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To: Commission for Revision of the Rules of Professional Conduct

From: Elliot L. Bien

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Re: Options for Addressing Plagiarism

Because the Rule 5-200 drafting team prefers the approach of Model Rule 3.3, and cites Rule 8.4 as another rule relevant to plagiarism, the Commission could usefully address that subject in one or both of the following ways.

1. Add language to Rule 3.3 (Candor Toward The Tribunal)

A new subsection (3) could be added to paragraph (a) as follows:

(a) A lawyer shall not knowingly:

....

(3) in any submission to a tribunal, use language authored by another without attribution unless the true author had so permitted.

2. Add comment to Rule 8.4 (Misconduct)

A comment could be added to the rule as adopted by the Commission in January 2016 (copy follows) because paragraph (c) cites dishonesty and similar misconduct, and paragraph (d) cites conduct prejudicial to the administration of justice. Thus, a new comment could state:

Plagiarism in any setting can violate paragraph (c), but if submitted to a tribunal it can also violate paragraph (d). See *In re Glass* (2014) 58 Cal.4th 500, 524 (“[h]onesty is absolutely fundamental in the practice of law . . . [and] the place it holds in the administration of justice” [cit. and internal quotes. omitted]).

**PROPOSED RULE 1-120 [8.4] OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING

Rule 8.4 Misconduct

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 a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

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

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

[3] 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.

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