fraudulent or criminal conduct related to a tribunal proceeding. It also notes that under paragraphs (a) and (b), if the lawyer is unsuccessful in averting the conduct, the lawyer must refuse to offer the false evidence. In addition, the comment identifies the narrative

[2] In response to a request by OCTC, the Commission is also recommending that the substance of 5-200(D) (a lawyer "shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional") be retained in a comment to clarify the application of paragraph (a)(1). (See Comment [2].)

approach, a procedure sanctioned in California case law that is cited, when the person who intends to testify falsely is the lawyer's criminal defendant client.

Comment [5] provides important guidance for a lawyer who seeks to perform the lawyer's duties to engage in "reasonable remedial measures" as required under paragraph (b) when a fraud has been perpetrated on the court. In particular, the comment provides cross-references to rules and statutes that provide further guidance.

Comment [6] provides interpretative guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule are terminated. In particular, it recognizes that the duties under paragraph (b) to rectify fraudulent conduct before a tribunal do not apply when the lawyer learns of the fraudulent or criminal course of conduct only after the lawyer's representation has terminated.

Comment [7], regarding a lawyer's withdrawal from representation occasioned by events contemplated by the rule's provisions, provides important guidance that when a lawyer complies with the lawyer's duties under the rule, the lawyer does not necessarily need to withdraw. However, the comment also notes that withdrawal may be mandatory when, as a consequence of the lawyer's compliance, the lawyer-client relationship deteriorates to the extent the lawyer can no longer competently represent the client or continued representation will result in a violation of the Rules.

In addition to the recommended provisions, the Commission declined to recommend a provision suggested in public comment that would expressly bar plagiarism in briefs or other submissions to a court. The Commission determined a specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed rule 8.4(c) or Bus. & Prof. Code § 6106.[3] Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

National Background – Adoption of Model Rule 3.3

Every jurisdiction except California has adopted some version of Model Rule 3.3. Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.[4] Sixteen jurisdictions have adopted a

[3] Proposed rule 8.4 (c) provides it is professional misconduct for a lawyer to:

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation

[4] The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

slightly modified version of Model Rule 3.3.[5] Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.[6]

Post-Public Comment Revisions

After consideration of public comment, the Commission revised paragraphs (a), (c), and (d) for clarity. Comment [3] was added to make clear that in addition to this rule, lawyers are remain bound by their statutory obligations to never mislead a judge or judicial officer, nor commit an act of moral turpitude, dishonesty or corruption. Comment [4] was added to clarify that paragraph (d) does not apply to ex parte communications otherwise not prohibited by law or by the tribunal.

[5] The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.

[6] The thirteen jurisdictions are: Alabama, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.

Rule 3.3 [5-200] Candor Toward The Tribunal*
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) A lawyer shall not:

(1) knowingly make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code § 6068(e) and Rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false. (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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(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.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code § 6068(e) and Rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such

that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

Rule 3.3 [5-200] Candor Toward The Tribunal*
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not ~~knowingly~~:

(1) knowingly make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(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 ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(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.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that

has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(~~b~~a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. ~~This Rule does not apply when a lawyer comes to know* of a violation of paragraph (b) after the lawyer's representation has concluded. There~~However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

Withdrawal

[~~7~~8] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with ~~Rule 1.6 and~~ Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

Rule 3.3 [5-200] ~~Trial Conduct~~ Candor Toward The Tribunal*
(Redline Comparison of the Proposed Rule to Current California Rule)

~~In presenting a matter to a tribunal, a member:~~

~~(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;~~

~~(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;~~

~~(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;~~

~~(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and~~

~~(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.~~

(a) A lawyer shall not:

(1) knowingly make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code § 6068(e) and Rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false. (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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(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.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer

should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code § 6068(e) and Rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments

TOTAL = 14 ***A = 4*** ***D = 5*** ***M = 5*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32h	Law Professors (Zitrin) (07-25-16)	Y	A	3.3(c)	The first ethics professors' letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon termination of the representation was a recipe for disaster. The commission has now removed the offending language. The commenters congratulate the commission for this decision.	No response required.
X-2016-43x	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	M	3.3(d)	1. Add to the end of paragraph (d) the words "to the position of the client" to clarify the adversity. 2. In Comment [5], the reference to "Rule 1.4(b)(4)" should be to "Rule 1.4(a)(4)".	1. The Commission has made the suggested change. 2. The Commission agrees and has made the change.
X-2016-47	Bien, Elliot (08-17-16)	N	M	3.3	The commenter's position is that the rule should be modified to specifically address plagiarism. Such modification would address the recent increase in judicial attention paid to plagiarism. The existing language of the rule is too uncertain to be helpful on the subject of plagiarism. Such modification will bolster public confidence in the legal profession. The commenter further asserts	The Commission considered the commenter's proposal and rejected it. In the original Report & Recommendation submitted by the Rule 3.3 drafting team, it was identified as a "Concept Considered But Rejected." The Report stated: A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would

[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 the Commission failed to address the concern he raised re plagiarism because "it did not vote against [his] proposal," and "[no" vote was even called. The Commission silently accepted its drafting committee's recommendation to remain silent on this subject."	be better addressed under proposed Rule 8.4(c) or Bus. & Prof. Code § 6106.[2] Moreover, there is no evidence that adopting such a provision would promote a national standard as the drafting team is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules. The Commission's position has not changed. The commenter was also afforded an opportunity to present his position at a regularly scheduled Commission meeting. That no Commission member made a motion to vote on the commenter's proposal does not mean that the Commission "failed to address" or consider it.
X-2016-52p	Law Professors (Zitrin) (08-24-16)	Yes	A	3.3(c)	See X-2016-32h Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.

[2] Proposed Rule 8.4(c) provides it is professional misconduct for a lawyer to:

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation.

Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments

TOTAL = 14 ***A = 4*** ***D = 5*** ***M = 5*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-66o	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Y	A	3.3	Supports adoption of proposed Rule 3.3, which fills vacuum left by prior rule.	No response required.
X-2016-68h	Law Professors (Zitrin) (08-24-16)	Y	A	3.3(c)	See X-2016-32h Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-83e	Garrett, Christopher (09-26-16)	N	D	3.3	Rule will indirectly deprive individuals and lawyers of free speech and public petition rights.	The commenter's concern is not directed to the substance of proposed rule 3.3 (or rules 3.4 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.3 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. In addition, the Commission has made some changes to Rule 3.5 that it believes removes some of the concerns the commenter has expressed with respect to this rule. See revised paragraph (a) of Rule 3.5 which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						application, respectively. See also revised paragraph (c) of Rule 3.5, which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"
X-2016-86c	U.S. Department of Justice (Ludwig) (09-27-16)	Y	M	Cmt. 6, cmt. 5, (a)(1), (a)(3)	1. Delete second sentence of proposed comment 6.	1. The Commission has not made the suggested change. Proposed Rule 3.8(g) and (h) impose duties on a prosecutor after a proceeding has concluded so the following sentence is appropriate at the end of Comment [6]: There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h). Retaining that sentence is necessary to avoid confusion that Rule 3.3 supersedes Rule 3.8(g) and (h), which is not intended. Nevertheless, the Commission has added "However," to the beginning of the sentence to emphasize that some duties survive the
					2. Make clear that attorney's duty of confidentiality supersedes duty under paragraph (a)(1) to correct previously made statements.	2. The Commission has not made the suggested change. The suggested change to paragraph (a)(1) would

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						eviscerate the rule. Correcting a false statement of material fact or law previously made to the tribunal *by the lawyer* would not require the lawyer to violate either §6068(e) or Rule 1.6. Including the statute and the rule as a limitation in paragraph (a) will give lawyers an excuse not to correct *the lawyer's* (not the client's) falsehoods and will defeat the purpose of the rule. Comment [5] already makes it clear that remedial measures do not include disclosure of client confidences. 3. The Commission has not made the suggested change. The comment language explains the scope of the rule's application, which is an appropriate function of a comment.
					3. Comment 5 concept that there is no violation for offering evidence to establish its falsity should be in the body of the rule.	
X-2016-93h	Los Angeles County Public Defender (Brown) (09-23-16)	Y	M		Rule should explicitly state that criminal defense lawyers are not required to cite authority contrary to the position of their clients.	Please see response to Menaster, Public Hearing, below.
X-2016-97b	Freedman, Daniel (09-27-16)	N	D	3.3	Rule would put land use attorney profession in jeopardy by chilling speech, restricting the attorney's ability to be zealous for the client, and opening attorney to discipline	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					as retribution.	
X-2016-104ak	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (09-27-16)	Y	D		1. "Knowing" standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult. 2. OCTC is concerned that the proposed rule is far more limited than current rule 5-200, which prohibits an attorney from seeking to mislead a judge, judicial officer, or jury by an artifice or false statement of factor law. California should not allow lawyers to make false statements to a court without proper and reasonable inquiry and a good faith basis for the statement.	1. The Commission disagrees. 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 this Rule, which addresses a lawyers statements and the submission or presentation of evidence to a court. 2. The Commission disagrees with the commenter's assessment of current rule 5-200, which is simply a restatement of Bus. & Prof. C. § 6068(d). As stated in the Commission's Report and Recommendation on proposed Rule 3.3, it believes that "the Model Rule approach regarding a lawyer's duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that is regulated under the rule, an attribute that is preferable in a disciplinary rule." The more specific approach should provide

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						greater public protection and promote respect for the administration of justice.
					3. Rule is more limited than current rule and only bars false statements of fact or law. 4. Rule does not address when a lawyer: (1) states or alludes at trial to evidence that is not relevant or is inadmissible, (2) states the attorney's belief in the credibility of a witness; or (3) violates discovery orders of a court.	3. The rule also applies to the presentation of evidence to a court. 3. The Commission believes that (1) is covered by this Rule; (2) is addressed in proposed Rule 3.4(g); and (3) is addressed in Rule 3.4(f).
X-2016-126b	Ivester, David (09-27-16)	N	D	3.3	Proposed Rule 1.0.1's broad definition of the word "tribunal" will limit and interfere with administrative law practitioners' ability to advocate for clients in administrative proceedings.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
X-2016-129b	California Building Industry Association (CBIA) (Cammarota) (09-27-16)	Y	M	1.0.1, 3.3	Proposes amended definition of "tribunal" under proposed rule 1.0.1 such that attorney communications are not "chilled" by proposed rule 3.3.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 34-38 of the public hearing transcript.)	N	D	(a)(2); cmt. 4	Defense lawyer's duty to disclose adverse authority to court amounts to violations of fifth and sixth amendments. Fifth amendment issue: a person charged with a crime shouldn't	No change to paragraph (a) or Comment [4] is required. The first clause in paragraph (a)(2) is verbatim from Model Rule 3.3(a)(2), which has been the rule for many years in the vast majority of jurisdictions and, as

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					have a duty to assist the government with his or her conviction. Sixth amendment issue: a defense lawyer has a duty of loyalty to client to not volunteer information harmful to client. Recounts example where defendant is convicted because attorney was required to provide case authority saying that what he has done is in violation of the law. In response to an inquiry from the hearing panel, the commenter noted that the counterpart ABA rule does not appear to be enforced against defense lawyers as his office's research has not revealed any cases on this issue.	noted by the commenter, has not resulted in Fifth or Sixth Amendment problems for criminal defense lawyers. The Commission is not aware of authority supporting the commenter's position that a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles. In the event a constitutional issue were to arise, the last sentence in comment [4] provides that the obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions. In summary, the Commission does not recommend a provision under which a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles and that such conduct can never be disciplined. Such a determination is for the court.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.5
(Current Rules 5-300 and 5-320)
Contact With Judges, Officials, Employees and Jurors

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("ABA") counterpart, Model Rule 3.5 (Impartiality and Decorum of the Tribunal). 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 3.5 (Contact With Judges, Officials, Employees and Jurors). This proposed rule 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.

Proposed Rule 3.5 in context within the Rules of Professional Conduct. Proposed rule 3.5 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate". Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules.

Recommendation that proposed Rule 3.5 be circulated for public comment. Proposed Rule 3.5 addresses two topics, (i) contact with judicial officials and (ii) contact with jurors, topics that are addressed in two separate rules in the current California Rules of Professional Conduct, rules 5-300 (judicial officers) and 5-320 (jurors). The ABA Model Rules address those two topics in a single rule, Model Rule 3.5.

In conformance with the Charter principle that the Commission is to start with the relevant California rule, the two California rules were separately assigned. However, acknowledging the Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the two topics could be combined in a single rule numbered 3.5. Further, the Commission also determined that the substance of the two current California rules, which are more detailed and identify more precisely the kinds of conduct prohibited under the rules, were more appropriate as disciplinary standards. Accordingly, although numbered 3.5, proposed rule 3.5 largely carries forward, without substantive change, the language of current California rules 3-500 and 3-520:

(i) paragraphs (a) through (c) carry forward the content of current rule 5-300; and
(ii) paragraphs (d) through (l) carry forward the content of current rule 5-320.

There are two principal reasons for this recommendation. First, carrying forward the specificity of current California rules 5-300 and 5-320 should avoid challenges of overbreadth and vagueness and better serve the purpose of the proposed Rules to protect the integrity of the legal system and promote the administration of justice by specifying the conduct that is prohibited. Second, defining what conduct is or is not acceptable better aids judicial personnel, lawyers and jurors from engaging in conduct that might be well meaning, but reflects adversely upon the fairness of the judicial process.

The **title of the rule** was also revised by in part combining the titles of current rules 5-300 and 5-320, and adding references to "judges" and "employees," to more accurately describe the content of the rule, which, as a disciplinary rule, regulates the extent to which lawyers may engage in communicating with judges and jurors.

Text of Rule 3.5.

Paragraph (a) carries forward current rule 5-300(A), but the first sentence has been revised to recognize the various codes or standards of conduct or ethics that regulate the conduct of court personnel and point lawyers to the different sources of law besides the proposed rule that regulate their conduct in giving gifts to judges or court personnel. The second sentence remains unchanged.

Paragraph (b) carries forward rule 5-300(B), amended to recognize exceptions to its application. It specifies circumstances when ex parte communications with judges, judicial officers and personnel, and jurors are prohibited. It is preferable to the Model Rule, which simply provides for a blanket prohibition "unless authorized to do so by law or court order."

Paragraph (c) revises the definition of "judge" and "judicial officer" in rule 5-300(C) to include administrative law judges, neutral arbitrators, and State Bar Court judges. The change clarifies the rule's application to those additional neutral decision-makers.

Paragraphs (d) through (f) and (h) through (l) carry forward the current rule 5-320(A) through (C) and (E) through (I), with only minor changes to conform to this Commission's style and formatting (e.g., "lawyer" for "member"). As noted, these provisions provide more specificity regarding prohibited conduct in relation to jurors, which should enhance compliance and

facilitate enforcement. Paragraph (k) recognizes that a lawyer can address a juror as part of the proceedings and paragraph (l) defines "juror" to mean "any empaneled, discharged, or excused juror."

Paragraph (g) supplements current rule 5-320(D) with the specific prohibitions set forth in MR 3.5(c). The Commission determined that Model Rule 3.5(c) is an exception to the Model Rules' approach in that it identifies in detail the conduct that is prohibited. That detailed description is appropriately included in a disciplinary rule.

There are three comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied. Comment [1] provides examples of codes or standards of conduct referred to in paragraph (a). It clarifies what is intended by the clause "applicable code of judicial ethics, code of judicial conduct, or standards governing" court employees in paragraph (a) by providing examples of such codes or standards. Comment [2] refers to CCP § 206, which provides specific guidance on what communications with jurors are permitted. Comment [3] clarifies when a lawyer may communicate with a discharged juror. It provides an important clarification that even after a particular juror is discharged, a lawyer may not communicate with the juror until the entire jury is discharged.

In addition to the recommended provisions, the Commission declined to recommend Model Rule 3.4(d), which prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal." The Commission determined it is unnecessary in light of the Commission's recommended adoption of Model Rule 8.4(d) as proposed Rule 8.4(d) (providing it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice")

Non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the Model Rules' numbering system and the substitution of the term "lawyer" for "member."

National Background – Adoption of Model Rule 3.5

Every jurisdiction except California has adopted some version of Model Rule 3.5. Fifteen jurisdictions have adopted Model Rule 3.5 verbatim.[1] Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.[2] Fourteen jurisdictions have adopted a version of the rule that diverges substantially from Model Rule 3.5.[3]

Post Public Comment Revisions

After consideration of public comment, the Commission made several amendments to the text of proposed Rule 3.5.

In paragraph (a), the Commission added the term "statute" in the first sentence and the term "judicial officer" in the second sentence.

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[1] The fifteen jurisdictions are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

[2] The twenty-one jurisdictions are: Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

[3] The fourteen jurisdictions are: Alabama, Alaska, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

In paragraph (b), the term “permitted” was substituted for “authorized.”

In paragraph (c), the following clause was added to the definition of “‘judge’ or ‘judicial officer’”: “(iv) members of an administrative body acting in an adjudicative capacity.”

In paragraph (g), the Commission merged subparagraphs (g)(3) and (4) and replaced the draft language with language from current rule 5-320(D).

Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors (Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court; or

(2) with the consent of all other counsel in the matter; or

(3) in the presence of all other counsel in the matter; or

(4) in writing* with a copy thereof furnished to all other counsel in the matter; or

(5) in ex parte matters.

(c) As used in this Rule, "judge" and "judicial officer" shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* 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.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) Except as permitted by statute, an applicable code of judicial ethics~~,~~ or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless ~~authorized~~ permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court; or

(2) with the consent of all other counsel in the matter; or

(3) in the presence of all other counsel in the matter; or

(4) in writing* with a copy thereof furnished to all other counsel in the matter; or

(5) in ex parte matters.

(c) As used in this Rule, "judge" and "judicial officer" shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; ~~and~~ (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* 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.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, or duress ~~or harassment;~~ , or

~~(4) the communication~~ is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors
(Redline Comparison of the Proposed Rule to Current California Rule)

(~~A~~a) ~~A member~~Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal~~ unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall~~.* This Rule does not prohibit a ~~member~~lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(~~B~~b) ~~A member~~Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before ~~such~~the judge or judicial officer, except:

(1) ~~In~~in open court; or

(2) ~~With~~with the consent of all other counsel in ~~such~~the matter; or

(3) ~~In~~in the presence of all other counsel in ~~such~~the matter; or

(4) ~~In~~in writing* with a copy thereof furnished to ~~such~~all other counsel in the matter; or

(5) ~~In~~in ex parte matters.

(~~C~~c) As used in this ~~rule~~Rule, "judge" and "judicial officer" shall ~~include~~also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* 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.

~~Rule 5-320 Contact With Jurors~~

(~~A~~d) A ~~member~~lawyer connected with a case shall not communicate directly or indirectly with anyone the ~~member~~lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(~~B~~e) During trial a ~~member~~lawyer connected with the case shall not communicate directly or indirectly with any juror.

(~~C~~f) During trial a ~~member~~lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the ~~member~~lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate;

(~~D~~3) ~~After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are~~the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(~~E~~h) A ~~member~~lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(~~F~~i) All restrictions imposed by this ~~rule~~Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(~~G~~j) A ~~member~~lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the ~~member~~lawyer has knowledge.

(~~H~~k) This ~~rule~~Rule does not prohibit a ~~member~~lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(~~I~~l) For purposes of this ~~rule~~Rule, "juror" means any ~~empanelled~~empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials, Employees, and Jurors
Synopsis of Public Comments

TOTAL = 9 *A = 0* *D = 2* *M = 6* *NI = 1*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-42	Platten, Christopher (08-11-16)	N	M	3.5	Modify the rule to provide that contributing funds to a labor organization that represents court personnel does not violate the rule.	The Commission did not make the requested modification. The policy of the proposed rule is to align the propriety of a lawyer's conduct with the propriety of a judicial officer's or judicial employee's conduct. Determining whether a lawyer can make a contribution to a labor organization that represents court employees requires the lawyer's analysis of applicable provisions of the Code of Judicial Ethics (http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) and the standards governing employees of a tribunal (http://www.courts.ca.gov/documents/creating_ethical_handout3.pdf). The intended parallelism of this regulatory policy would be undermined if the Commission resolved issues in Rule 3.5 in a manner that might be inconsistent with the application of those judicial provisions. Rather than revising the black letter text or providing a comment on this topic, 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
						believes that appropriate guidance may be obtained from a bar association legal ethics committee or from the Committee on Judicial Ethics Opinions (http://www.courts.ca.gov/documents/CJEO-Rules.pdf).
X-2016-43bh	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-8-16)	Y	M	(j)	Modify (j) to make clear that the requirement to reveal information to the court is subject to a lawyer's duty of confidentiality.	The Commission has not made the suggested change . The language is taken from current rule 5-320(G). The Commission is not aware of any problems that have arisen from the inclusion of that language without qualification.
X-2016-66q	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Y	M	(b)(5)	Language of (b)(5) is not specific enough and should read "properly scheduled ex parte matters."	The Commission has not made the suggested change. The Commission is not aware of any problems that have arisen from the inclusion of that language without further qualification in proposed paragraph (b)(5), which is taken verbatim from current rule 5-300(B)(5).
X-2016-76j	Los Angeles County Bar Association (LACBA) (Schmid) (09-21-16)	Y	M	(a), (g)(3), (g)(4)	Paragraph (a) imposes an unreasonable burden on lawyers as it requires them to become familiar with a set of rules that don't apply to the majority of lawyers in the state. The exception contained in 5-300 should be retained.	The Commission has not made the suggested change. The language of current rule 5-300(A), which formerly conformed to the the language of the Code of Judicial Ethics, now conflicts with that Code, which stringently limits a

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Paragraph (g)(3) & (4) should be clarified to not preclude a lawyer not involved in the case from which the juror was discharged from giving the juror advice.	judge's ability to accept gifts, even where there is a relationship between lawyer and judge "such that gifts are customarily given." To avoid similar conflicts between the Rules and Code in the future, the Commission determined that the most sensible approach was to refer lawyers to the applicable Judicial Codes.
X-2016-83g	Garrett, Christopher (09-26-16)	N	D	1.0.1(m), 3.3, 3.4, 3.5	The definition of tribunal in proposed rule 1.0.1(m), in particular that part that includes "an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved," would arguably include hearings, petitions and meetings with local governments, such as cities and counties. Rules 3.3, 3.4 and 3.5, which apply to proceedings before a tribunal, would threaten to a lawyer's ability to advocate for the lawyer's clients in these settings. Imported into these proceedings, the rules unnecessarily burdens one's public petition or speech rights.	The Commission notes that the commenter's concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 would appear to be necessary. Please see Commission's response to the commenter concerning Rule 1.0.1.Nevertheless, the Commission has made some changes that it believes removes concerns the commenter has expressed with respect to this rule. See

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						revised paragraph (a) which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c), which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"
X-2016-97d	Freedman, Daniel (09-27-16)		NI	1.0.1(m), 3.3, 3.4, 3.5	Although the rules [3.3, 3.4 and 3.5] are reasonable as applied to proceedings before the judiciary, they cannot reasonably be applied to administrative and adjudicatory proceedings held by local governmental bodies. However, by virtue of the proposed definition of "tribunal," these rules will be applied to those local bodies.	The commenter's concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 would appear to be necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. Nevertheless, the Commission has made some changes that it believes removes concerns the commenter has expressed with respect to this rule. See revised paragraph (a) which adds the terms "statute" and

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						"judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c), which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"
X-2016-104am	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)		M	3.5, (g)(4)	1. OCTC supports adoption of the rule. 2. However, OCTC recommends that the rule also prohibit communications to a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after their discharge. (*Lind v. Medevac* (1990) 219 Cal.App.3d 516.) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.	1. No response required. 2. The Commission has not made the suggested change, given that a current rule provision, which has been carried forward in the proposed rule as paragraph (g)(4), has been held to apply to the situation described.
X-2016-126d	Ivester, David (09-27-16)		M	1.0.1(m), 3.3, 3.4, 3.5	Proposed Rule 3.5 refers to "tribunals," but it is plain that the rule pertains to judicial proceedings. For instance, Proposed Rule 3.5(b), which prohibits ex parte communications with "a judge or judicial officer." Proposed Rule	The commenter's concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					3.5(c) defines "judge or judicial officer" to refer to other court personnel. It does not use terminology that translates quasi-adjudicatory land use and similar types of proceedings. If Proposed Rule 3.5(b) is read to prohibit ex parte communications in "quasiadjudicative proceedings," the unintended and unwarranted result would be that a client and other non-lawyers could engage in legal ex parte communications in a quasi-adjudicatory proceeding, but lawyers, who clients hire to communicate with government on their behalf, could not.	3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 would appear to be necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. Nevertheless, the Commission has made some changes that it believes removes concerns the commenter has expressed with respect to this rule. See revised paragraph (a) which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c), which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"
X-2016-129d	California Building Industry Association (Cammarota) (09-27-16)	Y	D	1.0.1(m), 3.3, 3.4, 3.5	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-	The commenter's concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					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 between judicial proceedings and quasi-judicial proceedings that militate extending those restrictions.	bodies. As such, no response concerning Rule 3.5 would appear to be necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. Nevertheless, the Commission has made some changes that it believes removes concerns the commenter has expressed with respect to this rule. See revised paragraph (a) which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c), which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.9
(No Current Rule)
Advocate In Nonadjudicative Proceedings

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 3.9 (Advocate In Nonadjudicative Proceedings) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. 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 3.9 (Advocate in Nonadjudicative Proceedings). This proposed rule 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.

Proposed rule 3.9 requires that a lawyer communicating in a representative capacity with a legislative body or administrative agency regarding a pending nonadjudicative matter or proceeding disclose that the lawyer's appearance is in a representative capacity. The rule does not apply when the lawyer seeks information from a body or agency that is available to the public. Proposed rule 3.9 adopts the blackletter portion of New York Rule of Professional Conduct 3.9 verbatim. While both the proposed rule and the New York rule are derived from ABA Model Rule 3.9, they depart from the ABA Model Rule by eliminating the reference to specific rule provisions that are applicable to conduct before a tribunal.[1] The departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concepts of evidence and inappropriate contact with a judge or juror. However, these same concepts are confusing and inapplicable for setting a clear disciplinary standard in a nonadjudicative proceeding.

There is one comment to the rule. This comment is derived from ABA Model Rule 3.9, Comment [3] and it provides specific guidance as to how the rule should be applied. The proposed comment has been revised to explain that the rule does not require disclosure of the client's identity.

National Background – Adoption of Model Rule 3.9

As California does not presently have a direct counterpart to Model Rule 3.9, this section reports on the adoption of the Model Rule in United States' jurisdictions. Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.[2]

[1] ABA Model Rule 3.9 requires that a lawyer comply with certain provisions of Rule 3.3 (Candor Toward The Tribunal), Rule 3.4 (Fairness to Opposing Party And Counsel), and Rule 3.5 (Impartiality and Decorum Of The Tribunal).

[2] The two jurisdictions are: North Carolina and Virginia.

The ABA State Adoption Chart for ABA Model Rule 3.9 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf

Thirty-one states have adopted Model Rule 3.9 verbatim.[3] Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.[4] Three states have adopted a version of the rule that substantially diverges from Model Rule 3.9.[5]

Post Public Comment Revisions

After consideration of public comment, the Commission has revised the black letter of the rule to clarify its scope of application.

[3] The thirty-one states are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[4] The fourteen jurisdictions are: Alaska, District of Columbia, Florida, Georgia, Hawaii, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Tennessee, Texas, and Washington.

[5] The three states are: Colorado, Maine, and North Dakota.

Rule 3.9 Advocate in Nonadjudicative Proceedings
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

A lawyer representing a client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This Rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

Rule 3.9 Advocate in Nonadjudicative Proceedings
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

A lawyer ~~communicating in~~ representing a ~~representative capacity with~~ client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This Rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

~~Model~~ Rule 3.9 Advocate ~~In~~in Nonadjudicative Proceedings
(Redline Comparison of the Proposed Rule to ABA Model Rule)

A lawyer representing a client before a legislative body or administrative agency in ~~a~~connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity ~~and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5~~, except when the lawyer seeks information from an agency that is available to the public.

Comment

~~[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.~~

~~[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~

~~[3]~~ This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. ~~Nor~~This Rule also does ~~it~~not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4. This Rule does not require a lawyer to disclose a client's identity.

Proposed Rule 3.9 Advocate in Non-adjudicative Proceedings
Synopsis of Public Comments

TOTAL = 9	A = 3
	D = 0
	M = 5
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-32q	Law Professors (Zitrin) (07-25-16)	Yes	M	3.9	While the commission has adopted Rule 3.9 "inexplicably" [this] version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4 and 3.5… Such compliance is required by ABA MR 3.9. We cannot understand the commission's reluctance to remind practitioners of common requirements of attorney honesty. [W]e believe that it is better for rules of conduct to make it abundantly clear that lawyers must act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings.	The Commission disagrees with the commenters' assessment. The proposed rule does not suggest that a lawyer may engage in dishonest conduct. Rather, the Commission determined that the Model Rule's requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct *before a tribunal* should not be included in this rule, which governs non-adjudicative settings. This departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concept of "evidence," but these same concepts are confusing or incorrect for setting clear disciplinary standards in a non-adjudicative proceeding. It is appropriate, however, that lawyers be held to the requirements set forth in Rules 4.1 through 4.4, as the proposed rule provides.

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

Proposed Rule 3.9 Advocate in Non-adjudicative Proceedings
Synopsis of Public Comments

TOTAL = 9 ***A = 3*** ***D = 0*** ***M = 5*** ***NI = 1***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43q	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin)	Yes	A	3.9	Supports adoption of proposed Rule 3.9.	No response required.
X-2016-32q	Law Professors (Zitrin) (07-25-16)	Yes	M	3.9	While the commission has adopted Rule 3.9 "inexplicably" [this] version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4 and 3.5… Such compliance is required by ABA MR 3.9. We cannot understand the commission's reluctance to remind practitioners of common requirements of attorney honesty. [W]e believe that it is better for rules of conduct to make it abundantly clear that lawyers must act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings.	The Commission disagrees with the commenters' assessment. The proposed rule does not suggest that a lawyer may engage in dishonest conduct. Rather, the Commission determined that the Model Rule's requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct *before a tribunal* should not be included in this rule, which governs non-adjudicative settings. This departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concept of "evidence," but these same concepts are confusing or incorrect for setting clear disciplinary standards in a non-adjudicative proceeding. It is appropriate, however, that lawyers be held to the requirements set forth in Rules 4.1 through 4.4, as the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						proposed rule provides.
X-2016-52q	Law Professors (Zitrin) (08-24-2016)	Yes	M		See X-2016-32q Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories	See X-2016-32q for Commission's response to the Law Professors' comments
X-2016-68q	Law Professors (Zitrin) (09-21-2016)	Yes	M		See X-2016-32q Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32q for Commission's response to the Law Professors' comments
X-2016-104aq	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Yes	A		1. Supports adoption of proposed Rule 3.9. 2. Supports adoption of the Comment to Rule.	1. No response required. 2. No response required.
X-2016-97e	Freedman, Daniel (9-27-16)	No	M		While we agree with the spirit of this rule, as drafted it is too vague to apply in connection with hearings in front of local administrative bodies and typical nonadjudicative proceedings. For example, if an attorney has a personal interest in a specific issue that may also impact a client's interest, there is an untenable vagueness concerning whether his/her participation in the hearing is in a "representative capacity." [A]s drafted, this rule will create unacceptable risk that an attorney's participation in the political process, for personal reasons, will be subject to	The Commission disagrees that proposed Rule 3.9 creates an unacceptable risk that a lawyer's personal participation in the political process would invoke the rule. The Rule clearly applies to lawyers representing clients in a pending non-adjudicative matter or proceeding. The Commission has revised the rule to clarify this further by by substituting "representing a client before" for "communicating with …."

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					heightened scrutiny that will likely result in politically motivated and/or unwarranted complaints to the state bar.	
X-2016-83a	Garrett, Christopher (9-26-16)	No	A		The proposed Rule 3.9 represents a workable balance between the policy of ensuring that public officials are adequately informed of a lawyer's representation and providing workable and enforceable rule. The rule is also consistent with the constitutional rights to free speech and to petition the government for redress of grievances.	No response required.
X-2016-86d	United States Department of Justice (US DOJ) (Ludwig) (9-27-16)	Yes	NI		We take no position regarding the adoption of a Rule that addresses a lawyer's obligations as an advocate in non-adjudicative proceedings before a legislative body or administrative agency. That said, we note that the proposed Rule, as modified from Model Rule 3.9, may create confusion. Specifically, the proposed Rule requires "[a] lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding [to] disclose that the appearance is in a representative capacity, except when the lawyer seeks	The Commission recognizes the confusion that might be generated by the language used and has revised the rule to clarify its scope of application by substituting "representing a client before" for "communicating with …."

Proposed Rule 3.9 Advocate in Non-adjudicative Proceedings
Synopsis of Public Comments

TOTAL = 9	*A = 3*
	D = 0
	M = 5
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					information from an agency that is available to the public." Obviously, however, a lawyer need not *appear* before a legislative body or administrative body in order to *communicate* with such body; lawyers can draft written submissions for consideration "in connection with an official hearing or meeting." It is unclear whether the Commission intended for the proposed Rule to extend to such communications.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.2
(Current Rule 2-100)
Communication With a Represented Person

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 2-100 (Communication With a Represented Party) 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 4.2 (concerning communications with a represented person) and the Restatement of Law Governing Lawyers counterpart, Restatement § 99 (Represented Nonclient – The General Anti-contact Rule). The result of the Commission's evaluation is proposed rule 4.2 (Communication With a Represented Person). This proposed rule 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.

Proposed rule 4.2 carries forward the substance of current rule 2-100, the "no contact" rule, and prohibits a lawyer who represents a client in a matter from communicating, either directly or indirectly, about the subject matter of the representation with a person represented by a lawyer in the same matter. The Rule is intended to protect the represented person against (i) possible overreaching by the prohibited lawyer, (ii) interference by the prohibited lawyer with the client-lawyer relationship, and (iii) the uncounseled disclosure of privileged or other confidential information.

In addition to containing the basic prohibition in paragraph (a), the proposed Rule would carry forward, largely intact, the other black letter provisions in current rule 2-100(B) and (C) as paragraphs (b) and (c). There are also two new paragraphs: paragraph (d), which imposes a duty on a lawyer to treat with fairness a represented person with whom communications are permitted under the Rule (e.g. a public official), and paragraph (e), which includes two definitions intended to avoid ambiguity in the application of the Rule.

Proposed Rule 4.2, like current rule 2-100, is substantially more detailed than the corresponding Model Rule, which is a single blackletter sentence supplemented by nine Comments, many of which expand or provide express exceptions to the rule. The Commission believes that a rule similar to current rule 2-100 is preferred to the Model Rule because it more closely adheres to the Charter's principle that the Rule function as a minimal disciplinary standard. Further, the detailed proposed rule enhances compliance and facilitates enforcement, as well as promotes protection for the public and respect for the legal profession and administration of justice.

Paragraph (a), the basic prohibition, presents a key issue: whether to substitute the term "person" for "party" in current rule 2-100. This substitution has been made by every jurisdiction, either by making the substitution in the black letter provision of its Rule 4.2 counterpart or by stating in a comment that "party" applies to any person involved in a matter who is represented by a lawyer. Changing "party" to "person" will also resolve the limitations inherent in using the term "party" that were recognized in *In the Matter of Dale* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 798. Given the rule's aforementioned objectives to protect any person who has chosen to be represented by a lawyer in a matter against

possible overreaching by lawyers who are employed in the matter, interference by those lawyers with the lawyer-client relationship, or the uncounseled disclosure of confidential information, there is no principled reason to limit the protection of the rule to those persons who are parties. Nevertheless, public comment received by the first Commission and this Commission demonstrates that some lawyers in the criminal justice system believe that the substitution of "person" for "party" will inhibit their ability to investigate. However, the experience in other jurisdictions has not borne that out. In any event, proposed Comment [8] makes clear that the change is not intended to prohibit current legitimate investigative practices. In light of these contentions, this change in language creates a point of controversy in considering the Rule. See also discussion of paragraph (c), below.

Paragraph (b), which carries forward the substance of current rule 2-100(B), is intended to clarify the operation of the proposed rule when the represented "person" is an organization, including a governmental organization.[1] The only substantive change to that paragraph is to no longer view as a "represented person" a constituent of the organization "whose statement may constitute an admission on the part of the organization." That clause was deleted because it is ambiguous and applies even if the statement "may" constitute an admission against interest, and the provision requires a lawyer at his or her peril to analyze the applicable state rules of evidence and law of agency in deciding whether to communicate with a non-managerial employee or agent of a represented entity. Most states do not include this as the ABA deleted a similar clause as a part of its Ethics 2000 Commission's comprehensive revisions of the Model Rules. In any event, deleting the clause should not put organizations at risk of conceding liability in a communication by one of its constituents because nearly every communication that could constitute an admission would have to originate from a constituent who is already off-limits under subparagraph (b)(1) (which encompasses any officer, director, partner, or managing agent).

Paragraph (c) carries forward most of current Rule 2-100(C), which explicitly recognizes several exceptions to application of the rule, including communications with public officials or public entities and communications otherwise authorized by law. Paragraph (c) does not carry forward current paragraph (C)(2), which excepts communications initiated by a represented person seeking advice from an independent lawyer. Current rule 2-100(C)(2) is superfluous because an independent lawyer could not be covered by the rule, which applies only to communications *by a lawyer in the course of representing a client in the matter*, which would make the lawyer making those communications not independent.

A key issue, however, is the addition of the phrase, "or a court order." This is intended to address concerns expressed by lawyers in the criminal justice system to the prior Commission that the substitution of "person" would interfere with the ability to conduct investigations. Including this phrase removes any ambiguity that might otherwise suggest that, for example, a prosecutor could not seek a court order to communicate with a represented witness in conducting a criminal investigation. Most states that have a version of Model Rule 4.2 include the option of seeking a court order. When considered in light of the substitution of "person" for "party," the phrase represents an appropriate balancing between protecting lawyer-client relationships of any person involved in a matter and permitting lawyers, whether on behalf of private or governmental interests, to effectively represent their clients by conducting investigations into the matters for which they had been retained. During the first Commission's process, the provision generated substantial input from interested

[1] Proposed Rule 1.0.1(g-1) defines "person" to mean "a natural person or an organization."

stakeholders both in formal public comment and in appearances at Commission meetings and public hearings. This Commission also received communications from interested stakeholders regarding this change. To address the expressed concerns, this Commission has also recommended including proposed Comment [8].

Paragraph (d) is new. It requires that when lawyers deal with a represented person as permitted by the rule, i.e., pursuant to paragraph (c)(1), the lawyer must comply with the requirements of Rule 4.3, which in effect requires lawyers to treat unrepresented persons fairly and is intended to prevent overreaching by lawyers when communicating with *unrepresented* persons. Although there may be other general provisions under which a lawyer might be charged for engaging in overreaching conduct, e.g., Bus. & Prof. Code §§ 6068(a) and 6106, their application to situations governed by proposed Rule 4.2 is not readily apparent. Including this express provision should eliminate that ambiguity and facilitate compliance.

Paragraph (e) includes two definitions, one for "managing agent" and another for "public official." They are intended to clarify the application of the rule in an organizational context and when a lawyer is attempting to exercise the right to petition the government, respectively.

Finally, non-substantive changes to the current 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."

Principle 5 of the Commission's Charter 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." Proposed Rule 4.2 has been the focus of a substantial amount of case law that has clarified how it should be applied. The comments the Commission recommends are an attempt to capture that case law and other authority to clarify how the rule is applied, do not conflict with Principle 5, and also accord with Principle 4 of the Commission's Charter by facilitating "compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties."

Of particular note is Comment [8] which, as noted above, has been added to clarify that the Rule is not intended to preclude communications with represented persons in the course of legitimate investigations as authorized by law. A similar comment was included in the first Commission's proposed Rule to address the concerns of lawyers on both sides in the criminal justice system.

Post-Public Comment Revisions

After consideration of public comment, the Commission has deleted paragraph (d) and Comment [2A]. However, the Commission added Comment [9] to clarify that communications with a represented person not prohibited under the Rule are still subject to other restrictions.

(Staff note: The dissent below was submitted in connection with the Commission's original public comment version of proposed rule 4.2.)

Commission Member Dissent to the Recommended Adoption of Proposed Rule 4.2, Submitted by Carol M. Langford

This letter is to provide comments and lodge my dissent to some of the changes being made to old Rule 2-100.

First, I strongly agree that changing the word "party" to "person" is a good change, and long overdue. The State Bar Court should not have to reach for a B&P 6106 violation to punish conduct that should be prohibited by the Rule.

I disagree however, with Comment 2A (what is in the current draft called a "placeholder"). This Comment seems to say that actual knowledge is required before a lawyer can be prosecuted under the Rule. This language is not in the current Rule, and there has been no problem with that lack of inclusion so far (for many, many years). I also think that when we heard from Allen Blumenthal from the Office of Chief Trial Counsel that your language saying "The Rule applies where the lawyer has actual knowledge that the person..(..)" will almost completely impair their ability to prosecute a violation of the Rule, then we must take heed.

It is true that the case law says actual knowledge is needed. And it is true that it also says that knowledge may be inferred from the circumstances. However by saying "This Rule applies where the lawyer has actual knowledge..(..)" you are twisting the meaning in a way that implies that only actual knowledge is sufficient for a prosecution of the Rule. You are also inserting a mens rea element that is not applicable in the State Bar court. As Mr. Blumenthal explained, in the State Bar all a respondent has to do is to, for example, take money from the trust account and that will alone comprise the willfulness element needed to commit a State Bar offense. The State Bar does not look to actual knowledge and/or a Respondent's state of mind unless the discipline phase of the trial is over and the second phase of the trial - mitigation - is being heard.

Moreover, adding the Comment proposed could make it possible for a lawyer to contact a person in, for example, a domestic case when a quick online search would show she is represented. The same is true of a post-arraignment defendant. That completely circumvents the intent of the Rule. The State Bar Court in their case The Matter of Dale, wanted to stop exactly this type of over-reaching by lawyers. We should support our Court.

I believe the Comment to the Rule should state "This Rule applies when the member knows or reasonably should know that the person to be contacted is represented by another lawyer in the matter" if you are going to keep that Comment in.

Comment 3 is also problematic. I get that you want lawyers to be able to talk about things outside of the representation with someone represented by counsel since that is not what the Rule wants to sanction. However, the way your draft reads it would allow a DA to ask a defendant about other offenses that may be considered strikes. Or, a lawyer to ask a woman about a custody issue when she is only represented on the dissolution. Your language is far too broad, and there must be boundaries or the purpose of the Rule is thwarted.

I suggest the following language: "This Rule does not prohibit communications with a represented person concerning matters not reasonably related to the representation."

Now let's look at Comments 9 and 10 - particularly the first sentence of Comment 10 and the last sentence of Comment 9 regarding the availability of court orders and investigative activities respectively. Those Comments are a bold attempt to legislate through Rule Comments - something the Supreme Court has already told us they don't want us to do. I do not understand why you would ignore their plain admonishment. They are right in not wanting us - a Commission - to do that. I urge you to listen to them.

Last, I do not recall which Alternative was selected in our Proposed Rule, but if it is Alternative One that includes (ii) - admissions on the part of an organizational constituent - then that is good. Why wouldn't we want to protect organizations from being held to admissions when, for example, the constituent does not understand how statements can hurt him and the organization? And don't we want to protect people who have not been properly "Organizationally Mirandized" that what they say can hurt them, too?

Please consider these comments. I do know that others outside of the Commission will be closely watching this Rule and we might as well get it right - right now.

Very truly yours,
Carol M. Langford

Rule 4.2 [2-100] Communication With a Represented Person
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Clean Version)

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person* the lawyer knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:

(1) A current officer, director, partner,*or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

(c) This Rule shall not prohibit:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

(d) For purposes of this Rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This Rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this Rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person,* whether or not

a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This Rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This Rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that

prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.

Rule 4.2 [2-100] Communication With a Represented Person
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person* the lawyer knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:

(1) A current officer, director, partner,*or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

(c) This Rule shall not prohibit:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

~~(d) In any communication with a represented person* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.~~

(~~e~~d) For purposes of this Rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This Rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this Rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person,* whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

~~[2A] This Rule applies where the lawyer has actual knowledge that the person* to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances. (See Rule 1.0.1(f))~~

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This Rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This Rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] This Rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (~~e~~d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.

Rule 4.2 [2-100] Communication With a Represented ~~Party~~Person
(Redline Comparison of the Proposed Rule to Current California Rule)

(~~A~~a) ~~While~~In representing a client, a ~~member~~lawyer shall not communicate directly or indirectly about the subject of the representation with a ~~party~~person* the ~~member~~lawyer knows* to be represented by another lawyer in the matter, unless the ~~member~~lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:

~~(B) For purposes of this rule, a "party" includes:~~

(1) ~~An~~A current officer, director, partner,*or managing agent of ~~a corporation or association, and a partner or managing agent of a partnership~~the organization; or

(2) ~~An association member or an employee of an association, corporation, or partnership~~A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~.

(~~C~~c) This ~~rule~~Rule shall not prohibit:

(1) ~~Communications~~communications with a public ~~officer~~official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

~~(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or~~

~~(3) Communications otherwise authorized by law.~~

(d) For purposes of this Rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

~~Discussion~~Comment

~~Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.~~

~~Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.~~

~~Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.~~

~~As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.~~

~~Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)~~

~~Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)~~

[1] This Rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this Rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person,* whether or not

a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This Rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This Rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 (Limited Scope Representation).)

[5] [5] This Rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health

and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person. See, e.g. Business and Professions Code § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.

Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments

TOTAL = 16 ***A = 6*** ***D = 3*** ***M = 6*** ***NI = 1***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ad	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A		COPRAC supports the adoption of proposed rule 4.2.	No response required.
X-2016-68t	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Y	A		1. We support this proposed reformulation of current Rule 2-100 and believe that subsection (b), as well as the Comments, add clarity to a lawyer's obligations. 2. We struggled with the seeming lack of clarity in Comment [1] and Comment [5]. Comment [1] instructs that, even if a person currently represented by a lawyer, takes the initiative and seeks out another lawyer for advice in the same matter—*e.g.*, wanting potentially to change lawyers without the first lawyer knowing—the second lawyer is barred from communicating with that represented person, unless, against the person's wishes, the first lawyer approves the communication. Comment [5], on the other hand, says that a represented person may seek advice or	1. No response required. 2. The Commission did not make the suggested change. The Commission does not believe that Comment [1] reasonably can be read as suggested and don't believe that any change or elaboration in it is needed. The second lawyer would not have a client in the matter when speaking with a potential client and therefore would not be within the prohibition of paragraph (a) of the Rule. Comment [5] makes the same point.

[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
					representation of an "inde-pendent" lawyer, which we understand to mean not a lawyer representing a client in the same matter, without falling within the proposed rule's prohibition. Since it took us considerable time to sort the difference between the circumstances of Comment [1] and Comment [5], we suggest that the Commission give some attention to making the distinction clearer. 3. We further recommend that "or family member or designee" be added after "represented person" in Comment [5], since, for many in the criminal defense bar, the initial communication usually comes, not from an incarcerated accused, but from some family member or other designee.	3. The Commission did not make the suggested change. The Commission does not believe that such a clarification is necessary. The Rule is intended to address in part interference by a lawyer *involved in the matter* with the lawyer-client relationship of the represented person. An independent lawyer is not involved in the matter. The Commission does not understand why it is necessary to clarify that the rule also does not apply when an independent lawyer is contacted by a family member or other designee.

Proposed Rule 4.2 [2-100] Communication with a Represented Person
Synopsis of Public Comments

TOTAL = 16 *A = 6* *D = 3* *M = 6* *NI = 1*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-76k	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M	(d)	Paragraph (b) [the Commission believes the commenter means paragraph (d)] of Proposed Rule 4.2 states that any communication with a represented person not prohibited by this rule must comply with Rule 4.3. However, Proposed Rule 4.3 by its own terms is inapplicable to a represented person. As a result, the following clarifying language should be added to the end of paragraph (d) of Proposed Rule 4.2: "as if the person were not represented".	Rather than make the suggested change, the Commission has decided to delete paragraph (d).
X-2016-83b	Garrett, Christopher (09-26-16)	N	D		1. Proposed Rule 4.2 seeks to replace current Rule 2-100 and adds a new subsection (d) that requires compliance with the proposed Rule 4.3. The proposed Rule 4.3 regulates not only what the lawyer "state[s] or impl[ies]" but also requires the lawyer to evaluate what the unrepresented person believes and the interests of the unrepresented person as against the lawyer's own client. Whether the unrepresented person believes the lawyer is "disinterested" is left undefined, and the standards by which the lawyer is supposed to evaluate the unrepresented person's interests and conflicts as against	1. See Response to Lamport, X-2016-115a, below.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the lawyer's client is similarly undefined. The vagueness of the proposed rule 4.2 and 4.3 places legal practitioners at special and unreasonable risk for discipline due to an inability to assess an unrepresented person's unstated beliefs and interests. 2, In addition, the prohibition against a lawyer's "implications" of "disinterestedness" is a vague restriction that potentially constitutes impermissible infringement on the right to free speech and the right to petition the government guaranteed by the California Constitution.	2. See response to comment re Rule 4.3.
X-2016-87d	Attorneys' Liability Assurance Society (ALAS) (Garland) (09-27-16)	Y	NI		The proposed rule is ambiguous about whether a lawyer may communicate about the subject of the representation with the in-house counsel of a corporation that is also represented in the matter by outside counsel. The question arises often under the current rule and even experienced lawyers are not sure how to answer it. The proposed rule should not perpetuate this confusion. Instead, the Commission should take this opportunity to clear up confusion on a question that arises with some regularity.	The Commission disagrees with the commenter's suggestion that the proposed rule should include an exception for communications with an in-house counsel of a corporation. The Commission believes that given the wide range of legal representation afforded corporations of varying sizes, such an exception should be addressed in an ethics opinion as has been done in ABA Formal Ethics Op. 06-443. In that context, the large range of situations could be more adequately addressed and

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					As explained in ABA Formal Opn. 06-443, the ABA Model Rule counterpart has been interpreted to allow contact with inside counsel of an organization when the organization is also represented by outside counsel. As explained in the Opinion, the protections of the rule are not needed for communications involving an organization's lawyer employees because the rule is intended to prevent lawyers from taking advantage of non-lawyers. We think the Commission should adopt this approach.	distinguished than in a disciplinary rule.
X-2016-89a	League of California Cities (Leary) (09-27-16)	Y	M		The League urges the Board to: 1. Substitute the term "public officer" for "public official."	1. The Commission did not make the suggested change. The change from "public officer" to "public official" (as defined in (e)(2) [relettered as (d)(2) in the revised rule draft]) provides a more precise description of those constituents of a governmental organization for whom the right to petition would apply, and results in the rule reflecting the appropriate scope of the right to petition the government while preserving government counsel's attorney-client relationship with the governmental agency and its

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						constituents. The definition lists "public officer" as within the meaning of the term "public official."
					2. Either define "public officer" as "an individual who holds a position in government that is created or authorized by law, the tenure of which is continuing and permanent, not occasional or temporary, and in which the individual performs a public function for the public benefit and exercises some of the sovereign powers of the government," or reference the existing body of law distinguishing between public officers and public employees in a comment to Rule 4.2.	2. The Commission did not make the suggested change. See response to commenter's point 1, above.
					3. Modify Rule 4.2's exception to communications with public clients such that it conforms to the ABA approach, under which: (1) opposing counsel must provide the government attorney with reasonable advance notice of any attempt to communicate with a public client; (2) the communication must be directed to an individual who has authority to take or recommend action in the matter; and (3) the sole purpose of such communication must be to address a policy	3. The Commission did not make the suggested change. It believes that Comment [7] of proposed Rule 4.2 adequately addresses the commenter's points that are taken from an ethics opinion, ABA Formal Ethics Op. 1997-408. The ABA does not provide the requested guidance in a rule.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					issue, including potential settlement.	
X-2016-93l	Los Angeles County Public Defender (Brown) (09-23-16)		D		We believe that it is essential that prosecutors and defense lawyers be permitted to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 857.) We believe that adoption of the Proposed Rule will inject uncertainty into an area where no uncertainty currently exists. If adoption of the Proposed Rule actually does change the scope of the rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" in fact makes not change, then the term should not be changed. Further, we are concerned that Comment [8] authorizes (by not precluding) "communications with represented persons in the course of such legitimate investigative activities as authorized by law." The two cases cited in the Comment, and the only Attorney General	The Commission has not made the suggested change. It continues to believe that proposed Comment [8] appropriately addresses the concerns raised by the commenter. That comment clarifies the application of the "authorized by law" exception, including in particular the recognized application of the exception to legitimate government investigative activities. The comment provides assurance that the change from "party" to "person" is not intended to change application of the exception. In this regard, the last sentence of the comment has been added to assure lawyers in the criminal justice system concerned with the change from "party" to "person" that the rule is not intended to prohibit current legitimate investigative practices.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Opinion of which we are aware, all depend on the distinction between investigation and the filing of criminal charges. Our concern is with the use of the term “investigative activities” in the Comment. It can easily be imagined that a prosecutor might understand “investigative activities” as permitting direct contact with a represented defendant, without consent of counsel, even after the filing of a criminal charge, so long as the contact is viewed as part of the “investigative activities.” Investigation of criminal cases often persists even after the filing of charges. We urge the Commission to cite to the Attorney General Opinion as well as the federal cases, and clarify that permission to conduct interviews is limited to pre-filing time periods. This could be accomplished by adding a sentence in the Comment: “The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law, prior to the filing of criminal charges.”	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Although we oppose the adoption of this Rule with the term "person" in lieu of "party," if this Rule is adopted, the exception in the Comment for criminal defense lawyers conducting investigative activities authorized by law is essential (See, e.g., *Grievance Comm. for S. Dist. of N.Y. v. Simels* (2d Cir. 1995) 48 F.3d 640.) We therefore proposed the following additional language to paragraph (b): "(b) A lawyer for the defendant in a criminal proceeding or other proceeding that may result in an individual's liberty being restrained, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established."	
X-2016-94b	Disability Rights California (Murdyk) (09-27-16)	Y	A		DRC supports Proposed Rule 4.2, which preserves the ability of a lawyer to communicate with a public official, board, committee, or body. As the comments to the Rule recognize, this exception is necessary to preserve the right to petition protected under the First Amendment of the United States Constitution and Article I, Section 3 of the California Constitution.	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-97f	Freedman, Daniel (09-27-16)	N	D		Although the spirit of proposed rules 4.2 and 4.3 are commendable, as drafted, these rules create unacceptable risks to attorneys engaging with administrative agencies and government officials on political issues. Again, in many informal settings, defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear, and a lawyer's profession should not be placed at risk as a result of their personal interests in engaging in the political process. Moreover, in this setting, there is inherent vagueness in the term "disinterested," that would require an investigation into an attorney's subjective intent for engaging an unrepresented party. The same is true with respect to the rule's prohibition on giving "legal advice." In dealing with governmental agencies, the line between "legal advice" and political opinion is almost impossible to define. Accordingly, the rule creates an unacceptable risk that an attorney's engagement and involvement with government agencies may stifle and chill an attorney's constitutionally protected right to	1. See Response to Lamport, X-2016-115a, below.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					engage in the political process, and will create the unacceptable risk that an attorney's livelihood may be attacked through state bar complaints based on political motivations and interests.	
X-2016-82e	Polish, James (09-27-16)	N	M		1. This rule and the comment to the rule fail to clarify certain issues. The rule appears to contain a blanket exception for "communications with a public official, board, committee, or body." However, some case law has narrowly interpreted this provision in the current rule to apply only to petitioning activity. Compare United Stated v. County of Los Angeles, 2016 WL 4059712 at *2-3 (C.D. Cal. July 27, 2016) with United States v. Sierra Pacific Industries, 759 F.Supp.2d 1206, 1212-14 (E.D. Cal. 2010) (Magistrate Judge Opinion), reconsideration denied, 759 F.Supp.2d 1215 (E.D. Cal.), amended, 857 F.Supp.2d 975 (E.D. Cal. 2011) (Magistrate Judge Opinion). I think rules should mean what they say, and if the intent was to provide a blanket exception, that should be stated. If not, the rule should be clarified. 2. Also, does the phrase "[I]n representing a client" in	1. Proposed Rule 4.2 does not provide a "blanket exception" for communications with public officials, boards, committees or bodies. See Comment [7], which explains the application of the rule in these settings. 2. The rule does not apply to an independent lawyer. See

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					subsection (a) mean what it says? Does the rule apply if, for example, a lawyer, on his or her own behalf, contacts a former client now represented by other counsel to find out why the client changed counsel or to collect unpaid fees? Some authorities in other jurisdictions have effectively read the quoted provision out of ABA Model Rule 4.2. See, e.g., N.Y. City Ethics Opinion 2011-1 (2011), and authorities cited; Hawaii Formal Opinion 44 (2003); Disciplinary Board v. Lucas, 2010 ND 187, 789 N.W.2d 73, 76 (2010). Contra Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075, 1079 (1990). Again, I think the rule should mean what it says. 3. The comments say that "a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation." The rule should be clarified to specify that a lawyer should be permitted to deal directly with a party appearing in a lawsuit in pro per, even if the party has assistance	response 2 to SDCBA, X-2016-68t, above. However, in the hypothetical posed by the commenter, the lawyer must be cognizant that, depending upon the communication with the former client, the lawyer might violate proposed Rule 7.3(b). 3. The Commission has not made the suggested change. The comments are not intended to provide practice guidelines. As noted by the commenter, the ability to communicate with a person appearing in pro per but with assistance from a lawyer who has not made an appearance is addressed in case law and so paragraph (c)(2) would apply. See Comment [8].

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					from an attorney who has not made an appearance. See McMillan v. Shadow Ridge at Oak Park Homeowner's Assn., 165 Cal.App.4th 960, 965-68 (2008), Contra ABA Formal Opinion 472 (2015). Prosecution of a lawsuit requires frequent communication with the opposing side. Counsel of record should not be required to identify and try to deal with a lawyer who has elected not to appear in the action. Such a lawyer, by electing not to make an appearance, has effectively given permission for counsel of record to deal directly with the pro se party. If that is not what the lawyer intended in limiting the representation, he or she should have made an appearance in the case.	
X-2016-104at	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. OCTC supports this rule. It is concerned, however, with the use of the term "knows" in subsection (a), as it would appear to allow willful blindness, recklessness, or gross negligence in learning whether the person was represented by counsel. (See also OCTC comments to proposed Rules 1.9 and 1.3, and the General Comments sections 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 circumstances. A lawyer may not engage in willful blindness to avoid knowledge that the person with whom the lawyer seeks to communicate is represented by counsel.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						Further, case law has sanctioned the "knowledge" standard with respect to current rule 2-100. See, e.g., *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183 [69 Cal.Rptr.2d 558]; *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398 [58 Cal.Rptr.2d 178].
					2. OCTC supports Comments 1, 2, 3, 5, 6, 7, and 8.	2. No response required.
					3. OCTC is concerned that Comment 2A merely repeats the rule and its definition of actual knowledge for the same reasons discussed in its comments to subsection (a) of the rule.	3. Comment [2A] has been deleted. See proposed Rule 1.0.1(f).
					4. OCTC supports the first sentence of Comment 4. OCTC is, however, concerned with Comment 4's use of the term "knows" for the same reasons it is concerned with the use of that term in subsection (a) of this proposed rule.	4. See response OCTC's comment 1.
X-2016-115a	Lamport, Stanley (09-27-16)	N	M		Proposed Rule 4.2(d) should be deleted as shown on the attached redline. Paragraph 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and indirect communications with a represented "public official,	The Commission agrees to delete paragraph (d) for the reasons stated below. The Commission, however, disagrees with the commenter's statement regarding proposed Rule 4.3's

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					board, committee, or body" on a client's behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf chills a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law.	ambiguities or the commenter's suggestion that imposing obligations of honesty and fairness on a lawyer who engages in communications with the government "chills" the lawyer's or the client's right to free speech. Rather, the Commission appreciates that paragraph (d) as applied to the to the provisions of paragraph (c) may cause confusion, which is not consistent with the Commission's Charter that "the proposed rules set forth a clear and enforceable articulation of disciplinary standards," The Commission recognizes the tension between proposed paragraphs (d) and (c). Paragraph (d) formerly was intended to clarify that the exceptions to Rule 4.2 identified in paragraph (c) do not give a lawyer complete discretion to engage in overreaching or other misconduct in communicating with persons within the purview of paragraph (c). The decision to delete paragraph (d) is intended to remove the confusion the provision has

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						apparently generated and does not mean a lawyer now has such discretion. Communications with a represented person not prohibited under the Rule are still subject to other constraints. See, e.g., Bus. & Prof. Code § 6106; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.
X-2106-121e	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		The Access Commission is in favor of proposed Rule 4.2, which is particularly important for legal services organizations, because low and moderate income clients are often vulnerable to inappropriate communications. We support the proposed Rule's intent to protect against possible overreaching or interference by prohibited lawyers. We are gratified to see that the proposed Rule specifically addresses limited scope representation and clarifies who to talk to at different points in a limited scope representation.	No response required.
X-2016-126e	Ivester, David (09-27-16)	N	M		Proposed Rule 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and indirect communications with a represented "public official, board, committee, or body" on a client's behalf. Making Proposed	See Response to Lamport, X-2016-115a, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf would chill a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law. These unwarranted extensions of trial rules to sundry administrative processes may not only limit and inhibit lawyers in their efforts to represent their clients, but could lead as well to strategic claims of ethical violations against lawyers with the aim of interfering with the legal representation of a party in such administrative processes. These proposed rules would unnecessarily burden the fundamental and constitutional rights to speak with and petition public agencies and officials by interfering with an individual's right to engage counsel who can effectively represent his or her interests with public agencies and officials.	
X-2016-129e	California Building Industry Association (Cammarota) (09-27-16)	Y	M		1. Proposed Rule 4.2(d) should be deleted. Paragraph 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and	1. See Response to Lamport, X-2016-115a, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					indirect communications with a represented "public official, board, committee, or body" on a client's behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf chills a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law. 2. The Commission's tentative adoption of Proposed Rule 3.9 adequately addresses lawyer communications in a representative capacity with legislative bodies and administrative agencies. Since public officials, boards, committees and bodies are all subsets of legislative bodies and administrative agencies, Proposed Rule 3.9 covers the same communications that are covered by Proposed Rule 4.2(c)(1). In light of Proposed Rule 3.9, Proposed Rule 4.2(d) is no longer necessary and should be deleted.	2. The Commission disagrees that Rule 3.9 covers the same communications that are covered by proposed Rule 4.2(c)(1). Rule 3.9 applies "when a lawyer represents a client *in connection with an official hearing or meeting* of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument." (Comment [1].) As that comment further clarifies, Rule 3.9 does not apply to the situations envisioned by the commenter, i.e., "negotiations or other bilateral transactions" between the lawyer and a person under paragraph (c).

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.3
(No Current Rule)
Communicating with an Unrepresented Person

EXECUTIVE SUMMARY

In connection with the consideration of current Rule 2-100 (Communication with a Represented Party), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 4.3 (Dealing With an Unrepresented Person), the Restatement of the Law of Lawyering, section 103 (Communications with Unrepresented Nonclient). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. The evaluation was made 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. Although the proposed rule has no direct counterpart in the current California rules, much of its concept is found in current rule 3-600(D) concerning how a lawyer for an organization must deal with the organization's constituents. The result of the evaluation is proposed rule 4.3 (Communicating with an Unrepresented Person). This proposed rule 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.

The key concept of the proposed rule is in **paragraph (a)**, which prohibits a lawyer when communicating on behalf of a client with an unrepresented person from doing three things: (i) stating or implying the lawyer is disinterested; (ii) correcting the person's misconception if the lawyer knows or reasonably should know the person incorrectly believes the lawyer is disinterested; and (iii) providing legal advice, other than to obtain counsel, if the interests of the person are in conflict with the client's interests. By including the first two objectives, the proposed rule will extend the principles found in current rule 3-600(D) beyond the organizational context.[1] The Commission concluded the provision provides important public protection and critical guidance to lawyers interacting with unrepresented persons by clarifying the conduct that is prohibited rather than requiring them to parse and interpret more general prohibitions in the State Bar Act. Further, proposed Rule 4.3 complements proposed Rule 4.2's prohibitions on communicating with a represented party when such communications are permitted under that rule. Moreover, Rule 4.3 would provide an alternative basis for discipline to Business & Professions Code §§ 6068(a) and 6106 that would not require the establishment of a fiduciary relationship or proof of an act of moral turpitude. Finally, a version of Model Rule 4.3 has been adopted in every other jurisdiction in the country.

The major concern with paragraph (a) is the third prohibition concerning the giving of legal advice. Unless the person retains counsel, the lawyer will be unreasonably restricted in attempting to inform the person of the lawyer's client's legal positions. There is a fine line between providing

[1] Rule 3-600(D) provides:

> (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.

legal advice and giving legal information and a lawyer arguably should not be subject to discipline for giving legal advice or stating the legal positions of the lawyer's client. The Commission has addressed this concern by including proposed Comment [2], discussed below.

Paragraph (b) has no counterpart in jurisdictions that have adopted Model Rule 4.3. Nevertheless, the provision is important in protecting the attorney-client privilege and legal rights of third persons with whom the lawyer interacts. A concern expressed regarding paragraph (b) is that it imposes unique risks on a lawyer and creates a gap between what a client may do and what a lawyer is permitted to do. The Commission, however, concluded that a lawyer should not be permitted to engage in conduct that is prejudicial to the administration of justice simply because a layperson might not have the same duties as a lawyer.

Finally, non-substantive changes to the current 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 three comments to the 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 function of a rule comment. Comment [2] is a substantial revision of the corresponding Model Rule comment and clarifies the prohibition on giving "legal advice" in the third sentence of paragraph (a). In particular, it includes the important point that a lawyer does not give legal advice to an unrepresented person when the lawyer states a legal position on behalf of his or her client. Comment [3] was a placeholder when the Commission adopted the rule and in fact, has been moved to different rule.

National Background – Adoption of Model Rule 4.3

As California does not presently have a direct counterpart to Model Rule 4.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

The ABA State Adoption Chart for the ABA Model Rule 4.3, from which proposed rule 4.3 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_3.authcheckdam.pdf

28 states have adopted Model Rule 4.3 verbatim (AK, AZ, AR, CO, DE, HI, ID, IL, IN, IA, LA, MA, MS, MO, NE, NV, NH, NM, ND, OH, OK, RI, SC, SD, TN, VT, WV, WY); 22 jurisdictions have adopted a rule that is substantially similar to 4.3 (AL, CT, DC, FL, GA, KS, KY, ME, MD, MI, MN, MT, NJ, NY, NC, OR, PA, TX, UT, VA, WA, WI); only California has not adopted a rule derived from Model Rule 4.3 (CA).

Post-Public Comment Revisions

After consideration of public comment, the Commission added Comment [3] which provides a cross-reference to proposed Rule 8.4, Comment [5], regarding a lawyer's involvement in lawful covert activity when investigating violations of law. Comment [5] to proposed Rule 8.4 (Misconduct) states a lawyer does not engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation when a lawyer "advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or

constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act."

Rule 4.3 Communicating with an Unrepresented Person
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Rule 4.3 Communicating with an Unrepresented Person
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Rule 4.3 ~~Dealing~~Communicating with an Unrepresented Person
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(a) In ~~dealing~~communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person ~~misunderstands the lawyer's role~~* incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if~~ If the lawyer knows* or reasonably should know* that the interests of ~~such a person are or have a reasonable possibility of being~~the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

~~[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).~~

[2] ~~The Rule~~Paragraph (a) distinguishes between situations ~~involving unrepresented persons whose interests may be adverse to those~~in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and ~~those in which the person's interests are not in conflict with the client's~~situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. ~~Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur~~A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an

unrepresented person.* So long as the lawyer ~~has explained~~discloses that the lawyer represents an adverse party and ~~is~~ not ~~representing~~ the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into ~~an~~the agreement or settle ~~a~~the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document ~~or the lawyer's view of~~and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

Proposed Rule 4.3 Communication with an Unrepresented Person
Synopsis of Public Comments

TOTAL = 10 ***A = 4*** ***D = 2*** ***M = 4*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bo	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Y	A		COPRAC supports the proposed rule and comments. COPRAC agrees that Rule 4.3 provides important public protection and guidance to lawyers in dealing with an unrepresented person and that adoption of Rule 4.3 will promote consistency across jurisdictions, all of which have adopted some form of Rule 4.3. COPRAC also agrees that imposing upon lawyers additional obligations in communicating with unrepresented persons may be appropriate, even if a "gap" is created between what a lawyer and a client may do. Lawyers are fiduciaries and may be held to a higher standard and prohibited from engaging in conduct their clients may engage in, and, in fact, already are in numerous contexts.	No response required.
X-2016-66u	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We commend and support the adoption of this proposed rule as an important corollary to proposed Rule 4.1.	No response required.
X-2016-75d	Kerins, Steve (09-25-16)	N	M	(b)	Paragraph (b) intrudes into a lawyer's representation of his or her own client, and should be	The Commission disagrees that Rule 4.3 improperly intrudes into a lawyer's

[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
					omitted.	representation of the lawyer client. Current case law does not permit a lawyer to engage in conduct with the intent to obtain a non-client person's privileged or confidential information.
X-2016-83c	Garrett, Christopher (09-26-16)	N	D		Proposed Rule 4.2 seeks to replace current Rule 2-100 and adds a new subsection (d) that requires compliance with the proposed Rule 4.3. The proposed Rule 4.3 regulates not only what the lawyer "state[s] or impl[ies]" but also requires the lawyer to evaluate what the unrepresented person believes and the interests of the unrepresented person as against the lawyer's own client. 1. Whether the unrepresented person believes the lawyer is "disinterested" is left undefined, and the standards by which the lawyer is supposed to evaluate the unrepresented person's interests and conflicts as against the lawyer's client is similarly	With respect to commenter's comments regarding proposed Rule 4.2, see Commission's response to Garrett, X-2016-83b, in Rule 4.2 Public Comment Synopsis Table. 1. The Commission disagrees. The terms "knows" and "reasonably should know" are both defined terms in the proposed Rules. See proposed Rule 1.0.1(f)[2] and (j),[3] respectively. Both require that the lawyer not turn a blind

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

[3] (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.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					undefined. The vagueness of the proposed rule 4.2 and 4.3 places legal practitioners at special and unreasonable risk for discipline due to an inability to assess an unrepresented person's unstated beliefs and interests. 2. In addition, the prohibition against a lawyer's "implications" of "disinterestedness" is a vague restriction that potentially constitutes impermissible infringement on the right to free speech and the right to petition the government guaranteed by the California Constitution.	eye to the obvious. The lawyer must draw reasonable[4] inferences from the unrepresented person's words and conduct. 2. The Commission does not agree that paragraph (a) is impermissibly vague. The term "disinterested" has not been shown to be vague in the many jurisdictions that have adopted this rule. Dictionary terms include "free from selfish motive or interest,"[5] "free of bias and self-interest; impartial;"[6] and "unbiased by personal interest or advantage; not influenced by selfish motives."[7] The Commission also does not believe that such a term, which is intended to preclude a lawyer from engaging in misleading conduct in communications with an

[4] "Reasonable" is also a defined term in the proposed Rules. See Rule 1.0.1(h) ("Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.)

[5] See http://www.merriam-webster.com/dictionary/disinterested

[6] See http://www.thefreedictionary.com/disinterested

[7] See http://www.dictionary.com/browse/disinterested

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						unrepresented person, runs afoul of Constitutional protections.
X-2016-97g	Freedman, Daniel (09-27-16)	N	D		1. Although the spirit of proposed rules 4.2 and 4.3 are commendable, as drafted, these rules create unacceptable risks to attorneys engaging with administrative agencies and government officials on political issues. Again, in many informal settings, defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear, and a lawyer's profession should not be placed at risk as a result of their personal interests in engaging in the political process. Moreover, in this setting, there is inherent vagueness in the term "disinterested," that would require an investigation into an attorney's subjective intent for engaging an unrepresented party. 2. The same is true with respect to the rule's prohibition on giving "legal advice." In dealing with governmental agencies, the line between "legal advice" and political opinion is almost impossible to define. Accordingly, the rule creates an unacceptable	1. The Commission is not aware that Rules 4.2 and 4.3 have create unacceptable risks for lawyers in other jurisdictions who engage in communicating with government agencies and officials on behalf of clients. The Commission does not understand the commenter's statement that "defining when an attorney is engaged in the political process for personal interest or in a representative capacity may not always be clear." Proposed Rule 4.3 applies when the lawyer is "communicating *on behalf o*f a client." To suggest that the word "disinterest" applies to the lawyer's personal disinterest in the matter unreasonably stretches the bounds of rule interpretation. See also response 2 to Garrett, X-2016-83c, above.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					risk that an attorney's engagement and involvement with government agencies may stifle and chill an attorney's constitutionally protected right to engage in the political process, and will create the unacceptable risk that an attorney's livelihood may be attacked through state bar complaints based on political motivations and interests.	2. The Commission disagrees and believes that Comment [2] to the rule succinctly draws a distinction between giving "legal advice" to an unrepresented person whose interests are in conflict with the interests of the lawyer's client and stating a legal position on behalf of a client or providing information The Commission does not believe that communication to an unrepresented person an interpretation of a statute, regulation or other law should be characterized as a "political opinion."
X-2016-104au	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. OCTC supports this rule. 2. OCTC is concerned that Comments 1 and 2 are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule.	1. No response required. 2. The Commission has not made the requested change. Comment [1] identifies the public policy underlying the rule and thus provides insight into how the rule should be applied and interpreted. Comment [2] provides important interpretative guidance as to the rule's application by distinguishing "legal advice," which a lawyer is prohibited from giving to an unrepresented person under the rule and "legal

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						information," which the lawyer is permitted to give.
X-2016-115i	Lamport, Stanley (09-29-16)	N	M		Proposed Rule 4.3 exposes lawyers to unique risks in communicating with an unrepresented person on a client's behalf. As a result, it creates the potential to compromise a lawyer's ability to represent a client that is not justified. 1. As a general rule, we want to maintain an identity between what a client lawfully can say and what a lawyer can say on a client's behalf. That identity is a fundamental quality of representation. We start to lose that identity when we expose lawyers to risks in connection with communicating on a client's behalf that are not shared by the client. Rule 4.3 would subject a lawyer to discipline (and potentially other consequences) for communications with an unrepresented person on a client's behalf with respect to matters that the client can communicate without any penalty.	The Commission disagrees. Rule 4.3 provides important pubic protection and has not exposed lawyers to unique risks in other jurisdictions, all of which have adopted a version of this rule. 1. The Commission disagrees that a lawyer is able to do whatever a client can personally do under the rules of professional conduct. . This suggestion neglects the lawyer's role and duties to third parties as an officer of the legal system. See COPRAC's comment, X-2016- 43bo, above, in support of the rule.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					2. The rule not only limits a lawyer's ability to represent a client vis-à-vis someone who chooses not to be represented, but it can interfere with a lawyer's exercise of independent judgment on a client's behalf, as the lawyer weighs the lawyer-unique risks created by the rule in advising a client about communicating with an unrepresented party. 3. If the Commission adopts the Proposed Rule 4.3, the Proposed Rule should be revised as shown on the attached redline.	2. The Commission disagrees with the commenter's characterization that the rule creates unique risks and is intended to protect a person who "chooses" to not be represented. It is beyond dispute that there is a problem of access to justice in California because persons of moderate means cannot afford legal representation. 3. The Commission has not made the suggested changes. The revised rule as proposed by the commenter would remove the protections afforded by the proposed rule, which tracks the rule adopted by other jurisdictions.
X-2016-121f	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		The Access Commission is in favor of proposed Rule 4.3, which is particularly important for low and moderate income persons given the high number of them who are unrepresented in legal matters. Unrepresented parties can be vulnerable to inappropriate communications. We support the proposed Rule's requirement that lawyers who communicate with unrepresented parties not imply that the lawyers are disinterested. We also	The Commission appreciates that many persons of moderate means are unrepresented not because they have chosen to do so but because they cannot afford to retain a lawyer.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					support the proposed Rule's prohibition on lawyers seeking or obtaining privileged or confidential information from unrepresented parties.	
X-2016-126f	Ivester, David (09-27-16)	N	M		1. Proposed Rule 4.2(d) would make Proposed Rule 4.3 applicable to a lawyer's direct and indirect communications with a represented "public official, board, committee, or body" on a client's behalf. Making Proposed Rule 4.3, with all of its ambiguities, applicable to a lawyer's direct or indirect communications with government on a client's behalf would chill a lawyer's ability to speak with government on a client's behalf and runs counter to all of the protections for communications with government under California law. 2. These unwarranted extensions of trial rules to sundry administrative processes may not only limit and inhibit lawyers in their efforts to represent their clients, but could lead as well to strategic claims of ethical violations against lawyers with the aim of interfering with the legal representation of a party in such administrative processes.	1. Concerning the commenter's reference to Rule 4.2(d), see response Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table. Concerning the commenter's discussion of Rule 4.3, see responses to Garrett, X-2016-83c, Freedman, X-2016-97g, and Lamport, X-2016-115i, above. 2. The Commission does not understand the commenter's reference to "unwarranted extensions of trial rules" in relation to Rules 4.2 and 4.3, which are not limited to litigation. If the commenter's reference is to Rules 3.3 through 3.5, please see response to commenter in the Rule 1.0.1 Public Comment Synopsis Table. If the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					These proposed rules would unnecessarily burden the fundamental and constitutional rights to speak with and petition public agencies and officials by interfering with an individual's right to engage counsel who can effectively represent his or her interests with public agencies and officials.	commenter is referring to Rules 4.2 and 4.3, regarding the comment re "fundamental and constitutional rights," see responses to Garrett, X-2016-83c, Freedman, X-2016-97g, and Lamport, X-2016-115i, above.
X-2016-129f	California Building Industry Association (Cammarota) (09-27-16)	Y	M		1. Proposed Rule 4.3 is problematic when applied to lawyer communications with a represented government agency. 1. In the first instance, Proposed Rule 4.3 concerns when a lawyer communicates directly with an unrepresented person. However, Proposed Rule 4.2 concerns a lawyer's direct or *indirect* communications with represented persons and organizations. Proposed Rule 4.2(d) makes proposed Rule 4.3 applicable to "any communication" not prohibited by Proposed Rule 4.2. Proposed Rule 4.2 permits direct and indirect communications with represented "public officials, boards, committees and bodies." However, Proposed Rule 4.2 does not explain how proposed Rule 4.3, which applies only to direct communications, would	1. The commenter's submission is concerned primarily with the interaction of proposed Rules 4.2 and 4.3, as provided in Rule 4.2(d). As explained in the response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table, the Commission has decided to delete proposed Rule 4.2(d).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					apply to indirect communications. The difference in the scope of the communications covered in Proposed Rule 4.2 (direct and indirect) and the scope of communications in Proposed Rule 4.3 (direct only) makes the application of proposed Rule 4.3 to proposed Rule 4.2 complicated and confusing to the average practitioner. 2. In addition, proposed Rule 4.3, as currently drafted, contains three vague and imprecise requirements that would chill lawyer communications with government on a client's behalf. As applied to Proposed Rule 4.2, proposed Rule 4.3 would prohibit a lawyer directly or indirectly communicating with a represented "public official, board, committee or body" from (i) stating or implying that the lawyer is disinterested, (ii) giving legal advice, or (iii) seeking to obtain confidential or privileged information. All of these terms are undefined, imprecise and open to interpretation. a. Proposed Rule 4.3 does not explain what it means to state or imply in a direct or indirect	2. The Commission disagrees with the commenter's assessment of the provisions of proposed Rule 4.3 which track Model Rule 4.3 and which have been adopted in some form in every jurisdiction. a. See response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					communication that a lawyer is disinterested. If it means that the lawyer cannot misrepresent that the lawyer is acting in a representative capacity, then Proposed Rule 3.9 is a much clearer statement. The term "disinterested" is not defined and has no established meaning under California law. As a result, there is a possibility that it could be interpreted in the future to have another meaning. b. Proposed Rule 4.3 does not explain what it means to directly or indirectly give legal advice. Comment [2] to Proposed Rule 4.3 states that "[a] lawyer does not give legal advice *merely* by stating a legal position on behalf of the lawyer's client." (Emphasis added.) However, the Comment does not explain when directly or indirectly communicating a client's legal position would be legal advice. Communications with government frequently involve advocacy of a client's legal position. Such advocacy could be construed as being beyond "merely" stating a legal position. c. Proposed Rule 4.3 does not explain what it means to "seek to	Table, regarding the Commission's decision to delete proposed Rule 4.2(d). See also response 2 to Garrett, X-2016-83c, above. b. See response to Lamport, X-2016-115a, in the Rule 4.2 Public Comment Synopsis Table, regarding the Commission's decision to delete proposed Rule 4.2(d). c. See response to Lamport, X-2016-115a, in the Rule 4.2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					obtain privileged or other confidential information" when directly or indirectly communicating with a represented "public official, board, committee or body" on a client's behalf. Leaving the answers to the ambiguities in the definition to future litigation in State Bar proceedings is not the answer. These ambiguities chill the conduct of lawyers who are not interested in being the test case in ways that can affect the lawyer's loyal representation of a client with respect to government, which should not be the case. The "public official, board, committee or body" exception in Rule 4.2(c)(1) exists to allow lawyers to freely communicate with government on a client's behalf. Under Article 1, Sec. 3(a) of the California Constitution, "The people have the right to instruct their representatives [and] petition government for redress of grievances." Under Article 1, Section 3(b) of the California Constitution, "The people have the right of access to information concerning the conduct of the people's business."	Public Comment Synopsis Table, regarding the Commission's decision to delete proposed Rule 4.2(d).

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The purpose of the exception in Proposed Rule 4.2(c)(1) is to allow lawyers the ability to communicate with government on a client's behalf to the same extent that a client is permitted to communicate with government under the California Constitution. Accordingly, in addition to deleting Proposed Rule 4.2(d), Proposed Rule 4.3(b) and comment [2] should be deleted. Additionally, Proposed Rule 4.3(a) should be amended as shown in the included redline.	

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.4
(No Current Rule)
Duties Concerning Inadvertently Transmitted Writings

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 4.4 (Respect For Rights Of Third Persons) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. 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 4.4 (Duties Concerning Inadvertently Transmitted Writings). This proposed rule 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.

Proposed rule 4.4 is derived from ABA Model Rule 4.4(b). ABA Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third party. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission determined to not recommend adoption of ABA Model Rule 4.4(a) because, similar to the First Commission, this Commission believes the rule is vague and overbroad with use of the terms "embarrass, delay, or burden a third party." In addition, there was concern that such a rule could be used for mischief in discovery disputes if one were to assert a discovery motion was being used in violation of the rule.

Proposed rule 4.4 requires a lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing is either privileged or subject to the work product doctrine, when it is reasonably apparent to the receiving lawyer that the writing was inadvertently sent or produced, to promptly notify the sender. The Commission is recommending that California adopt this duty as a rule of professional conduct because California case law[1] affirmatively states it is an ethical obligation of an attorney who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or otherwise clearly appear to be confidential and privileged that the attorney shall immediately notify the sender. In California, this duty is currently only found in case law and the Commission believes capturing the obligation in a rule of professional conduct will help protect the public and the administration of justice, as well as inform attorneys of their ethical obligation.

The main issue debated when evaluating this rule was whether to recommend an "obviously appear" standard regarding a writing's status as privileged or subject to the attorney work product doctrine, instead of a "knows or reasonably should know" standard. The argument in favor of an "obviously appear" standard was that California case law uses the phrase "materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . ." (*Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644, 656-657).[2] The

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[1] See, *Rico v. Mitsubishi* (2007) 42 Cal.4th 807; *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644.

[2] But see, *Rico*, 42 Cal.4th at 818: "The *State Fund* rule is an objective standard. In applying the rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much

Commission ultimately determined to recommend the objective standard of "knows or reasonably should know" because this standard accomplishes the same result articulated in the case by using a known disciplinary standard that is used in several proposed rules and in our current rules. Further, an objective standard should be more protective of privileged information because the standard will be that of a reasonably competent attorney. Such a standard will prevent an attorney from raising as a defense that the document did not obviously appear privileged or subject to the attorney work product doctrine "to me."

There is one comment to the rule. The comment provides guidance as to what steps the receiving lawyer should do, in addition to promptly notifying the sender, to either stop reading the document and return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal. These steps are consistent with what the California Supreme Court has stated a lawyer should do in this situation.

Although the concept contained in proposed rule 4.4 is currently addressed in case law, the proposed rule is a substantive change to the current rules because the duty is now being included as a rule of discipline.

National Background – Adoption of Model Rule 4.4

As California does not presently have a direct counterpart to Model Rule 4.4, this section reports on the adoption of the Model Rule in United States' jurisdictions. Other than California, all jurisdictions have adopted some version of ABA Model Rule 4.4; however, three jurisdictions do not have a version of Model Rule 4.4(b).[3]

The ABA State Adoption Chart for ABA Model Rule 4.4 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf

Fourteen states have adopted Model Rule 4.4 verbatim.[4] Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4.[5] Two states have adopted a version of the rule that substantially diverges from Model Rule 4.4.[6]

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review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended."

[3] The three jurisdictions are: Georgia, Michigan, and Texas.

[4] The fourteen states are: Arkansas, Connecticut, Delaware, Iowa, Kansas (with a different title), Massachusetts, Minnesota, Nevada, New Mexico (with a different title), North Dakota (Model Rule 4.4(b) is found in North Dakota Rule 4.5(a)), Ohio (4.4(b) is verbatim), Oregon (4.4(b) is verbatim), West Virginia, and Wyoming.

[5] The thirty-one jurisdictions are: Alabama, Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

[6] The two states are: Maryland and New Jersey.

Post-Public Comment Revisions

After consideration of public comment, the Commission made several changes to the text and comment of proposed Rule 4.4.

Text. The Commission modified the syntax of the black letter text to clarify the rule's application. This change is non-substantive. It also added the requirement that the lawyer "refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine." This latter change conforms the rule to the holding in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].

Comment. The Commission made a non-substantive change to the second sentence of Comment [1] (formerly the only comment to the rule] to include a cross-reference to Rule 4.2, which comprehensively regulates communications with a represented person. The public comment draft had provided: "If the sender is known to be represented by counsel, the lawyer must communicate with the sender's counsel."

The Commission also added proposed Comment [2], derived in part from Model Rule 4.4, cmt. [4], to clarify that the rule does not apply to writings that may have been inappropriately been disclosed to the lawyer. A citation to California case law that governs such disclosures has also been added.

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Clean Version)

Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.

[2] This Rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

~~A~~Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of ~~the lawyer's client and~~a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, ~~where it is reasonably* apparent that the writing* was inadvertently sent or produced,~~the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should ~~refrain from further examination of the writing* and either~~ return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. ~~If the sender is known* to be represented by counsel~~ In providing notice required by this Rule, the lawyer ~~must communicate~~shall comply with ~~the sender's counsel~~Rule 4.2.

[2] This Rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

~~**ABA Model Rule 4.4 Respect For Rights Of Third Persons**~~

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

(Redline Comparison of the Proposed Rule to ABA Model Rule)

~~(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.~~

~~(b) A~~Where it is reasonably* apparent to a lawyer who receives a ~~document or electronically stored information~~writing* relating to ~~the~~a lawyer's representation of ~~the lawyer's client and~~a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the ~~document or electronically stored information was inadvertently sent~~writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this Rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.

[2] This Rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~

~~[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional~~

steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, ‘‘document or electronically stored information’’ includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Proposed Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
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-2016-43bi	Committee on Professional Responsibility and Conduct (COPRAC) (09-08-16)	Y	M		1. The Committee supports the Commission's decision not to adopt section (a) of ABA Model Rule 4.4. 2. The Committee supports the text of proposed Rule 4.4 as written. While the proposed rule is narrower than ABA Rule 4.4(b), which applies to all inadvertent disclosures, whether or not privileged, we believe that this narrowed focus is consistent with existing California law and policy. 3. COPRAC's concern is with the proposed comment to the rule. The first sentence of the proposed Comment is inconsistent with the Supreme Court's direction that Comments should not set forth additional rules of conduct but instead provide guidance for lawyers in interpreting the text of the rule. As written, the sentence has the potential to become the basis of discipline, and also to freeze the development of case law that is outside the scope of the rule. COPRAC proposes that the Comment be rewritten to make clear that the rule does not	1. No response required. 2. No response required. 3. The Commission disagrees with the commenter's characterization of the formerly proposed Comment. Nonetheless, the Commission has redrafted what was the first sentence of the former Comment and moved it into the black letter of the Rule. The Commission believes the sentence accurately reflects the law.

[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
					address what steps the lawyer should take after complying with the rule and that the case law answers to those questions are being provided as a convenience and not as an independent source of law. 4. The second sentence of the comment is correct, but COPRAC believes it would promote clarity and uniformity simply to cross-reference Rule 4.2. Moreover, because the second sentence is in fact an effort to provide guidance in complying with the rule itself, COPRAC believes it should come first in the comment.	4. The Commission agrees with the commenter as to the language used and has made the suggested change. However, it has retained the sentence as the second sentence in the comment rather than make it the first sentence.
X-2016-66v	San Diego County Bar Association (Riley) (09-15-16)	Y	M		We recognize that proposed Rule 4.4 is almost *verbatim* ABA Model Rule 4.4(b). In California, however, our Supreme Court, in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817, adopted as the ethical standard for all California lawyers the rule first articulated in *State Compensation Insurance fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 (*State Fund*), and more recently reinforced in *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1185-1188.	The Commission agrees with the commenter and has revised proposed Rule 4.4 to include the requirement not to examine the writing any more than is necessary to determine whether it is privileged or subject to work product protection. The Commission has also made non-substantive syntax changes to the rule text to clarify the scope of its application.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					This *Rico/State Fund* ethical obligation not only requires that the lawyer who receives inadvertently produced privileged writings "shall immediately notify the sender," but also mandates that the lawyer "refrain from examining the materials any more than is essential to ascertain if the materials are privileged." Proposed Rule 4.4 eliminates this second requirement; we respectfully recommend that the Commission include it. Otherwise, proposed Rule 4.4 creates a grey area of confusion. Does the ethical lawyer stop reading as soon as it is clear that the document is privileged, the text of the rule notwithstanding? Or do Rules 1.1, competence, and 1.3, diligence, require the lawyer to read on; is it a decision in which the client itself has a right to participate, since a consequence could be disqualification, the text of the proposed rule notwithstanding?	
X-2016-76m	Los Angeles County Bar Association Professional Responsibility Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M		1. Proposed Rule 4.4 provides as follows (emphasis added): "A lawyer who receives a writing *relating to the representation of the lawyer's*	1. The Commission agrees with the commenter that the syntax of the rule as circulated for public comment created an ambiguity. The syntax has been changed to remove that

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					client and knows or reasonably should know that the writing is privileged or subject to the work product doctrine, where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender." While the language of Proposed Rule 4.4 tracks with the language of the corresponding ABA Model Rule, the pronoun references contained therein are confusing. The emphasized language above could be read to suggest that the lawyer is receiving a writing that is subject to privilege with his or her own client. 2. Further, PREC believes that the substance of the rule should apply to a lawyer receiving an inadvertently transmitted writing whether or not the lawyer is engaged in a representation that relates to the writing. As a result, the emphasized language above not only is confusing, it is also inaccurate and too limited. We propose that the emphasized language be deleted and the rule be revised to read as follows:	ambiguity. 2. The Commission has not made the requested change. A lawyer who receives privileged writings sent inadvertently should not be under a *duty* to notify the sender unless the privileged material relates to a matter in which the lawyer represents a client. The concern that outcome of the matter might be adversely affected by a lawyer's possession and use of such writings does not exist when the lawyer is not involved in the matter. Moreover, a lawyer

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					"A lawyer who receives a writing and knows or reasonably should know that the writing is privileged or subject to the work product doctrine, where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender." 3. In addition, in order to further clarify the application of this rule, we suggest adding a comment to clarify that Rule 4.4 only applies to inadvertent transmissions and does not apply to transmissions from the lawyer's own client. Please consider adding something to the following effect to the Comment: "This Rule only applies to writings that are transmitted inadvertently, and does not apply where the sender is the lawyer's client."	should not be required to investigate electronic messages marked "Privileged" or "Work Product" from a stranger, given the sophisticated techniques that can be used to access law firm computer and email databases, e.g., phishing. Requiring a lawyer to do so could compromise privileged and other highly-confidential information that law firms have in such databases. 3. The Commission has added Comment [2] which explains that the rule does not apply to writings that the lawyer knows or should know may have been inappropriately disclosed with a citation to a case that addresses that issue.
X-2016-104av	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A	4.4	OCTC supports adoption of the rule.	No response required.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.1
(Current Rule 3-110 Disc.)
Responsibilities of Managerial and Supervisory Lawyers

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), ABA Model Rule 5.2 (Responsibilities of a Subordinate Lawyer), and ABA Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law 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. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."[1] The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded that adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating that a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule 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.

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[1] The first Discussion paragraph to current rule 3-110 provides:

> 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].)

The following is a summary of proposed rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers).[2] This proposed rule 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.

Proposed rule 5.1 adopts the substance of ABA Model Rule 5.1. Paragraph (a) requires that managing lawyers make "reasonable efforts to ensure" the law firm has measures that provide reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct and the State Bar Act. Paragraph (b) requires that a lawyer who directly supervises another lawyer make "reasonable efforts to ensure" the other lawyer complies with the Rules of Professional Conduct and the State Bar Act, whether or not the other lawyer is a member or employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for a subordinate's rules violation under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the subordinate, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There are nine comments to the rule. Comments [1] – [4] describe the duties of managerial lawyers to reasonably assure compliance with the rules under paragraph (a). Comment [5] states that whether a lawyer has direct supervisory authority over another lawyer in a specific instance is a question of fact. Comments [6] – [9] elucidate on a supervisory lawyer's responsibility for another lawyer's violation.

National Background – Adoption of Model Rule 5.1

As California does not presently have a direct counterpart to Model Rule 5.1, this section reports on the adoption of the Model Rule in United States' jurisdictions. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers," revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.pdf

Thirty-one states have adopted Model Rule 5.1 verbatim.[3] Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1.[4] Five states have adopted a version of the rule that is substantially different to Model Rule 5.1.[5] One state has not adopted a version Model Rule 5.1.[6]

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[2] The executive summaries for proposed rules 5.2 and 5.3 are provided separately.

[3] The thirty-one states are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

[4] The fourteen jurisdictions are: Alabama, Alaska, District of Columbia, Florida, Georgia, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Vermont, and Virginia.

[5] The five states are: New Jersey, New York, Ohio, Oregon, and Texas.

[6] The one state is California.

Post-Public Comment Revisions

After consideration of public comment, the Commission added Comment [6] which is derived in part from proposed rule 5.2(b). In addition, the Commission has modified Comment [3] for clarity and deleted Comment [9] as unnecessary.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these Rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules.*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure

that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[8] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these Rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member ~~of~~ or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules.*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities ~~might not be required to implement particular measures under~~ satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing

lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[~~7~~8] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[~~8~~9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.

~~[9] This Rule does not alter the personal duty of each lawyer in a law firm* to comply with these Rules and the State Bar Act. See Rule 5.2(a).~~

Rule 5.1 Responsibilities of ~~a Partner or~~Managerial and Supervisory ~~Lawyer~~Lawyers
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(a) A ~~partner in a law firm, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm ~~conform to the Rules of Professional Conduct~~* comply with these Rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer ~~conforms to the Rules of Professional Conduct~~complies with these Rules and the State Bar Act.

(c) A lawyer shall be responsible for another ~~lawyer's~~lawyer's violation of ~~the~~these Rules ~~of Professional Conduct~~and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner or has comparable~~, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

~~[1] *Paragraph (a)* applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~– *Duties Of Managerial Lawyers To Reasonably* Assure Compliance with the Rules.*

[~~2~~1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed ~~to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed~~, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners* engage in any ancillary business.

~~[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (~~c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).~~a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] ~~Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as~~ Whether a lawyer ~~who~~ has direct supervisory authority over ~~performance of specific legal work by~~ another lawyer~~. Whether a lawyer has supervisory authority~~ in particular circumstances is a question of fact. ~~Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular~~

~~matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate~~

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action ~~by a partner or managing lawyer~~under paragraph (c)(2) would depend on the ~~immediacy of that lawyer's involvement and the~~nature and seriousness of the misconduct~~. A supervisor is required to~~ and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the ~~supervisor knows~~lawyer knows* that the misconduct occurred. ~~Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.~~

[8] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

~~[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.~~

[~~7] Apart from~~9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate~~. Whether~~ lawyer. The question of whether a lawyer ~~may~~can be liable civilly or criminally for another ~~lawyer's~~lawyer's conduct is ~~a question of law~~ beyond the scope of these Rules.

~~[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a). the Rules of Professional Conduct. See Rule 5.2(a).~~

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 5 *A = 1* *D = 2* *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-2016-43ae	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	M	(c) Comment [3]	1. In the final sentence of 5.1(c) "member of employee" should read "member or employee." 2. We believe that Comment [3] could helpfully be rewritten to make clear that it is an interpretation of the lawyer's duty to make reasonable efforts as set forth in paragraph (a) rather than creating an additional duty. We would propose it be replaced with the following: "[3] A lawyer with intermediate managerial authority in a firm may satisfy the duty of reasonable efforts under paragraph (a) by relying on a designated managing partner or a management committee or other body, provided that person or body has appropriate managerial authority and is charged with that responsibility. If, however, the lawyer knows or reasonably should know that the designated person or body has not adopted or implemented appropriate measures, the duty of reasonable efforts requires	1. The Commission agrees and has made this correction. 2. The Commission has made some changes in wording as a result of this suggestion; however, the Commission does not believe that Comment [3] in either its prior or current form can be read as imposing any duty in addition to those created by paragraph (a). In addition, although the suggested introductory language "lawyer with intermediate managerial authority" is shorter and simpler than the Commission's proposal, we think it might prove useful to underscore in this Comment that paragraph (a) is not limited in its application to firm partners/shareholders.

[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 the lawyer take corrective action."	
X-2016-65b	Dan L. Carroll (09-9-16)	No	D	Paragraph (c)	The language: "A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if: (1) the lawyer … with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved;" will create potential liability for in-house ethics counsel who make good faith conflict determinations that eventually are seen differently by a court. He is particularly concerned about this b/c of the inherent unpredictability of conflicts concepts such as "substantially related", the burdens that will be placed on the individual lawyer and the firm in having to deal with ethics complaints that ultimately are not pursued by OCTC, and the possibility that lawyers as a result will decline to serve as in-house ethics advisors.	The Commission disagrees with the concern stated by the commenter. Nevertheless, the Commission has added Comment [6] to address those concerns.
X-2016-66w	San Diego County Bar Assoc. (Riley) (09-15-16)	Yes	A	5.1	Supports the proposed Rule.	No response required.
X-2016-76n	L.A. County Bar Assoc. (Schmid) (09-24-16)	Yes	M	(a), (b), (c)(2), cmts. [3], [4]	1. Paragraph (b) could subject a Supervisory attorney to discipline whenever a subordinate attorney violates the Rules of Professional Conduct or the State Bar Act.	1. The Commission disagrees that paragraph (b) imputes liability for any violation of a subordinate lawyer. Paragraph (b), however, does require that

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						that lawyer make "reasonable efforts" to ensure that the other lawyer is complying with the Rules and the State Bar Act.
					2. Paragraph (c)(2) could subject a managerial lawyer to discipline for the conduct of a lawyer under the managerial attorney's supervision even if that conduct was in the subordinate lawyers personal, rather than professional capacity.	2. The Commission disagrees with the commenter's assessment. Nothing in the Rule suggests that a supervising lawyer is responsible for conduct of a subordinate lawyer in the latter's "personal capacity."
					3. Paragraphs (a) and (c)(2) use of the phrase "managerial authority in a law firm" without defining the term, resulting in a lack of notice on who might have liability under the Rule.	3. The Commission believes that the term "managerial authority" as applied to a law firm, which applies to a wide variety of organizations, including private law firms, government and corporate law offices, and legal services organizations, is not susceptible to a succinct definition appropriate in rules of professional conduct. Moreover, the Commission believes that the concept – those with authority to set the policies for compliance with the Rules, is not a foreign concept that requires a detailed exposition.
					4. The phrase intermediate managerial responsibilities"	4. The Commission has revised Comment [3] to clarify

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					contained in Comment [3] is not defined and therefore leaves unclear which firm lawyers have responsibility under the Rule. 5. Comment [4] should be deleted or revised, as that Comment suggests that discipline could be imposed for violations of guidelines regarding the assignment of cases or workload distribution. 6. Paragraph (c)(2), "whether or not a member of [sic] employee" should be revised to be "whether or not a member or employee."	what is meant by "intermediate managerial responsibilities." 5. The Commission has not made the suggested change. If guidelines are implemented to provide measures that "give reasonable assurance" that lawyers in the firm comply with the Rules and State Bar Act, and a managerial lawyer violates those guidelines, for example, those relating to the assignment of cases and distribution of workload, then that lawyer is in violation of the rule. Measures that are not enforced or complied with cannot provide the required reasonable assurance. 6. The Commission agrees and has corrected this typo.
X-2016-104aw	Office of Chief Trial Counsel (Dresser) (09-27-16)	Yes	D	5.1	1. Supervision should remain part of Rule 1.1 b/c there is an established history of case law governing this duty that would be upset by reallocating the	1 – 3. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					supervision duty to a different rule that is structured differently. 2. Competence and supervision can be hard to distinguish, so separating the two duties will lead to unwanted charging errors. 3. Respondent lawyers often dispute a competence charge but at trial argue for the first time that what OCTC has described in an uncharged supervision issue. 4. Comments [5], [6], [8], and [9] are unnecessary and merely repeat the Rule and Comment [6] also is obvious and not needed.	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). 4. The Commission disagrees with the commenter as to Comments [5] through [8]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement. The Commission agrees that Comment [9] is not necessary.

PROPOSED RULES OF PROFESSIONAL CONDUCT 7.1, 7.2, 7.3, 7.4 & 7.5
(Current Rule 1-400)
Advertising and Solicitation

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("ABA") counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer's Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

The result of the Commission's evaluation is a three-fold recommendation for implementing:

(1) The Model Rules' framework of having separate rules that regulate different aspects of lawyers' commercial speech:

Proposed Rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.

Proposed Rule **7.2** will specifically address advertising, a subset of communication.

Proposed Rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.

Proposed Rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.

Proposed Rule **7.5** will regulate the use of firm names and trade names.

(2) The retention of the Board's authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board's standards, including the repeal of a standard, require only Board action; however, many of the Commission's changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.

(3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

The five proposed rules were adopted by the Commission during its March 31-April 1, 2016 meeting for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process. Following consideration of public comment, a change was made to proposed Rule 7.1, therefore, we are requesting circulation for

a second public comment period. There were no substantive changes made to proposed Rules 7.2, 7.3, 7.4, and 7.5. See the Executive Summary for proposed Rule 7.2, 7.3, 7.4, and 7.5 provided with the Commission's request for adoption of the proposed rules.

1. *Recommendation of the ABA Model Rule Advertising & Solicitation Framework*. The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

2. *Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards*. The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

A description of each of the proposed rules follows.

Rules 7.1 (Communication Concerning A Lawyer's Services)

As noted, proposed Rule 7.1 sets out the general prohibition against a lawyer making false and misleading communications concerning a lawyer's availability for legal services.

Paragraph (a) carries forward the basic concept in current rule 1-400(D) by prohibiting false or misleading communications and providing an explanation of when a communication is false or misleading. (Compare rule 1-400(D)(1) – (4).)

Paragraph (b) carries forward the enabling provision in current rule 1-400(E) authorizing the Board to formulate and adopt advertising standards. (See discussion at recommendation 2, above.) The current rule provides that the Board "shall" adopt standards but given the comprehensive revisions recommended for the advertising rules, the Commission is

recommending that the enabling provision be revised to be a permissive as opposed to mandatory provision (e.g., that the Board "may" formulate and adopt standards).

There are six comments. Comment [1] explains the breadth of the concept of lawyer "communication" about a lawyer's services and is consistent with the similar concept in current rule 1-400(A). Comment [2] carries forward the concept found in current rule 1-400(E), Standard No. 1, which explains that guarantees and warrantees are false or misleading under the Rule. Comment [3] provides specific examples of how certain communications are misleading although true, thus providing insight into how the rule should be applied. Comment [4] provides similar guidance by focusing lawyers on the concept of reasonable, as opposed to unjustified, client expectations in evaluating whether a communication violates the rule. Comment [5] carries forward the concept in current Standard No. 15 regarding communications that promote a lawyer's or firm's facility with a foreign language. A lawyer's communication of a foreign language ability is helpful information to a consumer in choosing a lawyer, but it can also mislead a potential client who has expectations that a lawyer, as opposed to a non-lawyer, possesses the foreign language ability. Comment [6] provides cross-references to other law, including Bus. & Prof. §§ 6157 to 6159.2 and 17000 et seq., that regulate lawyer commercial speech. As can be seen, all of the comments provide interpretative guidance or clarify how the rule should be applied.

Post-Public Comment Revisions

The only change made to the proposed rule was the deletion of "an untrue statement" from paragraph (a). After consideration of public comment, the Commission has deleted the term "untrue statement" as redundant because the concept described comes within the term "material misrepresentation of fact or law."

Rule 7.1 [1-400] Communications Concerning A Lawyer's Services
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be

substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

Rule 7.1 [1-400] Communications Concerning A Lawyer's Services
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Draft Version)

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains ~~an untrue statement, or~~ a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as

would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

Rule 7.1 [1-400] ~~Advertising and Solicitation~~ Communications Concerning A Lawyer's Services

(Redline Comparison of the Proposed Rule to Current California Rule)

~~(A)~~ ~~For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:~~

~~(1)~~ ~~Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or~~

~~(2)~~ ~~Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or~~

~~(3)~~ ~~Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or~~

~~(4)~~ ~~Any unsolicited correspondence from a member or law firm directed to any person or entity.~~

~~(B)~~ ~~For purposes of this rule, a "solicitation" means any communication:~~

~~(1)~~ ~~Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2)~~ ~~Which is:~~

~~(a)~~ ~~delivered in person or by telephone, or~~

~~(b)~~ ~~directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

(~~C~~a) A ~~solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

~~(D)~~ ~~A communication or a solicitation (as defined herein) shall not:~~

~~(1) Contain any untrue statement; or~~

~~(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or~~

~~(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or~~

~~(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or~~

~~(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.~~

~~(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.~~

(~~E~~b) The Board of ~~Governors~~Trustees of the State Bar ~~shall~~may formulate and adopt standards as to communications ~~which~~that will be presumed to violate ~~this rule 1-400~~Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these ~~rules~~Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code ~~sections~~§§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members~~lawyers.

~~(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.~~

Comment*~~Standards:~~*

[1] This Rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

~~(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.~~

~~([~~2~~)]~~ A ~~"~~communication~~" which contains testimonials about or endorsements of a member unless such communication also~~ that contains an express ~~disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."~~guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[3] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

~~(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

~~(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~

~~(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.~~

~~(7)~~[4] A ~~"~~communication~~" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder~~

~~pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.~~ that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

~~(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.~~

~~(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.~~

~~(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.~~

~~(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)~~

~~(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.~~

~~(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.~~

~~(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.~~

~~(15) A "~~[5] This Rule prohibits a lawyer from making a communication~~" which~~ that states or implies that ~~a member~~the lawyer is able to provide legal services in a language other than English unless the ~~member~~lawyer can actually provide legal services in ~~such~~that language or the communication also states in the language of the

communication ~~(a)~~ the employment title of the person* who speaks such language ~~and (b) that the person is not a member of the State Bar of California, if that is the case~~.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.~~

Rule 7.1 [1-400] ~~Communication~~Communications Concerning ~~a~~A Lawyer's Services
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the ~~statement~~communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code §§ 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications of any type whatsoever about ~~a~~the lawyer or the lawyer's services, including advertising permitted by Rule 7.2. ~~Whatever means are used to make known a lawyer's services, statements about them must be truthful.~~A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this Rule. See also, Business and Professions Code § 6157.2(a).

[~~2~~3] ~~Truthful~~This Rule prohibits truthful statements that are misleading~~ are also prohibited by this Rule~~. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if ~~there is~~it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[~~3~~4] ~~An advertisement~~A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the

lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. ~~The inclusion of an~~ An appropriate disclaimer or qualifying language ~~may preclude a finding that a statement is likely to create~~often avoids creating unjustified expectations ~~or otherwise mislead the public~~.

[5] This Rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. See, e.g., Business and Professions Code §§ 6150 – 6159.2 and 17000 et. seq. Other state or federal laws may also apply.

~~[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.~~

Proposed Rule 7.1 [1-400] Communications Concerning a Lawyer's Services
Synopsis of Public Comments

TOTAL = 6 *A = 5* *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-2016-43-aq	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	(b)	7.1(b) should be deleted. There is no need for the standards at all as they are duplicative and that an attorney must prove a negative – that something is not misleading.	Although the Commission is not recommending any new Board adopted standards as part of its proposal for Rules 7.1 – 7.5, the enabling Court-granted authority in para. (b) that permits the Board to adopt standards is an important part of current Rule 1-400 because it facilitates the State Bar's ability to react proactively to specific advertising misconduct that might arise in the future. Board-adopted standards can be a preferred regulatory alternative to black letter rule changes or statutory regulation. In addition, if the Court itself views this regulatory strategy as no longer necessary, then paragraph (b) can be omitted by the Court with no impact to proposed Rules 7.1 – 7.5.
X-2016-66y	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	7.1, (b), cmt. 1	1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.	1. The focus of proposed Rule 7.1 is the prohibition of false or misleading communications, and Rule 7.2 specifically addresses advertising to the general public. The Commission disagrees, however, that the other rules, which govern the special

[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
						circumstances related to solicitation (7.3), specialization (7.4), and firm or trade names (7.5) do not raise concerns of public protection and should be relegated to administrative record-keeping.
					2. Paragraph (b) should be eliminated as should the standards themselves. Cmt. 1's language "on behalf of a lawyer" needs to be clarified.	2. See response to COPRAC, X-2016-43-aq, above.
X-2016-76t	Los Angeles County Bar Association (LACBA) (Schmid) (7-21-16)	Y	M	(a), cmt. 3	The term "untrue statement" should have a materiality requirement added such that an untrue statement of an immaterial fact is not a violation.	After further consideration, the Commission has deleted the term "untrue statement" as redundant because the concept described comes within the term "material misrepresentation of fact or law."
X-2016-104bf	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		1. OCTC disagrees with separate rules for communications, advertising, and solicitation. Unitary rule is clearer and more enforceable.	1. The Commission continues to believe it is crucial, in light of multijurisdictional practice of law and communications over the Internet, that California move with other jurisdictions toward a national standard for the rules governing advertising and solicitation. Adopting the national approach will afford great public protection.
					2. No reason to eliminate presumptions.	2. The Commission continues to take the position that the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						standards are not necessary to regulate inherently false and deceptive advertising. As presently framed, the presumptions force lawyers to prove a negative. They create a lack of predictability with respect to how a particular bar regulator will view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to regulate "taste" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n,* 447 U.S. 557 (1980); Alexander v. Cahill, 598 F.3d. 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad). Nevertheless, the Commission believes it essential that the Board's authority to promulgate standards be

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						maintained in the event new technology or changes in the delivery of legal services warrant a new standard. Consequently, Rule 7.1(b) has been retained in the rule.
X-2016-120o	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A	7.1	Supports the adoption of proposed Rule 7.1.	No response required.
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26, 2016. See page 46 of the public hearing transcript.)	Y	M	7.1	Proposed rule too specific and hinders attorney ability to adapt to changing technology. Streamline the rule to make the primary prohibition false or misleading claims.	By discontinuing California's unique approach to regulating advertising (current Rule 1-400) and moving to several rules that generally follow the Model Rule's structure and content, the Commission is recommending in favor of a national standard that is important in light of the Internet and other technological advances. This approach also streamlines regulation of lawyer advertising by eliminating unnecessary specificity and facilitating innovation by lawyers who want to use new technologies for marketing. This change follows the lead of existing California ethics opinions that similarly contemplate the use of new technologies by lawyers (see, e.g., CA State Bar Formal Op. No. 2012-186). As just one example of streamlining, the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						Commission is not recommending the continuation of current Rule 1-400(F)'s requirement to retain 'copies' of advertisements for two years. By discontinuing this requirement, a lawyer can consider using modern micro blogging social media website-based communications (such as Twitter) without being subject to an unworkable rule requirement that the lawyer retain copies of advertisements (but see, Bus. & Prof. Code § 6159.1, which still incudes a statutory advertisement retention standard.)

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1
(Current Rule 1-200)
False Statement Regarding Application for Admission, Readmission, Certification or Registration

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-200 (False Statement Regarding Admission to the State Bar) and in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("ABA") counterpart, Model Rule 8.1 (Bar Admission and Disciplinary Matters). 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 8.1 (False Statement Regarding Application for Admission, Readmission, Certification or Registration). This proposed rule 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.

Proposed rule 8.1 retains the substance of current rule 1-200 while expanding the public policy protections of the current rule. Current rule 2-100 prohibits members (on behalf of another person) from making false statements or omitting material facts in connection with an application for admission to the State Bar. Proposed rule 8.1 would expand the current rule to petitions for reinstatement after disbarment or resignation, applications for certified legal specialization and applications for special or temporary admission.

Paragraph (a) defines with specificity the applications covered under the expanded scope of proposed rule 8.1. The objective of paragraph (a) is to make clear that the rule applies to applications for admission, readmission, certification and registration.[1]

Paragraph (b) is new and recognizes the need to expand the public protection policy objectives of proposed rule 8.1 to cover conduct related to applications from both members of the California State Bar as well as non-California lawyer applicants (e.g. non-California lawyer seeking authorization to practice as a registered in-house counsel under the Multijurisdictional Program (MJP)).

Paragraph (c) makes clear that the proscriptions against making false statements, omissions or failure to correct a statement know to be false, equally apply to lawyers who are supporting or opposing the application of another person.

Paragraph (d) is derived from current rule 1-200(C) and clarifies that the rule does not apply to a lawyer representing a client/applicant in proceedings relating to admission, readmission, certification or registration.

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[1] One member of the Commission submitted a written dissent expressing concerns that proposed rule 8.1 might overlap with duties imposed by other rules, resulting in a risk of confusion on the part of lawyers seeking to comply and a potential for double-charging in disciplinary matters. The full text of the dissent is attached to this summary.

Proposed rule 8.1 contains two comments that clarify the rule's application. Comment [1] clarifies that a person making false statements in connection with that person's own application can be subject to discipline or cancellation of that person's admission or other authorization. Comment [2] relates to paragraph (d) and makes clear that a lawyer who represents a client/applicant is subject to other applicable rules and the State Bar Act.

Non-substantive changes in proposed rule 8.1 include: changing the title to accurately reflect the expanded scope of the rule, reordering the rule to place key definitions in the first paragraph and stylistic changes to track the ABA Model Rule numbering system, format and style conventions. These changes include substitution of the word "lawyer" for "member."

Post-Public Comment Revisions

After consideration of public comment, the Commission made several changes to the text and comment of proposed Rule 8.1. These changes follow the Commission's recommendation that proposed Rule 3.3 (Candor Toward The Tribunal) be adopted. The Commission believes Rule 3.3 is the appropriate source of regulation for statements made to a tribunal. Specifically, Rule 3.3, not Rule 8.1, should apply to applications for certification or registration under the California Rules of Court. (See also the concern expressed in the Dissent, which this change addresses.)

Text. The Commission limited the scope of proposed Rule 8.1 to applications for admission to practice law rather than including within its scope applications for certification or registration under provisions of the Rules of Court. This change is reflected by the substitution of new paragraph (d), which defines "application to practice law" in place of former paragraph (a), which delimited the scope of the rules application to include applications for certification or registration.

In addition to this global change in scope, the Commission has also added a further requirement to former paragraph (b) [now paragraph (a)] that in addition to not making a statement *in connection with his or her own application* that the lawyer knows to be false, the lawyer also must not make such a statement "with reckless disregard to its truth or falsity." This change was made in response to a public comment received from OCTC.

The Commission also revised former paragraph (c) [now paragraph (b)] to clarify the duties of a lawyer who makes a statement of material fact *in connection with another person's* application.

The Commission has added new paragraph (c), that imposes a duty on a lawyer, whether in connection with his or her own application or the application of another, to disclose a fact to correct a statement previously made that the lawyer knows has created a "material misapprehension" in the matter, unless the disclosure would violate Bus. & Prof. Code § 6068(e) or Rule 1.6.

Comment. The Commission modified Comment [1] to clarify its application and to provide a citation to a landmark California Supreme Court opinion on admission. The Commission has also added new Comment [2] to clarify the scope of the Rule's application. It has also revised Comment [3] to identify with specificity the obligations of a lawyer who represents an applicant for admission.

(Staff note: The dissent below was submitted in connection with the Commission's original public comment version of proposed rule 8.1.)

Commission Member Dissent to the Recommended Adoption

of Proposed Rule 8.1, Submitted by Robert L. Kehr

I generally support this proposed Rule and its expansion beyond admission to the Bar - the only subject of current rule 1-200 - to include various forms of certification and registration. However, there is an overlap between this Rule and proposed Rule 3.3 in that both address a lawyer's false statements to a court. Including the same topic in two rules would create inconsistent standards governing the same conduct, lead to confusion among courts, disciplinary authorities and lawyers, and create the risk of double charging in disciplinary proceedings. This problem could be eliminated by editing Rule 8.1(c) in the following way:

> (c) A lawyer supporting or opposing another person's application for admission, readmission, certification, or registration *is governed by rule 3.3*~~, shall not, as part of the application process, knowingly make a false statement of material fact, fail to disclose a material fact, or fail to correct a statement known to be false~~.

Rule 8.1 [1-200] False Statement Regarding Application for Admission to Practice Law
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows* to be false or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false .

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known* by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Comment

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by Rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

Rule 8.1 [1-200] False Statement Regarding Application for Admission~~, Readmission, Certification or Registration~~ to Practice Law
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Redline to Public Comment Draft Version)

~~(a) This Rule applies to applications for admission, readmission, certification or registration submitted to the State Bar or a court, including applications for: admission to practice law under Business and Professions Code §§ 6060 and 6062; readmission or reinstatement to practice law pursuant to California Rules of Court, rule 9.10(f); certification as a legal specialist under California Rules of Court, rule 9.35; and appearance and practice under California Rules of Court, rules 9.40 – 9.46.~~

(~~b~~a) An applicant for admission~~, readmission, certification or registration shall not knowingly* make a false~~ to practice law shall not, in connection with that person's own application for admission, make a statement of material fact~~, fail to disclose a material fact, or fail to correct a statement known~~ that the lawyer knows* to be false or make such a statement with reckless disregard as to its truth or falsity.

(~~c~~b) A lawyer ~~supporting or opposing~~shall not, in connection with another person's application for admission~~, readmission, certification or registration, shall not, as part of the application process, knowingly* make a false~~ to practice law, make a statement of material fact that the lawyer knows* to be false.

~~,~~(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a ~~material~~ fact~~, or fail~~ necessary to correct a statement known* ~~to be false~~by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and Rule 1.6.

(d) ~~This Rule does not apply to a lawyer in representing an applicant in proceedings~~As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission~~,~~ ~~readmission,~~ or certification ~~or registration~~to practice law in California or elsewhere.

Comment

[1] A person* who makes a false statement in connection with that person's own application ~~can~~for admission to practice law may be subject to discipline under this Rule ~~or to later cancellation of that person's admission or other authorization.~~after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by Rule 3.3.

[~~2~~3] ~~In~~A lawyer representing an applicant for admission~~, readmission, certification or registration, a lawyer is subject to other applicable rules and the State Bar Act.~~ to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

Rule 8.1 [1-200] False Statement Regarding Application for Admission to ~~the State Bar~~Practice Law
(Redline Comparison of the Proposed Rule to Current California Rule)

~~(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.~~

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~

~~(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.~~

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows* to be false or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known* by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and Rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission or certification to practice law in California or elsewhere.

~~Discussion~~Comment

~~For purposes of rule 1-200 "admission" includes readmission.~~

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by Rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.

Proposed Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration
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
X-2016-43am	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Yes	M	8.1	COPRAC supports the proposed rule, with the following significant caveat. Unlike present Rule 1-200, proposed Rule 8.1 includes within its scope applications for admission not only made to the State Bar, but also applications to a court, including *pro hac vice* applications. Proposed Rule 8.1, however, contains a different standard of truthfulness than that applicable to lawyer statements made to a court or other tribunal. In particular, proposed Rule 3.3 [5-200] and Bus. & Prof. Code § 6068(d) each prohibits an attorney from making any "false statement of fact" to a tribunal; whereas proposed Rule 8.1 [1-200] prohibits an attorney only from making a false statement of "material" fact. With respect to applications for admission, readmission, certification or registration made to a court, then, the applicable standards of truthfulness are different. Moreover, permitting an attorney, as proposed Rule 1-200 does, to	The Commission agrees and has revised proposed Rule 8.1 to avoid the conflict between the rule and proposed Rule 3.3. See new paragraph (d), which is substituted for paragraph (a) of the public comment rule draft, and 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 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration
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
					make knowingly false statements about non-material matters to the State Bar or any tribunal is contrary to an attorney's duty of honesty under the State Bar Act. (*See* Bus. & Prof. Code §§ 6068(d) and 6106). Because proposed Rule 1-200 cannot be harmonized with the prohibition in the State Bar Act on making knowingly false statements of fact to a tribunal or engaging in dishonest conduct, the limiting term "material" should not be used in Rule 1-200. Rather, the Rule should prohibit an attorney from knowingly making ***any*** false statement of fact, not merely a false statement of "material" fact. 2 COPRAC recognizes that the present formulation of Rule 1-200 and ABA Model Rule 8.1 both include the materiality limitation, but each applies only to statements made in connection with an application for admission to the State Bar, not applications made to a tribunal, such that the inconsistent standard of truthfulness present in proposed Rule 8.1 is not present in either.	

Proposed Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration
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
X-2016-76u	Los Angeles County Bar Association (LACBA) (Schmid) (9-21=-16)	Y	M	8.1	1. With respect to section (c) of Proposed Rule 8.1 [False Statement Regarding Application for Admission, Readmission, Certification or Registration (current Rule 1-200)], LACBA does not believe that it is appropriate to impose on a lawyer supporting or opposing another person's application the dual burden of (1) disclosing all material facts relating to that application and (2) correcting any statement contained in that application. For example, if a lawyer is opposing an application on specific grounds (such as moral character), why should that lawyer have any obligation to correct a false statement or an omission made by the applicant that is not relevant to the opposition? 2. LACBA is also concerned that the language changes from current Rule 1- 200 inadvertently expose an applicant or a lawyer supporting or opposing another person's application to technical violations for immaterial or unintended misstatements or omissions. While the first applicable prohibitory clause in both sections (b) and (c) of this	1. The Commission has revised paragraph (c) to address the commenter's concerns. See revised paragraph (b) [formerly paragraph (c)]. That paragraph has been modified to apply only to "material fact[s]" that the lawyer "knows to be false." 2. See response to #1.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					rule (i.e., "knowingly make a false statement of material fact") is qualified by both knowledge and materiality, the second clause (i.e., "fail to disclose a material fact") and the third clause (i.e., "fail to correct a statement known to be false") of sections (b) and (c) are not so qualified. LACBA recommends that sections (b) and (c) be qualified by both knowledge and materiality. 3. With respect to the second applicable prohibitory clause in both sections (b) and (c), the omission should be known to the applicant or the lawyer (as is the case with the current version of the rule). 4. With respect to the third applicable prohibitory clause in both sections (b) and (c), the false statement should be material in order to impose a burden of correction on the applicant or the lawyer. As written, this third clause (i.e., "fail to correct a statement known to be false") obligates an applicant or a lawyer to correct a statement known to be false without regard to whether the statement is material – even though there is	3. See response to #1. 4. See response to #1. In addition, with respect to the third clause of former paragraphs (b) and (c), the Commission believes that the focus should not be on the materiality of the fact but rather on the materiality of the misapprehension that a previous misstatement might have caused. See new paragraph (c).

Proposed Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration
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
					no prohibition on making a false statement of fact that is not material.	
X-2016-104bk	Office of Chief Trial Counsel (OCTC) (9-26-16)	Y	M	8.1	1. OCTC has concerns about the use of "knowingly" in this rule for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. False statements made with reckless disregard, gross negligence, or willful blindness are, and should be, disciplinable. Moreover, the "knowing" requirement is inconsistent with Supreme Court's direction for applicants and would lessen the current standards required of applicants by the Supreme Court. 2. OCTC is concerned that this proposed rule and Comment 1 to this rule would only prohibit a false statement of fact or law, not other misleading statements. . . . California has long held that an attorney is required to refrain	1. The Commission disagrees that "knowingly" is an inappropriate standard under all provisions of the Rule. Under proposed rule 1.0.1(f), "'Knowingly,' 'known,' or 'knows' means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Under that definition, a person cannot avoid an allegation of "willful blindness" by asserting that the person did not have knowledge. However, the Commission has revised former paragraph (b) [now paragraph (a)] to include a "reckless disregard" standard, which the Commission agrees is an appropriate standard in connection with an applicant's own application. 2. The Commission believes that a prohibition on misstatements of fact or law is an appropriate limitation in an application process. The Commission does not understand what other "acts"

Proposed Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration
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
					from misleading and deceptive acts without qualification.	would be relevant in this context.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4
(Current Rule 1-120)
Misconduct

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-120 (Assisting, Soliciting, or Inducing Violations) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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 American Bar Association ("ABA") counterpart, Model Rule 8.4 (concerning professional misconduct of a lawyer). 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 8.4 (Misconduct). This proposed rule 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.

Proposed rule 8.4 carries forward the substance of current rule 1-120 by prohibiting a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act. The proposed rule also adopts the substance of ABA Model Rule 8.4 which contains a similar prohibition as well as additional provisions addressing misconduct that warrants imposition of discipline. The proposed rule is designed to collect in a single rule various misconduct provisions that are currently found in other California rules of professional conduct or in the Business and Professions Code. The rule is intended to facilitate compliance and enforcement by clearly stating these principles in a single rule where lawyers, judges and the public can identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply.

Paragraph (a), which carries forward the substance of current rule 1-120, prohibits a lawyer from violating the rules of professional conduct, or the State Bar Act, or knowingly assist, solicit or induce another to do so. In addition, this paragraph prohibits a lawyer from doing any of the aforementioned through the acts of another.

One issue considered was whether to follow the approach in ABA Model Rule 8.4(a) which would generally prohibit a lawyer from "attempting" to violate a rule or a provision of the State Bar Act. The Commission determined that the question of whether an attempted violation should be an independent basis for discipline is better addressed on a rule-by-rule basis. This approach means that any prohibition on an attempt would be tailored to a specific rule's violation and potential harm rather than a generalized standard for all of the rules and the State Bar Act. This avoids possible unintended consequences of a one size fits all attempt standard that would not account for the specific purpose of individual rules. For example, in proposed rule 1.5 [4-200], the Commission has recommend a rule that provides a lawyer "shall not make an agreement for, charge, or collect an unconscionable fee or illegal fee." The terms "make" and "charge" in effect prohibit an attempt to "collect" an unconscionable fee.[1] Although only the

[1] This is similar to the standard in Business and Professions Code section 6090.5 that, in part, prohibits a lawyer from agreeing or seeking an agreement that professional misconduct shall not be reported to the State Bar. This section was revised in 1996 in response to a State Bar Court finding that the prior version of the section did not include terms that could be construed fairly as a prohibition on attempts. (See

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 an unconscionable or illegal fee should be prohibited as disciplinable misconduct. On the other hand, the Commission also recommends adoption of proposed rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. For this rule, the harm is the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with a lawyer-client relationship. A generalized prohibition against an attempt to engage in such a communication does not further the purpose of this rule and it would pose a risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person.

Paragraph (b) adopts the language of MR 8.4(b) but adds a reference to "moral turpitude." This provision focuses on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, all of which are central principles in lawyer conduct. The reference to moral turpitude is added to maintain conformity with the broader public protection afforded by Business and Professions Code section 6106.

Paragraph (c) adopts the language of MR 8.4(c) but adds the words "reckless or intentional" to modify "misrepresentation." The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of "reckless or intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that should result in discipline under this rule.[2]

Paragraph (d) adopts the language of MR 8.4(d) concerning conduct "prejudicial to the administration of justice." The Commission concluded that a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice regardless of whether the conduct occurs in connection with the practice of law.

Some members of the Commission raised a concern that this provision may not survive a Constitutional challenge if it is not limited to situations where the lawyer's conduct occurs "in connection with the practice of law." Compare, *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (former Bus. & Prof. Code § 6068(f), prohibiting "offensive personality," was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

Paragraph (e) adopts the language of MR 8.4(e) prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

Paragraph (f) adopts the language of MR 8.4(f) prohibiting a lawyer from knowingly assisting a judge in violation of judicial conduct rules. Expressly stating that such conduct is prohibited should contribute to the confidence that the public places in the legal profession and administration of justice is justified.

Assembly Bill No. 2787 (Kuehl) 1995-1996 session; and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.)

[2] Compare proposed rule 1.1, under which discipline is imposed only if a lawyer has "intentionally, recklessly, repeatedly, or with gross negligence" failed to act competently.

Finally, non-substantive changes to the current 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."

Proposed Rule 8.4 contains six comments intended to clarify how the rule is to be applied. Of particular note is Comment [6] which, as noted above, has been added to clarify that the paragraph (d) does not apply to constitutionally-protected conduct.

Post-Public Comment Revisions

After consideration of public comment, the Commission removed the references to "moral turpitude" from both 8.4(b) and 8.4(c). Paragraph (f) was modified to be parallel with paragraph (a) to include inducement and solicitation, and to clarify the meaning of judge and judicial officer. The Commission also modified Comment [4] to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude, dishonesty, or corruption. Finally, Comment [6] was modified to clarify that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.

Rule 8.4 [1-120] Misconduct
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

It is professional misconduct for a lawyer to:

(a) violate these Rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;

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

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, "judge" and "judicial officer" have the same meaning as in Rule 3.5(c).

Comment

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

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

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

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] This Rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

Rule 8.4 [1-120] Misconduct
(Commission's Proposed Rule Adopted on October 21–22, 2016 –
Redline to Public Comment Version)

It is professional misconduct for a lawyer to:

(a) violate these Rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;

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

(c) engage in conduct involving ~~moral turpitude,~~ dishonesty, fraud,* deceit or reckless or intentional misrepresentation;

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable ~~rules~~code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, "judge" and "judicial officer" have the same meaning as in Rule 3.5(c).

Comment

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

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

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

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts ~~of gross negligence~~ involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

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

Rule 8.4 [1-120] ~~Assisting, Soliciting, or Inducing Violations~~ Misconduct
(Redline Comparison of the Proposed Rule to Current California Rule)

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

It is professional misconduct for a lawyer to:

(a) violate these Rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;

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

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this Rule, "judge" and "judicial officer" have the same meaning as in Rule 3.5(c).

Comment

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

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

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

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law

or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] This Rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

Proposed Rule 8.4 [1-120] Misconduct
Synopsis of Public Comments

TOTAL = 10 *A = 1* *D = 1* *M = 7* *NI = 1*

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-9	Mahacek, Jim (7-13-16)		NI		Current rules demand that any record of public reprobate becomes a life time reflection on the attorney. This is especially unfair to new attorneys who lack experience with sometimes very tricky and vague rules. An attorney so disciplined should have the right to apply to a state bar judge after an appropriate amount of time based on the severity of the discipline and have the discipline expunged if the attorney can show good conduct and rehabilitation.	Member records expungement policies are beyond the scope of the Commission's rule revision project because those policies are addressed in provisions other than the Rules of Professional Conduct (see, e.g., Rule 9.6(b) of the California Rules of Court). Regarding the commenter's concern about "vague" rules, consistent with the Commission's Charter the Commission has proposed amendments that are intended to eliminate ambiguities and facilitate the function of the rules as disciplinary standards.
X-2016-32r	Law Professors (Zitrin) (07-25-16)		M	8.4(b) & (c)	ABA Model Rules 8.4(b) and (c) define misconduct as both commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," or engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." Proposed California rule 8.4(C) combines both of these phrases. However, it adds engaging in "conduct involving moral turpitude" to both phrases. This is may be	The Commission has revised the proposed rule to remove the references to "moral turpitude" from both 8.4(b) and 8.4(c). The Commission has modified Comment 4 to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude. In response to another comment, the Commission has modified Comment 6 to make

[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
					redundant with respect to crimes.	clear that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.
X-2016-33	Brasov, Narcis	No	D		Rule infringes upon freedom of speech and religion by subjecting lawyers to discipline for expressing views on the wrong side of the official orthodoxy.	The Commission disagrees that the Rule infringes on freedom of speech or religion. In particular, in response to another comment, the Commission has modified Comment 6 to make clear that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The other paragraphs of the Rule address defined conduct that falls outside Constitutional protections.
X-2016-52r	Law Professors (Zitrin) (08-24-16)	Yes	M	8.4(b) & (c)	See X-2016-32r Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32r.
X-2016-43bj	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M	Cmt. 4	Comment 4 should be deleted as it risks inconsistency with established case law.	The Commission believes Comment 4 remains appropriate to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude. The Commission has modified Comment 4 and believes that as modified it is

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						not inconsistent with the case law.
X-2016-66ad	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A		We support this incorporation of ABA Model Rule 8.4 as a proposed rule for California lawyers. While the phrase "prejudicial to the administration of justice" can be somewhat general, we believe on balance that there are broad categories of misconduct that, if established to the requisite standard, should subject a lawyer to discipline; subsection (a) through (f) encompass such categories and particularized rules in each instance would be cumbersome if not impossible.	No response required.
X-2016-68r	Law Professors (Zitrin) (9-21-16)	Y	M	8.4(b) & (c)	See X-2016-32r Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32r.
X-2016-76x	Los Angeles County Bar Association (LACBA) (9-21-16)	Y	M	(a), (b), (c), (d)	Paragraphs (a),(b), and (c) are superfluous. Paragraph (d) is vague and could lead to unintended discipline.	With respect to paragraph (a), all but the first clause (stating that it is professional misconduct to "violate these rules or the State Bar Act") carries over and expands on current Rule 1-120, defining the circumstances in which a lawyer can be liable for violations of the Rules and State Bar Act even if the actual violation is committed by

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						someone other than the lawyer. This latter portion of paragraph (a), which states principles of responsibility not found elsewhere in the Rules, is not superfluous. With respect to the first clause of paragraph (a), as well as paragraphs (b) and (c), though they may be viewed as restating violations defined elsewhere in the Rules or State Bar Act, the Commission does not believe them to be superfluous (in the sense of unnecessary) because they serve an important notice purpose, grouping in one Rule for easy reference a list of what constitutes professional misconduct that can give rise to discipline. Given this purpose, and the virtue of consistency with the ABA Model Rules, the Commission believes these provisions remain appropriate. With respect to paragraph (d), after consideration, the Commission agrees that it is overly vague and unnecessary in light of the other provisions of the Rule, and has removed it.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-104bn	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(a), (f)	Concerned with "knowing" standard in subsection (a). The rules should not encourage willful blindness or failure to investigate. Concerned that the rule does not prohibit attempted violation of the rules. Concerned with subsection (f)'s "knowing" standard. Also concerned with use of "judge" or "judicial officer" as opposed to "tribunal." Rule should administrative law judges or arbitrators. Subsection (f) should also include "solicitation" as grounds for violation.	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 both paragraphs (a) and (e) (formerly (f)) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigates. The Rule does not apply the "knowingly" standard to violations committed by the lawyer him or herself. The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations. The Commission has modified paragraph (f) to be parallel with paragraph (a) to include inducement and solicitation. The Commission believes that paragraph (f)'s reference to

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						"judicial officers" includes administrative law judges. The Commission does not believe that extending paragraph (a) to a "tribunal" makes sense, and notes that assisting, soliciting, or inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 26-28 of the public hearing transcript.)	Yes	M	8.4(c)	Rule's prohibition of moral turpitude is vague and gives OCTC too much discretion. The concept is already addressed in B&P Code section 6106.	The Commission has revised the proposed rule to remove the references to "moral turpitude" from both 8.4(b) and 8.4(c). The Commission has modified Comment 4 to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4.1
(Current Rule 2-400)
Prohibited Discrimination, Harassment and Retaliation

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Current Rule 2-400 was first adopted effective March 1, 1994. There is no counterpart to rule 2-400 in the American Bar Association ("ABA") model rules. However, ABA Model Rule 8.4(d) addresses discrimination by individual lawyers while representing a client.[1] The result of the Commission's evaluation is proposed rule 8.4.1 (Prohibiting Discrimination, Harassment and Retaliation). This proposed rule 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.

The main issue considered when drafting proposed Rule 8.4.1 was whether to expand the rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, which is found in current Rule 2-400(C).[2] A majority of the Commission believes current Rule 2-400(C) renders the rule difficult to enforce. Eliminating the requirement would give the Office of Chief Trial Counsel original jurisdiction to investigate and prosecute under the current procedures of the disciplinary system any claim of discrimination that comes within the scope of the Rule.

In addition to changes to address the main issue identified above, the Commission proposes the following substantive changes to the current rule:

(1) Expanding the proposed rule beyond the management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept representation of any client." Current

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[1] Model Rule 8.4(d) provides it is misconduct for a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice." A Model Rule comment clarifies the application of paragraph (d):

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

[2] Current Rule 2-400(C) provides:

> "No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed."

Rule 2-400 already applies to discrimination in the management or operation of a law firm in "accepting or terminating representation of any client." The Commission believes the rule's prohibition should not be limited to law firm management. Adopting a rule that generally prohibits unlawful discrimination or harassment while engaged in representing a client is consistent with current ABA Model Rule 8.4(d), Comment [3] to that rule, and proposed ABA Model Rule 8.4(g)[3] and several other professions that prohibit this same behavior in their codes of conduct.[4]

(2) Expanding the proposed rule to cover additional protected categories. Current Rule 2-400's list of protected characteristics is substantially narrower than current California law. Because the identity of protected characteristics protected under anti-discrimination law is not static, the Commission added paragraph (c)(1) to delimit the scope of "protected characteristics" for purposes of the rule that not only is consistent with current California law but also includes a catchall provision for any "other category of discrimination prohibited by applicable law." This latter addition would authorize professional discipline pursuant to whatever applicable anti-discrimination laws might exist in the future without the need to amend the rule.

(3) Expanding the proposed rule to encompass unlawful discrimination and harassment engaged in for the purpose of retaliation. This addition would permit professional discipline where a lawyer, in representing a client or in relation to a law firm's operations, unlawfully discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. This provision is intended to provide protection for lawyers obligated under the rule (e.g., lower level lawyers within a law firm) to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even when the unlawful conduct is being committed by higher level lawyers within the firm.

(4) Adoption of paragraph (d),[5] which requires a lawyer who has been charged with, or is being investigated for, a violation of the Rule, to give notice to the State Bar of any

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[3] Proposed ABA Model Rule 8.4(g) would provide it is professional misconduct for a lawyer to:

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

[4] Examples include: (1) American Dental Association, Code of Conduct, Section 4.A. "Patient Selection" (dentist shall not refuse to accept patients because of the patient's race, creed, color, sex or national origin); and (2) American Psychological Association, Ethical Standard 1.12 "Other Harassment" (prohibition against behavior that is harassing or demeaning based on factors such as a person's age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status).

[5] Proposed Rule 8.4.1(d) states:

"(d) A lawyer who is the subject of a State Bar investigation of State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding."

See also, Business & Professions Code section 6068(i) [re duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding].

parallel administrative or judicial proceeding, such as an EEOC or DFEH investigation. In part, this notice is intended to provide the Office of Chief Trial Counsel with information necessary to determine whether or not to hold in abeyance the State Bar investigation or disciplinary proceeding pending the outcome of a related proceeding.

(5) Adoption of paragraph (e)(1), which requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (a) of the proposed rule to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review. Paragraph (e)(2) requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (b) to the California Department of Fair Employment and Housing and the United State Equal Employment Opportunity Commission. The purpose of these provisions is to provide to the relevant government agencies an opportunity to become involved in the matter so that they may implement and advance the broad legislative policies with which they have been charged.

(6) Adoption of paragraph (f), which is intended to clarify that the proposed rule does not prevent a lawyer from representing another person alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Finally, non-substantive changes to the current 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."

Proposed Rule 8.4.1 contains six comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [2] which, among other things, has been added to clarify that the rule does not apply to constitutionally-protected conduct. Comment [4] has been added to clarify that paragraph (d) permits the State Bar to use discretion in abating a disciplinary investigation or proceeding when the State Bar is made aware of a parallel administrative or judicial proceeding premised on the same conduct. Comment [5] clarifies that paragraph (e) is intended to recognize the important public policy served by enforcing the laws and regulations prohibiting unlawful discrimination.

Post-Public Comment Revisions

After consideration of public comment, the Commission edited paragraphs (a), (b), and (c)(4) for clarity. The Commission modified paragraph (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar. The Commission also modified paragraph (f) to state the rule does not preclude a lawyer from declining or withdrawing from a representation as required or permitted by the Rule 1.16 [Declining or Terminating Representation], nor does the rule preclude a lawyer from providing advice and engaging in advocacy as required or permitted by the Rules or the State Bar Act. In addition, the Commission added Comment [3] which states that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. Finally, the Commission added Comment [9] which is taken from the Discussion section to current Rule 2-400. This Comment is intended to make clear that

conduct falling within this Rule may also be subject to discipline under other applicable provisions.

Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this Rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This Rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this Rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation (Commission's Proposed Rule Adopted on October 21–22, 2016 – Redline to Public Comment Draft Version)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or ~~for the purpose of retaliation.~~

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not~~, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully~~:

(1) on the basis of any protected characteristic,

(~~1~~i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(~~2~~ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(~~3~~) iii) unlawfully refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment~~.~~; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or

harassment in employment and in offering goods and services to the public; and

(4) "~~retaliation~~retaliate" means to take adverse action against a person* because ~~a~~that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon ~~issuing~~being issued a notice of a disciplinary charge under this Rule, a lawyer shall:

(1) ~~I~~if the notice is of a disciplinary charge under paragraph (a) of this Rule, ~~the State Bar shall~~ provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section~~.~~; or

(2) ~~I~~if the notice is of a disciplinary charge under paragraph (b) of this Rule, ~~the State Bar shall~~ provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This Rule shall not preclude a lawyer from:

(~~f~~1) ~~This Rule shall not prevent a lawyer from~~ representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation~~.~~;

(2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged

victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. ~~This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.~~ While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that ~~preemptory~~peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[~~3~~5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[~~4~~6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[~~5~~7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination,

harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[~~6~~8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this Rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

Rule 8.4.1 [2-400] Prohibited ~~Discriminatory Conduct in a Law Practice~~Discrimination, Harassment and Retaliation
(Redline Comparison of the Proposed Rule to Current California Rule)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(~~A~~c) For purposes of this rule:

(1) "~~law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means ~~a failure~~to fail to advocate corrective action where the ~~member~~lawyer knows* of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination or harassment prohibited ~~in~~by paragraph (~~B~~b); ~~and~~

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state ~~or~~and federal statutes ~~or~~and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public~~.~~; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this Rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This Rule shall not preclude a lawyer from:

~~(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:~~

(1) ~~hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) ~~accepting or terminating~~declining or withdrawing from a representation ~~of any client.~~as required or permitted by Rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

~~(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a~~

~~complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.~~

Comment~~Discussion~~

~~In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

~~A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.~~

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this ~~rule~~Rule may also be initiated and maintained~~, however,~~ if such conduct warrants discipline under California Business and Professions Code ~~sections~~§§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
X-2016-13	Robinson, Bari (07-25-16)	N	A		I have been an attorney for almost 40 years and have had instances in my career where I feel I was victim of bias and discrimination. The experiences were very debilitating to me personally and did harm to my career . . . the instances of bias and discrimination of many I have mentored are distressingly similar to mine.	The Commission's proposed Alt1 provides the State Bar with authority to address unlawful discrimination, harassment, or retaliation.
X-2016-15a	Garen, Clark (08-01-16)	N	D		Discrimination should not be a basis for taking action against an attorney's license, <u>especially</u> prior to a civil adjudication of liability. Every employee who is terminated now enters the courtroom lottery for discrimination claims. Subjecting an attorney's license to action based on a discrimination claim will give the discharged employee additional leverage with which to extort a settlement from the attorney. This is not a proper field of regulation and any regulation should only occur after a civil action is concluded.	The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed.
X-2016-19b	Anderson, Mark (08-01-16)	N	D		I agree with the concerns raised by the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and	The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil

[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
					questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings. There is no good reason to undercut the formal court processes by having the ability to institute parallel proceedings, especially if there is no proof of damage as would be required in a court proceeding. I'm also concerned about the "catch-all" phrase addition, as being vague enough to enlarge prosecution even where a court might not find liability.	action before discipline for unlawful discrimination, harassment, or retaliation may be imposed. The definition of prohibited characteristic extends to unspecified categories only to the extent they may in the future be affirmatively recognized by other law. The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful.
X-2016-21	Hills, Nickcolyer (07-28-16)	N	A		The State Bar Court and OCTC are perfectly well suited to litigate discrimination claims against lawyers by clients and their employees. It is no more unique than fraud, misrepresentation, or theft of client funds. The attorneys or their firms are sanctioned, disciplined and monitored for many rule violations, but the basic requirements of Rule 2-400 are not enforced unless and until there has been a final court decision finding discrimination by the attorney or his firm. It's time	No response required.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					to put a stop to this outlandish practice and demand that our attorneys and their counterparts be held to the same high standards as everyone else.	
X-2016-26	Shepard, Stephen (08-02-16)	N	D		The proposed rule interferes with an attorney's freedom to pick and choose clients and whom the attorney will or will not represent. Further, the proposed rule constitutionally prohibits the right to associate.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
						relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-27a	Cross, Terrence (08-02-16)	N	D		[No comment provided.]	No response required.
X-2016-28	Fisher, Frank (08-02-16)	N	D		The discrimination rules should have a conscience exception for those attorneys that have religious convictions that would require certain prohibited conduct to violate their deeply-held religious beliefs. We as attorneys should be upholding constitutional protections for conscience concerns. An attorney should not lose his or her livelihood merely because the attorney cannot act in a manner contrary to that warranted by his or her free exercise of religious beliefs. Furthermore, an attorney should not be subject to discipline until there has been a final adjudication that he or she has discriminated. Such a rule will provide people with certain sexual orientations to impose the full weight of governmental power on someone that may ultimately be found not to have done anything wrong. This is	Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed. The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					unconscionable!	to the extent the conduct is recognized by state or federal law to be unlawful.
X-2016-31	Nelson, Sheila (08-03-16)	N	D		Eliminating current Rule 2-400(C)'s pre-discipline adjudication requirement raises serious concerns regarding the need to assure due process, potential increased demands on State Bar resources, and significant questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings. The Board can and should adopt the rule that broadens the definition of protected classes while preserving the protection of due process that attaches to a civil adjudication of discrimination. Alternative 2, which incorporates the expanded list of protected characteristics and broadening of the rule's scope as reflected in Alternative 1, but which largely retains the jurisdictional limitation in current Rule 2-400(C) and can act as a safe guard against claims of discrimination that may be found to be without merit. The State Bar Court should not take on those issues for which	The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed. Paragraphs (d) and (e), and Comments [6] and [7] provide mechanisms for addressing parallel civil and administrative proceedings.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the general civil and criminal trial courts provide adequate protection.	
X-2016-32t	Law Professors (Zitrin) (07-25-16)	Y	NI		The difference between the two alternative rules is substantial, as the first alternate draft does not require pre-adjudication. Although current rule 2-400 does have such a requirement, that does not mean a new rule should. However, the commission must carefully consider, if Alternative One is chosen, whether lawyers in appropriate circumstances, should be able to choose their clients despite certain "protected characteristics" under the rule. MR 8.4.1(a) currently states that "in terminating *or refusing to accept*" a client the lawyer "may not unlawfully discriminate." The term "unlawfully" is only vaguely defined in section (c)(3) of the rule. We understand why many on the commission felt that Alternative Two, requiring independent pre-adjudication, may take much of the teeth out of this rule. However, should the commission choose Alternative One, with no pre-adjudication, it would give trial counsel huge discretion in	See response to Public Comment 2016-52t below.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					determining what is "unlawful." If choosing Alternative One, therefore, the commission might want to consider removing the language "or refusing to accept…" to remove that issue from trial counsel's potentially over-zealous discretion. We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult may also serve to vest even more interpretive discretion in trial counsel. For example, consider: ● A lawyer supervising a legal clinic at a law school affiliated with a battered-women's shelter would be violating this rule by accepting only women clients in the clinic; ● An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria; ● A lawyer supervising a disability rights clinic who refuses to accommodate an individual *without disabilities* who seeks help regarding perceived discrimination *against* him might	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					arguably violate this rule. Should these lawyers be subject to discipline absent a separate independent finding? Absent an adjudication, we are not persuaded that discipline is warranted. However, if the "refuse to accept" language is removed, striking pre-adjudication is more viable.	
X-2016-36	Eisner, Paul (08-02-16)	N	M		While the proposed repeal of 2-400(C) is a step in the right direction, it is far from adequate reform. Age discrimination is treated differently and age discrimination is rampant in the legal profession. Firms frequently set forth criteria which discriminates against those attorneys who were traditional law students, promptly passed and are forty years of age or older. Age discrimination is rampant in the legal profession and the bar is complicit, taking no action to terminate it. I would recommend the following rule be adopted: "(1) As used herein, the term "law firm" means and refers to any association, partnership, limited partnership, limited liability partnership, law corporation,	The proposed Rule includes age as a "protected characteristic" on the basis of which unlawful discrimination or harassment may result in discipline. The Commission believes that the proposed Rule appropriately addresses age discrimination, and that a more specific rule addressing only age discrimination is not necessary.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					limited liability corporation or other entity through one or more attorneys join for the practice of law. (2) All advertisements, listings and other solicitations seeking to employ or obtain the contract services of an attorney shall state the name, address, telephone number and e-mail address of both the attorney(s) and law firm or other entity seeking to employ or retain the contract services of an attorney. Any advertisement, listing or other solicitation which is incomplete, but from which the name, address, telephone number and e-mail address of both the attorney(s) and law firm or other entity seeking to employ or retain the contract services of an attorney can be readily ascertained by viewing the attorney information on the State Bar website shall be in substantial compliance with this Rule. (3) No attorney, law firm or other entity may advertise, list, make any advertisement stating that a prospective employee or prospective independent contractor, or otherwise require that a prospective or actual	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					employee: (a) Must or is preferred to be a graduate of a particular year(s) or class(es), (b) Is or is preferred to be a recent graduate or have been admitted to practice in a particular year(s), (c) Has or is preferred not to have a maximum amount of experience whether expressly stated or set forth in form of a range with low to high number of years of experience, (d) Is or is preferred not to be of or over a certain chronological age, or (e) Is or is preferred to be or not to be of a particular race, creed, religion, national origin, ethnicity, gender, sexual preference or marital status. (4) This rule does not apply to any potential or actual client who is not an attorney, seeking to hire or retain an attorney to represent him, her or it. (5) Every attorney and law firm is required to report to the California State Bar the filing of three claims alleging discrimination within any twelve month period, whether	

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					with Department of Fair Employment and Housing, Equal Employment Opportunity Commission, or any other federal, state (including but not limited to California) or local public agency having investigatory, adjudicatory or quasi-adjudicatory powers in matters of employment discrimination prohibited by federal, state (including but not limited to California) or local law. The reporting requirement applies when three claims are filed counting all agencies even though no agency may have had more than one claim filed."	
X-2016-40	Allen, Adeline (08-15-16)	N	D		The proposed rule violates the First Amendment rights of attorneys, including free speech, free association, and free exercise. The new rule would essentially create a free-standing speech code for lawyers, pursuant to which lawyers will be subject to professional discipline simply for engaging in politically incorrect speech. The proposed rule would limit the autonomy of lawyers to accept and decline representation,	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission does not believe there is any even

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					thereby interfering with the historically recognized right of attorneys to determine which clients and cases to accept and which to decline. The rule will compel lawyers to take cases and/or clients they would otherwise not take, forcing attorneys into fiduciary, confidential, and oftentimes long-term attorney-client relationships with unwanted clients. Such a scenario is not only bad for the attorney, it is bad for the client as well. The proposed rule and Comments conflict with other rules of professional conduct, such as rule regarding diligence and zeal, conflicts of interest, and accepting appointments. Hence, in complying with the new rule attorneys may be violating other rules, placing lawyers in a no-win situation. There is no factually demonstrated need for the proposed rule.	potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).

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X-2016-43bk	Committee on Professional Responsibility and Conduct (COPRAC)	Y	NI		COPRAC has reviewed the provisions on both alternative versions of this proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation. The Committee supports the adoption of a disciplinary rule that prohibits discrimination, harassment, and retaliation. However, the Committee was unable to reach consensus on either version of proposed Rule 8.4.1.	No response required.
X-2016-53	Price, Pamela (08-24-16)	N	A		I support the Commission's recommended version (ALT1). A victim of discrimination by an attorney in this State should not have to wait until he or she gets a judgment to bring the matter for discipline by the State Bar. In my 33 years of experience litigating discrimination claims, I can state unequivocally that discrimination, especially race discrimination, is very hard to prove. Getting a final judgment is even harder. The amount of time and money it takes to traverse our judicial system discourages most victims. Even finding a lawyer to pursue a discrimination claim against "a big firm" is almost impossible.	No response required.
X-2016-57	Copi, Margaret (08-31-16)	N	A		I agree with eliminating the requirement for a judgment of discrimination before the State	No response required.

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					Bar can enforce its rule against discrimination, as with all other rules. The Commission's recommended version of the rule (ALT1) has been watered down by a Staff version (ALT2) to keep the State Bar from enforcing the rule unless and until there has been a judgment against the lawyer. I support the Commission's recommended version (ALT1).	
X-2016-51	Johnson, Maxine (08-23-16)	N	A		I am an employee for a law firm and I have expressed to my boss that he needs to close the gap between me and another paralegal in the office who is paid more than I am. I feel that I am being discriminated against.	No response required.
X-2016-52t	Law Professors (Zitrin) (08-24-16)	Y	A		We note that there are two alternative proposed rules presented for public comment. After considerable thought and discussion about these two alternatives, we recommend Alternative One, ***but*** with the proviso that there be ***a carve-out for appropriate discretion permitted in client-selection***. We believe there should be no requirement for a prior adjudication before bringing a disciplinary action under the rule. However, if Alternative One is	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. In addition, the Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of

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					chosen, lawyers in appropriate circumstances should be able to choose their clients despite certain "protected characteristics" under the rule. Proposed Rule 8.4.1(a) currently states that "in terminating *or refusing to accept*" a client the lawyer "may not unlawfully discriminate." The term "unlawfully" is only vaguely defined in section (c)(3) of the rule. This would give trial counsel huge discretion in determining was is "unlawful." (We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult, may also serve to vest even more interpretive discretion in trial counsel.) Therefore, the Commission should change the language "in terminating or refusing to accept…" to read "*in terminating or accepting*…." We believe this modification must be accompanied by the following language (or similar) to be inserted into one of the comment paragraphs: "*A lawyer may restrict the types of people who will be accepted as clients for legitimate practice-based reasons.*"	underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.

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					For example, consider: ● A lawyer supervising a legal clinic at a law school affiliated with a battered-women's shelter would be violating this rule by accepting only women clients in the clinic; ● An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria; ● A lawyer supervising a disability rights clinic who refuses to accommodate an individual *without disabilities* who seeks help regarding perceived discrimination *against* him might arguably violate this rule. Should these lawyers be subject to discipline? We think the answer is no.	
Public Hearing	McDermott, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 48-52 of the public hearing transcript.)	N	D		This rule is designed primarily to prevent or punish representation of politically incorrect viewpoints. "If you force me and others, like the Catholic Church, to hire people or be conflicted with people who are determined to destroy the faith, the teaching	The Rule is not designed to prevent or punish representation of politically incorrect viewpoints. The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination,

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					and the position morally taken by the Church … is to deny representation to most of the people in this state based on political ideology, not based on any right to be a representative of the law."	harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.
X-2016-70	Dickinson, Glenn (09-23-16)	N	D		Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties. The proposed rule fails to respect attorneys' consciences and professional judgments. The proposed rule undermines attorneys' duties of diligence and zealous client representation. The proposed rule creates unacceptable conflicts of interest between the attorney and client. The proposed rule is unconstitutional because it unconstitutionally chills and compels speech; and it is void for vagueness.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's

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					The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests. A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the state bar discipline mechanisms are engaged.	practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-66ae	San Diego County Bar Association (Riley) (09-15-16)	Y	M		First, we believe it important to state unequivocally that lawyers have an ethical obligation not to engage in unlawful discrimination, harassment or retaliation for the very reason stated in the first sentence of the Comment: such conduct undermines the core principle of our democracy that all persons	No response required to the preference for Alt-1 over Alt-2. With respect to the balance of the comment, the Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent

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					are equal, a principle at the heart of our profession. We are aware of the concerns some have raised about the inclusion of the phrase "in terminating or refusing to accept the representation of any client," as a potential ground for discipline, because it might infringe on the independence of a lawyer to choose which client the lawyer wants to represent or to continue to represent —for reasons wholly removed from unlawful discrimination. . . . Worse it could give rise to groundless complaints against lawyers who decline or terminate the representation of a client for legitimate reasons, only to have the disappointed, putative or former client file baseless State Bar discipline charges; charges nonetheless to which the lawyer must at some level respond. We do not believe, however, that a new discipline rule should contain such inherent uncertainty and provide such grounds for possible mischief. Consequently, we recommend that the Commission remove the phrase, "in terminating or refusing to accept the representation of any	the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. In addition, the Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that these changes make clear that the Rule does not improperly interfere with a lawyer's selection of clients.

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					client," from subsection (a). With this recommendation, we support the proposed rule. Further, we support Alternative 1, and disagree with adoption of Alternative 2 for the following reasons. Alternative 2 would prohibit the State Bar from even opening an investigation, or commencing any proceeding, for any alleged violation of the rule—no matter how egregious the alleged conduct—until a final administrative or court judgment finding unlawful discrimination or harassment. In effect, Alternative 2 would require the victim of alleged unethical conduct to initiate an administrative or civil proceeding (or an administrative proceeding sufficient to obtain a "Right to Sue" letter), and then pursue that proceeding to a final judgment—arguably foregoing even a beneficial civil settlement—before the State Bar could even open an investigation into the alleged unethical conduct. If the victim should initiate a civil action and then elect a favorable settlement and choose to "get on with his or her life," the State Bar's hands would be tied, no matter how	

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					blatantly the lawyer's conduct violated the rule. We believe that the investigation, and as appropriate the prosecution, of alleged violations of the Rules of Professional Conduct should not depend on the victim not only initiating an independent action but then prosecuting it to final judgment; nowhere else in the Rules of Professional Conduct do the rules impose such an obligation on victims of lawyer misconduct, and nowhere else do the rules so restrict the independence of the State Bar to investigate and pursue alleged misconduct. We are aware of the position of the Office of Chief Trial Counsel that it presently does not have the expertise or personnel to address what may be a surge in employment-related complaints. While the concerns of the Office of Chief Trial Counsel are legitimate, we believe they can be addressed within the proposed rule. First, the State Bar Act, Business and Professions Code section 6044.5(b)(1), permits the Chief Trial Counsel or designee to	

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					disclose non-public information to government agencies responsible for enforcement of civil laws; and the State Bar Rules of Procedure permit the State Bar to abate a proceeding when waiting for the disposition of a related proceeding that would expedite the State Bar matter. Consequently, if the Office of Chief Trial Counsel believed that the expertise of DFEH or the EEOC should better address any given complaint, we believe it has the tools available to refer those complaints to the appropriate agency and abate its own investigation or proceeding until the agency has had an opportunity to act in the first instance. In the past, the Office of Chief Trial Counsel has abated investigations while waiting for civil cases to proceed. We believe the Office of Chief Trial Counsel has the experience and ability to make similar determinations should it be faced with a surge of employment-related discrimination complaints.	
X-2016-73	Rainboldt, James (09-23-16)	N	D		An example of the cure being worse than the disease. Governing bodies which attempt to make the world perfectly fair, just and its people always or even mostly benevolent inevitably	A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule. The need for such a Rule is also

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					become totalitarian and work their own grave injustices. The object of a more fair and kinder world is virtuous, but this is not the way to do it.	supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-74	Harrison, John (09-23-16)	N	D		I am concerned that this proposed rule will be misused – and serve as a way to punish and root out someone who is characterized as an evil person when they choose to take on or not take on certain clients for various reasons – and the rejected client will somehow find a violation of this rule. This rule appears to protect clients but I think ti will serve to harass and remove attorneys who the majority finds repulsive and not to their liking.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules

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						relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-75e	Kerins, Steve (09-25-16)	N	D		In my opinion, the existing rule is sufficient for public protection.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules
				(a)	I am concerned that paragraph (a) of the proposed rule could be read to infringe on a lawyer's discretion in choosing his or her clients and cases, and thereby risk infringing on his or her right to free speech and expression.	
				(b)	I am also greatly concerned by very broad language in paragraph (b) – for example, the lack of any clear scienter requirement in the specific language in the rule for persons alleged to have engaged in discriminatory conduct. The proposed rule also clearly indicates that it is a disciplinary offense for a lawyer to "knowingly permit" unlawful discrimination or harassment, which, as defined, could impose an enormous burden on young, new, and subordinate lawyers. This standard also runs the risk of turning lawyers in the same firm or office into mandatory monitors and enforcers of one another's	

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					conduct, which, again, would be a great overreach and would serve to inhibit their professional collaboration in general as well as in the context of representing the firm's clients.	relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
				(d) and (e)	Finally, paragraphs (d) and (e) again would seem to operate to tie the attorney discipline process to civil and administrative employment and civil rights proceedings to an inappropriate extent.	With respect to scienter, the Rule's requirement that the conduct be "unlawful" incorporates the scienter requirements of the applicable law defining the unlawful discrimination, harassment, or retaliation. With respect to "knowingly permit," this is a defined term in the Rule, which requires that the lawyer know of the conduct at issue. Moreover, Comment [5] makes clear that what constitutes appropriate corrective action can vary with a lawyer's relative position within a law firm, accounting for such factors as seniority and subordination. The Commission believes paragraphs (d) and (e), and Comments [6] and [7], are necessary to provide a mechanism for addressing parallel civil and administrative actions and that there is a demonstrable need for the Rule.

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X-2016-76y	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M		PREC supports Proposed Rule 8.4.1 [Prohibited Discrimination, Harassment and Retaliation [ALT 1]]. PREC also recommends the addition of a comment from current Rule 2-400, which provides that a disciplinary investigation or proceeding for conduct coming within the rule may be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. PREC opposes [ALT 2] of the Proposed Rule, which moderates, but does not eliminate, the 2-400(C) precondition.	The Commission has added the requested Comment as Comment [9] to make clear that conduct falling within this Rule may also be subject to discipline under other applicable provisions.
X-2016-80a	Freedom X (Becker) (09-26-16)	Y	D		We wish to submit objection to proposed rule 8.4.1, which dangerously forecloses the legal representation of people exercising their constitutional rights of freedom of expression and religious liberty and imperils that liberty for everyone. It is, specifically, an unconstitutional abridgement of speech designed to suppress political dissent, granting intellectual autonomy to the state's favored ideas, while	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of

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					putting a boot on the necks of those members of society who wish to resist state-compelled thoughts that are unorthodox, or are outside the official government platform. Accordingly, if adopted, it would deny organizations like ours the right to advocate on behalf of individuals expressing, *inter alia*, sincerely held religious and moral beliefs regarding sexual conduct and national sovereignty, while simultaneously compelling advocacy on behalf of individuals promoting, *inter alia*, Islamic sharia and satanism.	the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-52t	Law Professors (Zitrin) (09-21-16)	Y	A		See X-2016-52t Law Professors (Zitrin) dated August 24, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-52t for the Commission's response to the Law Professors' comments.
X-2016-84a	Hadley, Sheldon (09-26-16)	N	D		No explanation provided.	No response necessary.
X-2016-85	Black Women Lawyers Association of Los Angeles (BWL) (Husband) (09-26-16)	Y	A		BWL strongly supports the elimination of the pre-discipline adjudication requirement. However, we believe paragraph	The Commission believes that the structure of the Rule and the use of the term "by reference to" in paragraph (c)(3) make clear that

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					(c)(3) should be revised as follows: "(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public. Provisions in such statutes and decisions defining unlawful practices and conduct are to be applied in reference to this rule without regard to other provisions in the statutes and/or decisions that: (a) limit their applicability to employment relationships or the offering of goods and services to the public; (b) limit coverage to entities with a certain minimum number of employees; or (c) set forth other non-substantive restrictions on the scope of coverage of those statutes or decisions We believe this, or similar language, is necessary to make the Rule consistent with both Comment [6], and the Commission's intent to broaden the applicability of the Rule to situations outside of the law practice employment context.	provisions of the type cited by the BWL are not incorporated into the definition of "unlawful." As a result, the Commission believes that former Comment [6] (now Comment [8]) is consistent with the Rule. The Commission believes that the more general statement in former Comment [6] (now Comment [8]) better serves the underlying purpose than efforts to define more specifically (with the risk of potentially missing some) the types of provisions that are not incorporated within the Rule's definition of "unlawful."

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					In sum, we strongly support adoption of ALT 1, with modifications to clarify the terms "unlawful" and "unlawfully" so they are consistent with Comment [6] and the broader scope of the amended rule.	
X-2016-88	St. Lawrence, Isaac; Hartsock, Robert; and McMurtrey, Gene (09-27-16)	N	D		Proposed Rule 8.4.1 undermines the recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation. The proposed rule will result in violation of other rules of professional conduct. The proposed rule creates unacceptable conflicts of interest between the attorney and client. The proposed rule fails to respect attorneys' consciences and professional judgments. The proposed rule in unconstitutional in that it chills and compels speech; and it is void for vagueness. A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bas discipline mechanism's engage.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this

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						eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-90	Equal Rights Advocates (Ramey) (09-27-16)	N	D		We strongly oppose the inclusion of the requirement of unlawfulness contained in both proposed versions of Rule 8.4.1. Inclusion of this requirement runs counter to the Rules' stated purpose of mandating professional discipline for conduct that serves to "undermine confidence in the legal profession" and that is "contrary to the fundamental principle that all people are created equal." The unlawfulness requirement is also plainly inconsistent with both the spirit	The Commission believes that the proposed Rule reflects a significant step forward from the current California rule. The Commission believes that inclusion of the requirement of "unlawfulness" is appropriate both given its charter to draft clear rules of discipline and to provide additional assurance that the Rule cannot be applied in ways that would intrude on Constitutional protections or improperly limit a lawyer's ability to select clients.

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					and the letter of the applicable provisions of Rule 2.3(C) of the Model Code of Judicial Conduct and with newly adopted ABA Model Rule 8.4(g) and the corresponding rules of the majority of the 23 states which have adopted antidiscrimination rules. The carving out of harmful attorney conduct which is discriminatory in nature so as to provide much more limited access to, or deterrence by, the legal discipline system than for other misconduct, and, ultimately, for much narrower recourse for victims, who by definition are members of groups historically mistreated by our own profession and the broader society, has no reasonable justification. As officers of the court, lawyers are held to a higher standard than just not being crooks or scofflaws. We stand at the gates of the legal system, charged with upholding the rule of law, and ensuring equal justice under the law for all, and with preserving the public trust in the justice system that ethical conduct engenders. Lawyers are held accountable when they violate	

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					that trust, and, irrespective of whether or not they have broken a law, they undeniably do actionable violence to the profession's commitment to equal justice and fundamental fairness when they discriminate, harass or retaliate against members of protected groups in the course of client representation. We respectfully urge that the Board of Trustees reject the "unlawfulness" requirement as currently contained in proposed Rule 8.4.1.	
X-2016-91a	Secord, James (09-27-16)	N	D		[No comment provided.]	No response required.
X-2016-92a	Home School Legal Defense Association (Estrada) (09-27-16)	Y	D		[No comment provided.]	No response required.
X-2016-95a	Green, Samuel (09-27-16)	N	D		I am strongly opposed to this proposed rule. As noted by others, proposed Rule 8.4.1 is likely to adversely impact the relationship between attorneys and their clients, the ability of attorneys to faithfully execute their duties, the ability of citizens to obtain zealous representation, and the ability of attorneys to exercise their constitutional rights.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of

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						the California Constitution. The Commission does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-106	The National Center for Law & Policy (Broyles) (09-27-16)	Y	D		Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further,

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					The proposed rule fails to respect attorneys' consciences & professional judgment. The proposed rule undermines attorneys' duties of diligence and zealous client representation. The proposed rule creates unacceptable conflicts of interest between the attorney and the client. The proposed rule is unconstitutional because it will chill and compel speech. The proposed rule is void for vagueness. The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests. A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.	Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the

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						Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal.. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-100	Clements, Richard (09-27-16)	N	D		I have reviewed both drafts. I am exceedingly troubled with the prospect of possibly denying representation to one of a "perceived" class. The undefined words "harassed" and "perceived" smack more of social engineering rather than the practice of law. Example: Would the State Bar really prosecute former Attorney General Jerry Brown and present Attorney General Kamala Harris for their refusal to represent the proponents of former Proposition 8 (the non action was criticized by Irvine Law School Dean Erwin Chemerinsky at the time)? I reserve the right to decline representation to anyone who falls outside my area of practice regardless of perception. If, during an intake conference, I determine that the subject should be the subject of scrutiny and evaluated by a qualified	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					proctologist I still reserve the right irregardless of perception. To characterize these attempts at language is to attempt to regulate fog and penalize for not doing so. What is really going on anyway?	required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-99	State Bar Council on Access & Fairness (COAF) (Downing) (09-27-16)	Y	M		COAF recommends the adoption of Rule 8.4.1 (ALT1) with the below minor amendment: (e) Upon issuing a notice of a disciplinary charge under this Rule: (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing, State Solicitor General at the Office of	The Commission declined to make the requested change because the breadth of complaints that would be sent to the State Solicitor General at the Office of the Attorney General would not be appropriate.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					the Attorney General, and the United States Department of Justice, Coordination and Review Section. The rationale for the recommendation is as follows. In addition to the anti-discrimination protections under the employment provisions of the FEHA, ALT 1 also implicates antidiscrimination protections under the public accommodations provisions of the Unruh Act.	
X-2016-101a	Gossling, Doug (09-27-16)	N	D		Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties. The proposed rule fails to respect attorneys' consciences & professional judgment. The proposed rule undermines attorneys' duties of diligence and zealous client representation. The proposed rule creates unacceptable conflicts of interest between the attorney and the client.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The proposed rule is unconstitutional because it will chill and compel speech. The proposed rule is void for vagueness. The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests. A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.	lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-118a	Dexter, Scott (09-27-16)	N	D		No explanation provided.	No response necessary.

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X-2016	Bar Association of San Francisco Legal Ethics Committee (BASF) (Banola) (09-27-16)	Y	A		BASF supports expanding current Rule 2-400 to cover discrimination or harassment in representing a client. BASF supports the removal of the pre-adjudication precondition. To allow a precondition to be imposed as to this rule alone is discriminatory and biased in and of itself because this rule would be singled out and treated differently than all other rules.	No response required.
X-2016-104-bo	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		1. OCTC supports subsections (a) and (d) of this rule. 2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require "knowingly" for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)	1. No response required. 2. 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 the referenced paragraphs and Comment [5] (formerly Comment [3]), which address not a lawyer's own discrimination or harassment, but rather a lawyer's failure to address discrimination or harassment engaged in by others, and will not encourage willful blindness or failure to investigate.

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					3. OCTC is concerned that subsection (e) and Comment 4 places requirements on the State Bar and is not a disciplinable offense. The purpose of the Rules of Professional Conduct is to regulate the practice of law, not to regulate the State Bar. This is beyond the direction and the authority the Supreme Court provided the Commission. Moreover, subsection (e) is vague as to which division of the State Bar is required to provide this information, the State Bar Court, OCTC, General Counsel, or some other unit.	3. The Commission has modified subsection (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar.
					4. OCTC supports Comments 2.	4. No response required.
					5. OCTC is concerned that Comments 1 and 5 are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule.	5. The Commission believes these Comments fit within its charter. Comment [1] provides useful guidance regarding the interplay between this Rule and the supervision provisions of Rules 5.1 and 5.3. Comment [7] (formerly Comment [5]) provides the underlying purpose of subsection (e) and (f) and so provides guidance for their interpretation and application.
					6. OCTC is concerned that Comment 3 is unnecessary.	6. As demonstrated by other public comments, the

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					Further, OCTC is concerned with the use of the term "knowingly" in this Comment for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)	Commission believes Comment [5] (formerly Comment [3]) is necessary to make clear that what constitutes a failure to advocate meaningful corrective action may vary with the circumstances, including in particular a lawyer's seniority and position within a firm.
X-2016-107	Sonoma County Women in Law (Winters) (09-27-16)	Y	A		We are happy to see proposed revisions that clarify this rule while emphasizing its importance in this profession. As an organization, we have discussed experiences and frustrations resulting from the inability to enforce this rule and the lack of compliance we have observed from some in the legal industry. We fully agree to the proposed language and support this monumental change.	No response required.
X-2016-109a	Pacific Justice Institute (Snider) (09-27-16)	Y	D		I have provided my name in a letter opposing proposed Rule 8.4.1. However, I also am compelled to write separately to discuss an issue not raised in the letter, namely, the unique impact that such a rule could have on in-	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					house counsel for religious corporations. Subsection b of Rule 8.4.1 places a restriction on attorneys at "law firms." A *law firm* is defined in Rule 1-100. The definition includes the plain meaning of the term, i.e., a combination of lawyers engaged in the practice of law. But the rule reaches far beyond that to capture in-house attorneys working for a "business entity." The term *business entity* has been interpreted broadly by California courts in certain contexts to encompass nonprofit corporations. Although the rules are not a picture of clarity regarding the term *law firm*, the fear is that the proposed rule will act as a riptide that pulls in-house counsel for nonconforming religious nonprofits out to sea to drown in the waters of political correctness. In relation to the operation of a *law firm*, an attorney cannot "refuse to hire" based upon a protected characteristic. In-house counsel is routinely involved in some aspect of the hiring process for any given employee and thus would fall under the proposed rule. Lawyers that work for faith-	law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission believes that these provisions eliminate any possibility that the Rule would improperly intrude on employment decisions that implicate Constitutional protections relating to religious beliefs.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					based institutions would find themselves in an untenable position. Religiously conservative entities typically require all employees to agree with the views of the entity's respective religion and conduct themselves in a manner that is consistent with those beliefs. The member of the Bar working for such an entity has a primary task of providing all necessary legal protections to safeguard the religious rights and identity of the religious institution.	
X-2016-110	Homeless Action Center (Gilg) (09-27-16)	Y	NI		Homeless Action Center hereby agrees with and signs onto the comment submitted by Equal Rights Advocates.	See response to X-2016-90.
X-2016-112	Monroe, Bruce (09-27-16)	N	D		Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties. The proposed rule fails to respect attorneys' consciences & professional judgment. The proposed rule undermines attorneys' duties of diligence and zealous client representation.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission does not believe there is any even

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The proposed rule creates unacceptable conflicts of interest between the attorney and the client. The proposed rule is unconstitutional because it will chill and compel speech. The proposed rule is void for vagueness. The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests. A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.	potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt

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						ABA Model Rule 8.4(g).
X-2016-113a	Christian Legal Society (Colby) (09-27-16)	Y	D		Rule 2-400 should be preserved as written because, for over two decades, it has done an excellent job of protecting the public and the legal profession. Rule 2-400 works and both alternative versions of proposed rule 8.4.1 would drastically and needlessly change 2-400. Proposed Rule 8.4.1 would have a negative impact on attorneys' First Amendment rights. The First Amendment protects lawyers' freedom of speech and free exercise of religion. The proposed rule unconstitutionally chills attorneys' First Amendment rights. Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule were adopted. The proposed rule fails to define "harass" and, therefore, does not pass constitutional muster. The proposed rule would have a negative impact on attorneys' Fourteenth Amendment rights.	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission believes that these provisions ensure that the Rule is not unconstitutionally vague, will not unconstitutionally chill the exercise of Constitutional rights relating to free speech and religion or Fourteenth Amendment rights, and cannot be interpreted or applied to impose discipline for service on boards of religious institutions. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					The proposed rule is unconstitutionally vague.	away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-116a	Hamilton, Thomas (09-28-16)	N	D		[No comment provided.]	No response required.
X-2016-119	Garret, Amy (09-27-16)	N	D		I am respecting requesting that the Commission reject both alternatives of Proposed Rule 8.4.1.	A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g).
X-2016-121i	California Commission on Access to Justice (09-23-16)	Y	A		The Access Commission supports proposed Rule 8.4.1. We agree that lawyers should not engage in harassment or discrimination or be permitted to terminate or refuse representation of a client on the basis of any protected characteristic or for the purpose of retaliation.	No response required.
X-2016-128	Morse, Gregory (09-27-16)	N	D		While we believe that highly held intentions are admirable and we all have concern for those values, these proposed versions	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination,

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					are not the way within the purview of the Rules of Professional Conduct to manifest such an infringement on lawyer autonomy in representing their clients. First, those firms and attorneys who represent First Amendment issues; freedom of expression, religious workers and entities, victims of civil rights violations to name a few, will have their rights of representation compromised. Currently, protections exist that prohibit government from taking discriminatory action against a person on the basis that such person believes or acts in accordance with a religious belief or moral conviction. These proposed rules would fly in the face of those protections, arguably invalidating those protections with imposition of these proposed rules. Congress and the courts are the place to address these issues, not the State Bar administration. What interested parties cannot achieve in the courts, they will try and control or stifle the messenger of court combatants through State Bar regulation.	harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission has modified the proposed comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/ NI[1]	Rule Section or Cmt.	Comment	RRC Response
					A lawyer has the right to determine whom and how they will represent their client. Lawyers should not be subject to being set up by some ambiguous, yet to be determined limitations based in the future, interpretation of these versions by some vagaries, with the potential to lose their license to practice law. This type of rule could easily be commandeered by special interests to prosecute lawyers without specific hard facts, to promote their own special interests. Lawyers could in fact be prosecuted on minimal trumped evidence without true recourse. Prosecution could occur in the media and press prior to proper review resulting in libelous career character assassination.	
X-2016-114	Legal Services for Prisoners with Children (Barry) (09-27-16)	Y	D		Legal Services for Prisoners with Children hereby agrees with and signs onto the comment submitted by Equal Rights Advocates.	See response to X-2016-90. [Note: This comment was originally submitted for proposed Rule 4.1 but was subsequently moved to the 8.4.1 table because of the substance of the comment.]
X-2016-108b	Law Foundation of Silicon Valley (Brunner) (09-27-16)	Y	M		Law Foundation of Silicon Valley adopts the same comment submitted by Equal Rights Advocates.	See response to X-2016-90.

THE STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT
180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639
TELEPHONE: (415) 538-2167

State Bar Commission for the Revision of the Rules of Professional Conduct

RULES AND CONCEPTS THAT WERE CONSIDERED BUT ARE NOT RECOMMENDED FOR ADOPTION

Introduction:

The State Bar's Special Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Rules of Professional Conduct. The Commission considered each of the current California rules and the comparable rule, if any, adopted by a preponderance of United States jurisdictions. In many instances, the comparable rule adopted was identical to, or a variation of, an American Bar Association ("ABA") Model Rule. The examinations of Model Rules that do not have a current California counterpart were conducted in accordance with the Commission Charter that focuses on the rules as disciplinary standards and discourages the adoption of aspirational provisions. With this focus, the Commission determined not to recommend the adoption of eight Model Rules. The following discussion identifies these rules and summarizes the Commission's reasoning for not recommending adoption.

ABA Model Rules Considered but not Recommended for Adoption

Model Rule	Title
2.3	Evaluation for Use by Third Parties
5.7	Responsibilities Regarding Law Related Services
6.1	Voluntary Pro Bono Publico Service
6.2	Accepting Appointments
6.4	Law Reform Activities
7.6	Political Contributions to Obtain Government Engagements or Appointments by Judges
8.3	Reporting Professional Misconduct

1. Model Rule 2.3 Evaluation for Use by Third Parties

Model Rule 2.3 provides:

> (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
>
> (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
>
> (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to

> have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.
>
> *Obtaining Client's Informed Consent*
>
> [5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).
>
> *Financial Auditors' Requests for Information*
>
> [6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 2.3 are the following.

(1) The rule is too vague and ambiguous for purposes of lawyer discipline. Consequently, although it arguably could provide guidance, it would be problematic as a disciplinary standard. For example, the following key phrases in paragraph (a) are unclear for disciplinary purposes: "evaluation of a matter affecting a client;" and "compatible with other aspects of the lawyer's relationship with the client."

(2) In comparison with the counterpart provision in the Restatement (§95), the versions of Model Rule 2.3 found in state variations often added rule language or comments in an apparent effort to articulate a more precise duty.

(3) Regardless of the precise language, policy concerns would remain. For example, research has revealed that the rule is more likely to be applied as a default civil standard in assessing whether a lawyer was negligent in preparing a third party opinion letter.

In addition to the foregoing, the Commission observed that both the current rules and case law, as well as the proposed new rules cover the conduct at issue in Model Rule 2.3. In particular, the conflict of interest rules and the duty of loyalty cases cover that conduct, and, more specifically, proposed rule 1.7(b) [3-310(B)] imparts the informed written consent requirement imposed by Model Rule 2.3(b). Proposing a new rule patterned on Model Rule 2.3 would thus be duplicative and unnecessary. Of some concern to the Commission was the fact that a majority of jurisdictions have adopted Model Rule 2.3. However, this was assuaged by the following information from the ABA Annotated Model Rules section on Model Rule 2.3 that reveals that the conduct covered by the rule rarely, if ever, arises in disciplinary cases:

> Rule 2.3 itself deals only with the lawyer's duty to the client, addressing the circumstances under which a lawyer may provide an evaluation to a third person and the extent to which information relating to the evaluation may be disclosed. The comment, however, goes further and provides guidance on information the evaluation may include, and how to deal with limitations on that information. The

comment also points out that a lawyer may have a legal duty to the recipient of the evaluation, but that issues related to that legal duty are beyond the scope of the rule. In fact, it is those legal duties to third persons, as well as the lawyer's obligations under a variety of government regulations, that have created most of the case law and commentary on the subject. There is virtually no reported disciplinary authority construing and applying Rule 2.3.

The Commission's Charter emphasizes the function of the California rules as enforceable disciplinary standards. Although Model Rule 2.3 is a rule adopted in a preponderance of jurisdictions, it does not appear to function as a disciplinary rule.

At the Commission's June 2-3, 2016 meeting, the Commission members unanimously approved a recommendation not to adopt a version of Model Rule 2.3 (14-0-0).

2. Model Rule 5.7 Responsibilities Regarding Law Related Services

Model Rule 5.7 provides:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to

lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, the conduct of nonlawyer employees in the distinct

entity that the lawyer controls, complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 5.7 are the following.

(1) Appropriate guidance is currently provided by other California authorities, including case law and ethics opinions. There appears to be no reason to supplement that authority.[1]

(2) Proposed rule 1.0, Comment [2], provides information that, along with the existing California law described in note 1, provides sufficient guidance to attorneys that they are subject to discipline for conduct in providing law-related services. Comment [2] states: "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."

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[1] See, e.g., *Libarian v. State Bar* (1944) 21 Cal.2d 862, 865 ("One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter."); *Marquette v. State Bar* (1988) 44 Cal.3d 253, 262 (attorney disciplined for violating Bus. & Prof. Code § 6106 for perjuring himself on a lease application even though application "did not relate to an issue bearing on the conduct of an attorney-client relationship."); *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 ("when an attorney serves a single client both as an attorney and as one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services."); see also, Cal. State Bar Opn. Nos. 1982-69, 1995-141, and 1999-154 which address an attorney's ethical responsibilities when rendering non-legal services to a client. Finally, some Business and Professions Code sections regulate the activities of a lawyer who also provides non-legal ancillary business services to a client, for example: Bus. & Prof. Code § 6009 (attorney lobbyists); Bus. & Prof. Code § 6009.3 (attorney tax preparers); Bus. & Prof. Code § 6077.5 (attorney debt collector); Bus. & Prof. Code § 6106.7 (attorney sports agent); and Bus. & Prof. Code § 6175.3 (attorney selling "financial products").

(3) The Commission is not aware of any problems regarding the inability to discipline lawyers due to the absence of Model Rule 5.7 in California.

At the Commission's June 2-3, 2016 meeting, the Commission members unanimously approved a recommendation not to adopt a version of Model Rule 5.7 (12-0-0).

3. Model Rule 6.1 Voluntary Pro Bono Publico Service

Model Rule 6.1 provides:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.
>
> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.
>
> **Comment**
>
> [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or

in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

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 by the Board primarily because the aspirational nature of the proposed rule conflicted with the focus of the Commission's Charter on rules that will set minimal standards for discipline. Nevertheless, the Commission subsequently considered and adopted a new Comment [5] to proposed rule 1.0 (Purpose and Function of the Rules of Professional Conduct). This Comment provides that:

[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. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

At the Commission's June 2-3, 2016 meeting, the Commission members approved the recommendation to adopt new Comment [5] to rule 1.0. (13-1-0)

Note: A member of the Commission submitted a written dissent to the above action. Refer to the Commission's executive summary of proposed rule 1.0 found in Attachment 2 to Board of Trustees Open Agenda Item 701 JUNE 2016 posted on the State Bar's website at: http://board.calbar.ca.gov/Agenda.aspx?id=11219&t=0&s=false

At the Commission's October 21-22, 2016 meeting, the Commission considered public comments received on Model Rule 6.1. The public comments included support for adoption of some version of Model Rule 6.1. A recommendation to consider a version of Model Rule 6.1 was made but failed by a vote of 1 yes, 13 no, and no abstentions. However, in connection with the Commission's consideration of public comments on proposed rule 1.0, the Commission revised proposed Comment [5] to rule 1.0 to include a clarifying statement that a lawyer may fulfill pro bono responsibilities by providing financial support to organizations providing free legal services.

4. Model Rule 6.2 Accepting Appointments

Model Rule 6.2 provides:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
>
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
>
> **Comment**
>
> [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.
>
> *Appointed Counsel*
>
> [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

> [3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

The Commission is not recommending a version of Model Rule 6.2 primarily because the rule is ambiguous in regards to its scope. It is uncertain whether the Model Rule is intended to apply exclusively to pro bono appointments by a tribunal or also to the conduct of lawyers who serve on panels and accept appointments with compensation.[2] In addition, while the rule is consistent with a lawyer's responsibilities under Business and Professions Code section 6068(h), the terms of the rule are more detailed than existing law such as section 6068(h) and might have the effect of constraining both lawyers and judges in taking a position on a lawyer's refusal to accept an appointment. For example, the rule includes the concept of a "repugnant client" and it is uncertain that existing California law or policy recognizes such a subjective assessment.

At the Commission's November 13-14, 2015 meeting, a motion to recommend the adoption of a version of Model Rule 6.2 failed (0-16-1).

At the Commission's October 21-22, 2016 meeting, the Commission considered a public comment received on Model Rule 6.2. The public comment supported adoption of some version of Model Rule 6.2 as an access to justice issue. The Commission carefully considered the need for a rule and determined that given the rarity in California of appointments without compensation and the existence of Bus. & Prof. Code § 6068(h), the absence of such a rule would not have a substantial impact on access to justice. After discussion, no member of the Commission recommended that a version of Model Rule 6.2 be considered for adoption.

5. Model Rule 6.4 Law Reform Activities Affecting Client Interests

Model Rule 6.4 provides:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.
>
> **Comment**
>
> [1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

[2] Following inquiry, ABA Center on Professional Responsibility staff provided background materials indicating that rule 6.2 was intended to address the situation where a judge appoints a lawyer to represent a client pro bono and not intended to regulate public defenders and/or members of a paid appointment panel. The materials received are on file with Commission staff.

The Commission is not recommending adoption of a version of Model Rule 6.4 due to concerns about the following unresolved issues:

(1) Whether the term “law reform organization” should be defined. For example, does the term include legislative bodies like Congress? Does the rule encompass reform activities regarding rules or is it limited to legislation? Does the organization to which the lawyer would belong need to have the power to promulgate, as opposed to recommend, changes in the law?);

(2) What does “materially benefitted” in the rule’s second sentence mean and how direct a benefit must it be? A further question is whether the immediacy of the benefit matters since the rule is intended to encourage lawyer participation in such activities; and

(3) If the client would be materially harmed (as opposed to benefitted), the second sentence of the rule arguably would not apply, and, if so, what rule would protect the client’s interest, if any. (Cf, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 [duty to disclose any personal relationship or interest that the lawyer knew or reasonably should have known could substantially affect the exercise of his professional judgment].)

At the Commission’s November 13-14, 2016 meeting, a motion to recommend the adoption of a version of Model Rule 6.4 failed (0-14-0).

6. Model Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Model Rule 7.6 provides:

> A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
>
> **Comment**
>
> [1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.
>
> [2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.
>
> [3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or

appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 7.6 are the following.

(1) There is no evidence there is a problem in California that requires such a rule. (E.g., no public comment was received on the rule by the first Commission except two comments that supported its rejection.)

(2) The substance of Model Rule 7.6 is addressed adequately by Business and Professions Code section 6106 under the concept of moral turpitude. This encompasses various forms of egregious misconduct, including acts of dishonesty and corruption, and criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials.

(3) Very few jurisdictions have adopted such a rule (only eight jurisdictions have adopted a rule derived from Model Rule 7.6).

(4) The rule requires proof of the lawyer's "purpose" in giving money, making it difficult to prove a violation. The difficulty of proving "purpose" makes the rule a poor candidate as a minimum standard of discipline as contemplated by the Commission's Charter.

(5) The rule might be unconstitutional in light of *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310.

(6) The rule originates from a local issue that confronted the Association of the Bar of the City of New York. That Bar Association was the principal proponent in advocating for the ABA's adoption of a rule in 1997.

At the Commission's March 31–April 1, 2016 meeting, the Commission members unanimously approved the recommendation not to adopt a version of Model Rule 7.6 (14-0-0).

7. Model Rule 8.3 Reporting Professional Misconduct

Model Rule 8.3 provides:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.
>
> **Comment**
>
> [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
>
> [2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.
>
> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.
>
> [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.
>
> [5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a

lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 8.3 are the following.

(1) Despite the recognition that reporting could be trumped by the duty of confidentiality with respect to information learned in the course of representation of a client, there remains a potential for conflict with that duty to the extent lawyers might feel obligated to seek a waiver of confidentiality to further the reporting interests of the lawyer rather than the client's own interests;

(2) The rule would pose a potential for conflicts with a lawyer's duty of loyalty in those specific instances where making the report would be detrimental to a current or former client's interests (for example, causing animosity with opposing counsel as the subject of a report that leads to the unwinding of a settlement that the client might otherwise have consummated); and

(3) The rule might be construed as inconsistent with the discretionary reporting policy reflected in Canon 3D(2) of the California Code of Judicial Ethics that states: "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which ***may include reporting the violation to the appropriate authority***." (Emphasis added.)

At the Commission's June 2-3, 2016 meeting, the Commission members approved a recommendation not to adopt a version of Model Rule 8.3 (10-4-0).