

Attachment 2

**Rules Revision Commission Executive Summaries
Proposed New & Amended Rules of Professional Conduct**

**RULES REVISION COMMISSION EXECUTIVE SUMMARIES
PROPOSED NEW & AMENDED RULES OF PROFESSIONAL CONDUCT**

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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

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.

January 22, 2016 meeting, the Commission determined that a proposed California version of Model Rule 6.1 should not be recommended for adoption because that rule would be an aspirational standard rather than a disciplinary rule.² The Commission's Charter provides that 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.

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.

**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 June 2 – 3, 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. *Id.*; *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 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. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

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

EXECUTIVE SUMMARY

In connection with consideration of current rule 1-100 (Rules of Professional Conduct, In General), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated current rule 1-100(B) (Definitions) in accordance with the Commission Charter, with a focus on the function of the entire set of rules as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, ABA Model Rule 1.0 (Terminology), as well as the Terminology section of the California Code of Judicial Ethics. The result of this evaluation is proposed rule 1.0.1 (Terminology) which expands upon the five definitions currently contained in rule 1-100(B). 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 provides a global terminology section with definitions of terms that are used throughout the proposed Rules of Professional Conduct. Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed rule 1.0.1 would obviate a lawyer’s need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the rules.

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

Paragraph (a) of proposed rule 1.0.1 defines “belief” of “believes” and is nearly identical to ABA Model Rule 1.0(a). The only changes are non-substantive and they include substituting “means”

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

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

for “denotes,”³ and the present tense “supposes” for “supposed” to correspond to the tense of “believes.”

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

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

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

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

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

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

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

Paragraph (h) defines “reasonable” or “reasonably” and is identical to ABA Model Rule 1.0(h).

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

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

⁵ Maryland, Michigan, and South Carolina have similarly removed the phrase “authorized to.”

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

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

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

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

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

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

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

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

Rule 1.0.1 [1-100(B)] Terminology

(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)

- (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.

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-110 (Failing to Act Competently) 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 1.1 (Competence). The result of the Commission’s evaluation is proposed rule 1.1 (Competence). 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 1.1 was whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence in order to substitute a standard like Model Rule 1.1 which states affirmatively that a lawyer must provide competent representation to a client. The Commission is recommending that the current California standard be retained as this is consistent with applicable Supreme Court precedent that has been repeatedly applied in State Bar Court disciplinary proceedings.

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

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

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

Third, the Commission is recommending deletion of the existing Discussion paragraph that provides case citations addressing a lawyer's supervision obligations. Rather than relying on case citations, the Commission is recommending three new separate rules on supervision (see the executive summaries of proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistants). This is consistent with the approach to the duty of supervision in most jurisdictions.

Rule 1.1 [3-110] Competence

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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.

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-210 (Advising the Violation of Law) 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 1.2 (Scope Of Representation and Allocation Of Authority Between Client and Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although this proposed rule has no direct counterpart in the current California Rules of Professional Conduct, the concept of limiting the scope of representation is addressed in California Rules of Court 3.35-3.37 & 5.425. The concept of allocation of authority is derived from the California Constitution, the California Penal Code, and California Supreme Court precedent. The result of this evaluation is proposed rule 1.2 (Scope of Representation and Allocation of Authority). 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 concepts addressed in current rule 3-210 are carried forward with modification in proposed rule 1.2.1. An executive summary for proposed rule 1.2.1 is provided separately. Proposed rule 1.2 addresses the allocation of authority within the lawyer-client relationship and the ability of a lawyer to undertake representation on a limited scope basis.

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

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

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

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

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

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

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

**Rule 1.2 [3-210] Scope of Representation and Allocation of Authority
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (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).

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.

**Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (a) A lawyer shall not advise or knowingly* assist a client in the 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.
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.

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 duty of confidentiality as provided in Rule 1.6 and Business and Professions Code § 6068(e)(1). 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) 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).

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

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.

preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard³ 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.

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).

Illinois Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.3: Diligence,” revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf

Thirty-nine states have adopted Model Rule 1.3 verbatim.⁴ Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.⁵ Two states have adopted a version of the rule that is substantially different to Model Rule 1.3.⁶

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 November 13 – 14, 2015 – Clean Version)

- (a) A lawyer shall not intentionally, recklessly, 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4
(Current Rule 3-500)
Communication with Clients

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-500 (Communication) 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 1.4 (Communications). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 1.4 (Communication with Clients). 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 1.4 is generally consistent with current rule 3-500 but has adopted clarifying language from ABA Model Rule 1.4 which has been adopted by the majority of jurisdictions. This language is intended to enhance public protection by more clearly stating a lawyer’s obligations to clients with regard to communication.

Paragraph (a)(1) provides a duty to inform clients when written disclosure or informed consent is required.

Paragraph (a)(2) provides a duty to discuss the means by which to accomplish a client’s representation objectives.

Paragraph (a)(3) most closely resembles current rule 3-500 and provides a duty to keep the client reasonably informed about significant developments relating to the representation, including providing access to significant documents.

Paragraph (a)(4) requires a lawyer to advise the client about any ethical limitations the lawyer faces when a client expects assistance barred by the rules or the law.

Paragraph (b) provides a duty to sufficiently explain a matter to a client so that the client can make informed decisions regarding the representation.

Paragraph (c) permits a lawyer to delay transmission of information to the client if doing so would prevent a client from harming himself or others.

Paragraph (d) provides that a lawyer’s obligation to provide information or documents is subject to any applicable order, agreement, or law.

Comment [1] provides that a lawyer will not be disciplined for failing to disclose insignificant or irrelevant information to a client.

Comment [2] provides that a lawyer may provide documents or information electronically and that the rule does not prevent the attorney for recouping expenses for such in a subsequent legal proceeding.

Comment [3] provides that paragraph (c) applies only during the representation and does not alter a lawyer's duties at the termination of the representation.

Comment [4] provides that the rule does not affect a lawyer's obligation to provide work product to a client.

Rule 1.4 [3-500] Communication with Clients
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

- (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,* as defined in Rule 1.0.1(e), 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 statutory limitation.

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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.1
(Current Rule 3-510)
Communication of Settlement Offers

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-510 (Communication of Settlement Offer) 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 light of the fact that the American Bar Association (“ABA”) Model Rules have no black letter rule on a lawyer’s duty to communicate settlement offers, the Commission considered approaches taken in other national jurisdictions with regard to communication of settlement offers. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 1.4.1 (Communication of Settlement Offers). 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 1.4.1 carries forward the substance of current rule 3-510 but has been renumbered to correspond to the ABA Model Rules. The renumbering will help lawyers from other jurisdictions authorized to practice law in California to more easily find corresponding California rules to aid in their determination of whether California imposes different duties. Moreover, it will help California lawyers research case law and ethics opinions that address corresponding rules in other jurisdictions. This will assist California lawyers in complying with their duties, particularly when California does not have such authority interpreting the California rule.

Paragraph (a)(1) provides a duty to promptly inform criminal clients regarding certain enumerated settlement offers. Paragraph (a)(1) would eliminate any ambiguity from current rule 3-510 about whether dispositive offers that fall short of a “plea bargain,” e.g., offers made in a pre-charge or pre-indictment context, must also be communicated to a client.

Paragraph (a)(2) carries forward the language of current rule 3-510 and provides a duty to promptly inform a client regarding a written settlement offer in non-criminal matters.

Paragraph (b) carries forward the language of current rule 3-510 and defines to whom a lawyer must communicate settlement offers for purposes of this rule.

The comment carries forward part of the discussion in current rule 3-510 and provides a duty to communicate oral settlement offers in civil cases if the offer constitutes a “significant development” pursuant to proposed rule 1.4.

Rule 1.4.1 [3-510] Communication of Settlement Offers
(Commission’s Proposed Rule Adopted on August 14, 2015 – Clean Version)

- (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.

Note: [*] indicates that a reference to a specific subparagraph will be included after the referenced rule has been completed by the Commission.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.2
(Current Rule 3-410)
Disclosure of Professional Liability Insurance

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-410 (Disclosure of Professional Liability Insurance) 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”) Model Court Rule on Insurance Disclosure. The result of the Commission’s evaluation is proposed rule 1.4.2 (Disclosure of Professional Liability Insurance). 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.

Current rule 3-410 requires a lawyer who does not have professional liability insurance to disclose that fact to the lawyer’s clients. The current rule exempts government lawyers and in-house counsel with regard to the representation of their employer. There is no counterpart to rule 3-410 in the ABA Model Rules. In addition, the ABA Model Court Rule on Insurance Disclosure employs a different approach in not requiring a lawyer to disclose the fact that he or she lacks professional liability insurance directly to his or her client but rather requires a report to the highest court (of the respective jurisdiction) whether he or she is currently covered by professional liability insurance. The reported information is then made available to the public. The Commission is not recommending a change to the approach and policy of the ABA Model Court Rule. The Commission believes that clients ought to receive direct disclosure from a lawyer.

The Commission is not recommending any substantive changes to the current rule. However, the Commission is recommending non-substantive amendments that are intended to make the rule easier to understand. These changes include combining into one paragraph all of the current provisions that identify situations where the rule is not applicable. Another clarifying change is to substitute the phrase “reasonably should know” for “should know” as the former is a term that is defined in proposed rule 1.0.1 (Terminology). Similarly, non-substantive, mostly stylistic, amendments are recommended in the Comments.

Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

- (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.

**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.

Rule 1.5 [4-200] Fees for Legal Services

(Commission's Proposed Rule Adopted on September 25 – 26, 2015 – 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 enter into an arrangement 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 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.

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] 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] A division of fees among lawyers is governed by Rule 1.5.1.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5.1
(Current Rule 2-200)
Fee Divisions Among Lawyers

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 2-200 (Financial Arrangements Among Lawyers) 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 1.5(e) (concerning fee divisions among lawyers) and the Restatement of Law Governing Lawyers counterpart, Restatement § 47 (Fee Splitting Between Lawyers Not In The Same Firm). The result of the Commission’s evaluation is proposed rule 1.5.1 (Fee Divisions Among Lawyers). 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 key topic addressed by this proposed rule is the regulation of fee sharing by lawyers who are not in the same law firm, including typical referral fees. Most states follow Model Rule 1.5(e) that permits lawyers to divide a fee only to the extent that the referring lawyer is compensated for work actually done on the matter or if the referring lawyer assumes joint responsibility for the matter. The California rule is one of a minority of states that permits a “pure referral fee,” i.e., California permits lawyers to be compensated for referring a matter to another lawyer without requiring the referring lawyer’s continued involvement in the matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the California Court of Appeal held that the payment of referral fees is not contrary to public policy. The court stated, “If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields.” (Id. at 921-922.) The Commission’s study found that no case since *Moran* had questioned the policy of permitting pure referral fees. In fact, the ABA’s Ethics 2000 Commission itself had recommended that the Model Rules permit pure referral fees, but that position was rejected by the ABA House of Delegates.

That is not to say that the proposed rule remains the same as the current rule. Rather, proposed rule 1.5.1 implements two material changes intended to increase protection for clients. First, the agreement between the lawyers to divide a fee must now be in writing and second, the client must consent to the division after full disclosure at or near the time that the lawyers enter into the agreement to divide the fee. Under current rule 2-200, there is no express requirement that the agreement between the lawyers be in writing and case law has held that client consent to the fee division need not be obtained until the fee is actually divided, which might not occur until years after the lawyers have entered into their agreement. These changes were made because an underlying reason for the rule is to assure that the client’s representation is not adversely affected as a result of an agreement to divide a fee. Deferring disclosure and client consent to the time the fee is divided denies

the client a meaningful opportunity to consider the concerns the rule is intended to address. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835.)

In addition, proposed rule 1.5.1 tentatively includes the provision in current rule 2-200 permitting a gift or gratuity for a client referral (rule 2-200(B)). This is tentative because the Commission's work on the lawyer advertising and solicitation rule is pending and the provision on gifts or gratuities will be considered for inclusion in that rule.

Rule 1.5.1 [2-200] Fee Divisions Among Lawyers
(Commission's Proposed Rule Adopted on September 25 – 26, 2015 – Clean Version)

- (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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.6
(Current Rule 3-100)
Confidential Information of a Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-100 (Confidential Information of a 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 1.6 (Confidentiality of Information). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.6 (Confidential Information of a Client). 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 1.6 is nearly identical to current rule 3-100 but has been renumbered to correspond to the ABA Model Rules. California’s treatment of lawyer-client confidentiality is unique. Unlike every other jurisdiction in the country, whose statement of a lawyer’s duty of confidentiality is contained in a rule of professional conduct that has been adopted by the jurisdiction’s highest court, California’s duty of confidentiality is contained in a statutory provision passed by the California legislature and enacted in 1871. The history of current rule 3-100 provides insight into proposed rule 1.6. First, because current rule 3-100 is an outgrowth of a legislative amendment to Business and Professions Code § 6068(e), the rule was never intended to function solely as a disciplinary rule, but was instead drafted with the intent of providing guidance to California lawyers on how to proceed when confronted with circumstances addressed in the sole exception to the rule. Understanding this intent helps explain the relatively large number of lengthy comments that this proposed rule contains. Second, the history further suggests that any substantive amendment, including concepts contained in the ABA Model Rules, would require amendment of Business and Professions Code § 6068(e). This is especially true of any express exceptions to the duty of confidentiality and is one of the principal reasons why proposed rule 1.6 contains no major deviations from current rule 3-100.

Paragraph (a)(1) carries forward the language of current rule 3-100 and provides a duty to protect client confidential information to the extent mandated by Business and Professions Code § 6068(e)(1) unless the client gives informed consent or as provided by paragraph (b).

Paragraph (b) carries forward the language of current rule 3-100 and provides that a lawyer may reveal confidential information to the extent necessary to prevent a criminal act resulting in serious bodily injury or death.

Paragraph (c) carries forward the language of current rule 3-100 and provides the steps that a lawyer must take, if reasonable, before disclosing client confidential information.

Paragraph (d) carries forward the language of current rule 3-100 and provides that a lawyer may not disclose any more confidential information than is necessary to prevent a criminal act resulting in serious bodily injury or death

Paragraph (e) carries forward the language of current rule 3-100 and provides that a lawyer does not violate the rule by declining to reveal confidential information permitted by paragraph (b).

Comment [1] provides context for the rule and explains the policy underlying the duty of confidentiality. The term “detrimental subjects” has been substituted for the phrase “legally damaging subject matter” in current rule 3-100. The language is derived from California ethics opinions that have traditionally understood the term “secrets” in Business and Professions Code § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or detrimental to the client.

Comment [2] provides the scope of the information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of confidentiality is broader than the lawyer-client privilege and also includes information acquired by virtue of the representation, regardless of the source, and information protected under the work product doctrine.

Comment [3] explains that the rule provides a narrow exception to the duty of confidentiality derived from Business and Professions Code § 6068(e)(2). Moreover, by distinguishing between “past, completed” and “future or ongoing” criminal acts, the comment provides important guidance to lawyers regarding the scope of the exception.

Comment [4] is a counterpoint to paragraph (e) and provides that a lawyer is not subject to discipline if the lawyer discloses confidential information in compliance with the provisions provided in paragraph (c). The comment also provides the rationale for the provision, i.e., the balance between protecting client confidential information and the prevention of a criminal act resulting in serious bodily injury or death.

Comment [5] provides that there is no duty to disclose confidential information and that the decision to disclose rests solely with the lawyer.

Comment [6] provides critical guidance to lawyers in the form of a list of non-exclusive factors a lawyer should balance in deciding whether to disclose confidential information in order to prevent a criminal act resulting in serious bodily injury or death. The comment further clarifies that the threatened harm need not be imminent for the exception to apply.

Comment [7] provides critical guidance to a lawyer deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act resulting in serious bodily injury or death as required under paragraph (c)(1).

Comment [8] clarifies what is meant by the limiting clause in paragraph (a), “to the extent that the lawyer reasonably believes the disclosure is necessary.” Because of the numerous ways in which a lawyer may disclose confidential information, the comment provides guidance, including examples of relevant circumstances that a lawyer might consider in determining the extent of the permitted disclosure under the circumstances.

Comment [9] requires a lawyer, if reasonable under the circumstances, to inform the client of the lawyer’s ability or decision to disclose confidential information to prevent a criminal act resulting in serious bodily injury or death. The comment provides critical guidance by setting forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made.

Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing a client of the ability or decision to disclose. The comment explains that there is no specific time when the disclosure must be made and provides a range of possibilities.

Comment [11] provides that disclosure of confidential information permitted by paragraph (b) will likely result in a deterioration of the lawyer-client relationship such that withdrawal may be necessary.

Comment [12] provides that other consequences may arise from disclosure permitted by paragraph (b) and identifies other rules a lawyer should consult in determining the lawyer's course of action.

Comment [13] addresses the fact that the rule does not comprehensively address a lawyer's duty of confidentiality and puts the lawyer on notice that there may be other obligations or exceptions not addressed in the rule, none of which the rule is designed to supersede.

Rule 1.6 [3-100] Confidential Information of a Client
(Commission's Proposed Rule Adopted on August 14, 2015 – Clean Version)

- (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 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 of 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 employment or 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 (see Rule 1.16(a)), 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 (Conflicts of Interest: Current Clients) and 1.1 (Competence).)

[13] *Other exceptions to confidentiality under California law.* 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.

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.

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

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.

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.

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

- (a) A lawyer shall not, without informed written consent* from each client, 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, 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 the lawyer's own interests, including when:
 - (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) A lawyer shall not represent a client in a matter in which 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 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.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer

initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. 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.

[6] 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] 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] 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. 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] 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] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.1
(Current Rule 3-300)
Business Transactions with a Client and Pecuniary Interests Adverse to a Client

EXECUTIVE SUMMARY

The Commission 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)).

¹ See Probate Code § 16004(c) which provides that:

A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

² This ambiguity in the current rule is discussed in an ethics alert article by the Committee on Professional Responsibility and Conduct (“COPRAC”) entitled: “Uncertain Ethics Requirements for Attorney Fee Modifications Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement.” The article includes a comment from the Office of the Chief Trial Counsel arguing that all modifications should be regarded as transactions because a current client’s trust and confidence is implicated. The article is posted at: http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf.

The Commission reasoned that the client protection intended by this requirement is not furthered by requiring an advisement in such circumstances because the objective of the requirement is already met, namely the client has retained a lawyer to advise the client on the transaction. In addition, the Commission was concerned that the lawyer's act of giving advisement notwithstanding that the client is already represented by another lawyer might be 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.

Related Model Rule concepts considered in connection with Model Rule 1.8(a).

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:

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."

“A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.”

The 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.

**Rule 1.8.1 [3-300] Business Transactions with a Client and
Pecuniary Interests Adverse to a Client
(Commission’s Proposed Rule Adopted on May 6 – 7, 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 terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that would 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 the lawyer's role.

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] This Rule 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.

[5] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof;

or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.2
(No Current Rule)
Use of Current Client's Information**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-100 (prohibition on disclosure of confidential information) and Business and Professions Code § 6068(e) 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 confidentiality issues as they might arise in a different contexts: Model Rules 1.6 (prohibition on *disclosure* of a *current* client's confidential information), 1.8(b) (prohibition against *use* of confidential information to a current client's disadvantage), and 1.9(c)(1) and (2) (prohibition against *use* of confidentiality to a *former* client's disadvantage and prohibition on *disclosure* of a *former* client's confidential information). The result of the Commission's evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules' framework of having separate rules that regulate different aspects of protecting the confidential information of a lawyer's clients: proposed rule 1.6 (prohibiting disclosure of a current client's confidential information); 1.8.2 (prohibiting use of a current client's confidential information to the client's disadvantage); and 1.9(c) (prohibiting use or disclosure of a former client's confidential information); and
- (2) proposed Rule 1.8.2 (Use of Current Client's Information), which regulates the use of a current client's confidential information. Proposed Rule 1.8.2 is derived from Model Rule 1.8(b) but incorporates language that more accurately reflects the source of confidentiality duties in California.

Proposed rule 1.8.2 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 Confidentiality Framework**. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of lawyers' confidentiality duties. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific confidentiality duties. This is of particular concern in California, which traditionally has the strictest duty of confidentiality in the country. At the same time, this approach will promote a national standard for how the confidentiality duty in different contexts is organized within the Rules.¹

¹ Every other jurisdiction in the country has adopted the ABA confidentiality rules framework that regulates the duty through three provisions: Model Rules 1.6, 1.8(b) and 1.9(b).

2. Recommendation to expressly address the duty owed to current clients not to use their confidential information to the client's disadvantage. As noted, the proposed rule regulates a lawyer's use of a client's confidential information. The existing duties of confidentiality and loyalty in the Rules (rules 3-100 and 3-310(E)) and State Bar Act (Business and Professions Code § 6068(e)) do not expressly address the type of client protection advanced by proposed rule 1.8.2. These current provisions are lacking to the extent that they could be narrowly construed to prohibit improper *disclosure* of client information (confidentiality) or the actual representation of an adverse interest (conflicts of interest). Such an interpretation could impair disciplinary actions that would otherwise address the type of misconduct – use of confidential information – that is targeted by this proposed rule.

The Commission did consider that a new rule might be unnecessary because § 6068(e)(1) is not limited to protection of client information. Section 6068(e) is arguably broad enough to encompass the trust and confidence that a client reposes in an attorney, the policy that underlies the rule. Compare the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] to the proposed Rule. On balance, however, the Commission determined that a rule which expressly prohibits the use of a client's confidential information to the client's disadvantage is preferable to relying on implied duties parsed from the Nineteenth Century language of section 6068(e)(1). As such, the proposed rule's express prohibition will better promote compliance and facilitate enforcement.

Text of Rule 1.8.2. Proposed rule 1.8.2 is a single paragraph rule that largely tracks Model Rule 1.8(b). It substitutes the term "information protected by Business and Professions Code § 6068(e)(1)" for the Model Rules' term "information relating to the representation of a client" because § 6068(e)(1) is the source of the confidentiality duty in California. It also adds "or the State Bar Act" to the exception clause because lawyers in California are uniquely regulated by the State Bar Act. The Model Rule's phrase "or required" has been deleted because there is no provision in either the Rules or the State Bar Act that requires a lawyer to compromise the duty of confidentiality owed a client.

There is a single comment to proposed Rule 1.8.2 that clarifies that a lawyer also violates the lawyer's duty of loyalty to the client when the lawyer uses the client's information to the client's disadvantage.

National Background – Adoption of Model Rule 1.8.2

Every jurisdiction except California has adopted some version of Model Rule 1.8(b). Thirty-five jurisdictions have adopted Model Rule 1.8, paragraph (b) verbatim;² 12 jurisdictions have adopted a rule provision substantially similar to 1.8(b)³; three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b).⁴

² The 35 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia.

³ The twelve jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Texas [the corresponding rule is Texas Rule 1.05(b)], Virginia and Wyoming.

⁴ The three jurisdictions are: Georgia, Mississippi and North Dakota.

Rule 1.8.2 Use of Current Client's Information
(Commission's Proposed New Rule Adopted on August 14, 2015 – Clean Version)

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.

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

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).

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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 November 13 – 14, 2015 – 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, 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).

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.

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).

**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 as 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.

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 November 13 – 14, 2015 – 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) 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;
 - (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 in a matter in which the lawyer represents the client; and
- (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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.6
(Current Rule 3-310 (F))
Compensation From One Other Than Client**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310(F) (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 national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.8(f) (Conflict of Interest Current Clients: Specific Rules), pertaining to accepting compensation for representing a client from one other than the client. The result of the Commission’s evaluation is proposed rule 1.8.6 (Compensation From One Other Than Client). 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.

Current rule 3-310(F) prohibits a member from accepting compensation from one other than the client unless there is no interference with the lawyer’s independent professional judgment and the duty of confidentiality owed to a client. The rule is intended to protect the client in situations where the lawyer’s independent professional judgment may become compromised based upon the lawyer’s fees being paid by one other than the client. Proposed rule 1.8.6 retains the substance of current rule 3-310(F) while expanding the public protection of the current rule. The proposed rule expands the current language of “accepting compensation” to include “enter into an agreement for or charge or accept compensation.”

In general, the proposed rule would retain the disclosure and waiver requirements found in current rule 3-310(F)(3). A substantive change that is recommended by the Commission is the addition of a new timing requirement in proposed paragraph (c) that requires a lawyer to obtain a client’s consent “at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . .” The rationale for this addition is to enhance the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. A possible concern posed by this addition is whether a lawyer’s ability to render services to the client in time sensitive matters would be compromised; however, this concern is mitigated by including the phrase “as soon thereafter as reasonably practical.”

Paragraph (a), incorporates the concept that the lawyer’s independent professional judgment shall not be compromised due to an agreement between the lawyer and a third-party payor. This is consistent with the language of 3-310(F)(1) and Model Rule 1.8 (f)(2).

Paragraph (b), the current rule uses the phrase “information relating to the representation of the client” to describe the information protected by the duty of confidentiality. The proposed rule substitutes the phrase “information protected by the Business and Professions Code § 6068 (e)(1) and Rule 1.6.” The Commission believes the proposed phrase provides enhanced guidance by citing to the specific provisions of California law that establish a lawyer’s duty of confidentiality.

Paragraph (c), of proposed rule 1.8.6 requires the lawyer to obtain a client's consent "at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . ." (See discussion above.)

Paragraph (c)(1). The current rule excepts a lawyer from the requirement to obtain consent where the lawyer's compensation is otherwise authorized by law. The proposed rule would expand the exemption to include court orders.

Paragraph (c)(2) excepts a lawyer from the requirement to obtain consent where the lawyer is rendering legal services on behalf of any public agency that provides legal services to the public or other public agencies. The proposed rule expands the concept of public agency to include non-profit organizations.

Proposed rule 1.8.6 contains four comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [1], which recognizes the existence of overlapping duties in a situation where the lawyer represents both a client and the third-party payor in the same matter. Comment [2] has been added to clarify the scope of the exemption from the disclosure and consent requirements under paragraph (c). Comment [3] further clarifies the scope of the rule as it relates to existing relationships between insurers and insureds. Comment [4] acknowledges that there might be some limited situations where a lawyer might not be able to obtain a client's consent

**Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

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.

**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.

Rule 1.8.7 [3-310] Aggregate Settlements
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

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.* This Rule does not apply to class action settlements subject to court approval.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.8
(Current Rule 3-400)
Limiting Liability to Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-400 (Limiting Liability to Client) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(h) (Conflict Of Interest: Current Clients: Specific Rules) as well as relevant California statutes, rules, and case law. 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 1.8.8 carries forward the substance of current rule 3-400. The main issues considered were whether to require a lawyer to advise the client to seek the advice of an independent lawyer regarding the settlement, and whether to not require a lawyer to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement. The Commission adopted both substantive changes.

Paragraph (a) restricts a lawyer from contracting prospectively with the client for the purpose of limiting liability to the client for the lawyer’s professional malpractice.

Paragraph (b) restricts a lawyer from settling a claim or potential claim for the lawyer’s professional malpractice liability to a current or former client, unless the client is either:

- (1) represented by an independent lawyer concerning the settlement;
- (2) advised by the lawyer in writing to seek the advice of an independent lawyer of the client’s choice regarding the settlement and the client is provided with a reasonable opportunity to seek that advice.

Comment [1] clarifies that Paragraph (b) of the proposed rule does not absolve the lawyer from their obligation to comply with other law, specifically California Business and Professions Code § 6090.5.¹

¹ Business and Professions Code § 6090.5:

- (a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:
 - (1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.
 - (2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.
 - (3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.
- (b) This section applies to all settlements, whether made before or after the commencement of a civil action.

Comment [2] is derived from the Discussion section of current rule 3-400 and adds that a lawyer may reasonably limit the scope of representation, which cross-references proposed rule 1.2 (Scope of Representation and Allocation of Authority).

Rule 1.8.8 [3-400] Limiting Liability to Client
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

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).

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.9
(Current Rule 4-300)
Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 4-300 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review) 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. California has had a variation of current rule 4-300 since 1928. However, there is no counterpart to rule 4-300 in the American Bar Association (“ABA”) Model Rules. The result of the Commission’s evaluation is proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review). 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 this proposed rule was whether the proposed rule’s language should conform to the Probate Code provisions which allow an attorney to purchase a client’s property at a Probate sale under certain circumstances. Current rule 4-300 prohibits a lawyer from purchasing property at various sales under legal process¹ where the lawyer, or any other lawyer affiliated with the lawyer or the lawyer’s firm, is acting either as an attorney for a party or as an executor, receiver, trustee, administrator, guardian, or conservator. The rule also prohibits a lawyer from representing the seller at such a sale in which the buyer is a spouse or relative of the lawyer or another attorney in the lawyer’s firm or is an employee of the lawyer or the lawyer’s firm. However, current rule 4-300 conflicts with Probate Code sections 9880-9885, which do permit a lawyer for an estate’s personal representative to make *probate* purchases, upon court order authorizing the purchase, provided all known heirs and devisees are notified and consent.² Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

¹ These sales include a probate, foreclosure, receiver’s, trustee’s, or judicial sale.

² Probate Code §§ 9881 and 9882 provide:

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if all of the following requirements are satisfied:

(a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.

(b) The written consents are filed with the court.

(c) The purchase is shown to be to the advantage of the estate.

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative’s attorney to purchase the property.

After careful consideration of whether to conform the current rule to the Probate Code, the Commission has approved retaining current rule 4-300, revised to incorporate the Commission's global changes, i.e., Model Rule numbering, format and style and substitution of the word "lawyer" for "member."

There are several reasons for the Commission's recommendation. First, when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. Second, rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct.³ Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. Third, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. Lastly, the Office of the Chief Trial Counsel has on three separate occasions submitted a comment urging the prior Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.

³ See *Eschwig v. State Bar* (1969) 1 Cal. 3d 8 (attorney purchased principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client.").

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

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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.*

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 ABA counterpart, Model Rule 1.8(j). 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 relations¹ 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

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.

Finally, non-substantive aspects of the proposed rules 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."

Rule 1.8.10 [3-120] Sexual Relations With Client
(Commission’s Proposed Rule Adopted on February 19 – 20, 2016 – Clean Version)

- (a) A lawyer shall not engage in sexual relations with a client 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.

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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.11
(No Current Rule)
Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**

EXECUTIVE SUMMARY

The Commission 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: Model 1.7 (current client conflicts) [rule 3-310(B) and (C); 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

As part of its study of conflicts of interest rules, the Commission also evaluated Model Rule 1.8, which compiles in a single rule 10 unrelated conflicts of interest concepts. In addition, where applicable the Commission has studied the current California rules that correspond to each of the conflicts concepts in Model Rule 1.8. The Model Rule 1.8 provisions and their California counterparts are:

Model Rule	California Rule Counterpart [new number]
1.8(a)	3-300 (Business Transactions With Client) [1.8.1]
1.8(b)	No California Rule Counterpart [but see proposed Rule 1.8.2]
1.8(c)	4-400 (Gifts From Clients) [1.8.3]
1.8(d)	No California Rule (none recommended)
1.8(e)	4-210 (Payment of Client’s Personal or Business Expenses) [1.8.5]
1.8(f)	3-310(F) (Third Party Payments) [1.8.6]
1.8(g)	3-310(D) (Aggregate Settlements) [1.8.7]
1.8(h)	3-400 (Limiting Liability to a Client) [1.8.8]
1.8(i)	No California Rule (none recommended) 4-300 (Purchasing Client Property at a Foreclosure) [1.8.9]
1.8(j)	3-120 (Sex with Client) [1.8.10]

The result of the Commission’s evaluation is a three-fold recommendation that the State Bar adopt, and the Supreme Court approve:

- (1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements), and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in California case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).
- (2) the rejection of the Model Rule 1.8 framework pursuant to which 10 unrelated conflicts of interest concepts are compiled in a single rule. Instead, the Commission has recommended that those concepts, most of which are already found in the current California Rules of Professional Conduct as separately numbered rules, be carried forward as separate rules with their own rule number that corresponds to the counterpart concept in Model Rule 1.8. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1 [current rule 3-300]; the rule corresponding to Model Rule 1.8(c) is numbered 1.8.3 [current rule 4-400], and so forth. Each of these rules is addressed in separate executive summaries.
- (3) proposed Rule 1.8.11 (imputation of prohibitions in the 1.8 series of rules), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest that arise from the 1.8 series of rules. Because conflicts that these rules are intended to prevent are not necessarily cured by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts.

Proposed rule 1.8.11 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts of Interest Framework.** The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.¹

2. **Recommendation that the Model Rule 1.8 compilation framework approach be rejected in favor of separately numbered rules as in the current California Rules.** The Commission recommends that California not follow the Model Rules' approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the Commission recommends that the rules in the 1.8 series, which are unrelated to one another

¹ Every other jurisdiction besides California has adopted the aforementioned ABA conflicts rules' framework.

except to the extent they involve potential conflict of interest situations, be given separate numbers. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the model rule counterpart should achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide. Aside from this ease of access rationale, the Commission also determined that the different concepts reflected in the rules, each of which imposes important duties critical to the maintenance of an effective lawyer-client relationship founded in trust, deserved the prominence of a separate, standalone rule.

3. **Recommendation of separate imputation rule for the 1.8 series of rules.** As noted, because the conflicts that these rules are intended to prevent cannot be cured by either the client's consent or by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts. Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the ABA Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The ABA Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

1. **Treat imputation under Rule 1.8 rather than 1.10**

The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k) [counterpart to proposed Rule 1.8.11], an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

The first Commission also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of Rules. Similar to the Ethics 2000 Commission, the first Commission concluded that a separate imputation rule was warranted.

Text of Rule 1.8.11. Proposed rule 1.8.11 carries forward the rule proposed by the first Commission. The first Commission made no substantive changes to the Model Rule. Rather, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.²

² Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or

Comment. The Commission recommends including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when the rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the Commission concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

National Background – Adoption of Model Rule 1.8(k)

Aside from California, every jurisdiction except five have adopted some version of Model Rule 1.8(k). The five jurisdictions are Georgia, Michigan, Mississippi, New York and Texas. Of those five jurisdictions, four have either not completed their review of the Ethics 2000 changes to the Model Rules (Georgia and Texas) or have made only piecemeal changes to their Rules since the ABA adopted the Ethics 2000 revisions (Michigan and Mississippi).

had a relationship with another party or witness or has or had an interest in the subject matter of the representation.”

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

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.

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.** 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).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.

Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on May 6 – 7, 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; 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 *Wutchurna 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] 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). 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] 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] With regard to the effectiveness of an advance consent, see Comment [8] 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.10
(No Current Rule)
Imputation Of Conflicts Of Interest: General Rule

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 1.10 (imputation and ethical screening), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest, a concept that is currently addressed only in California case law, and also would permit the erection of an ethical screen in narrowly defined circumstances to avoid the imposition of such imputations. Proposed rule 1.10 largely adheres to the structure and substance of Model Rule 1.10 but significantly differs in the extent to which a private firm is permitted to erect an ethical screen around a lawyer who has moved laterally from another private firm. Unlike the Model Rule, which broadly permits screening, i.e., it would permit the principal lawyer in the same matter to be screened, the proposed rule would permit screening only in limited situations, i.e., if the prohibited lawyer did “not substantially participate” in the matter at issue.

¹ Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed Rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules is addressed in separate executive summaries.

Proposed rule 1.10 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.²

2. **Recommendation of addressing the concepts of imputation and screening in a rule that tracks the organization of Model Rule 1.10.** There are four separate provisions in the proposed rule, two of which set forth the rules regarding imputation as it has been developed in case law in California (paragraphs (a) and (b)), one which provides that a client can waive the rule's application (paragraph (c)), and one which excludes government lawyers from the application of the rule (they are governed by Rule 1.11).

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing in paragraph (a) that imputation is the default situation that can be avoided only if the conflict is personal to the prohibited lawyer, the lawyer is screened under narrowly specified conditions, or the client waives the rule's application. *Second*, permitting the exception for screening a lawyer who "did not substantially participate" in the contested matter will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential information about the former clients is now in the opposing party's law firm. *Third*, adopting a limited screening provision will place in a rule of professional conduct an approach to screening that was sanctioned in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010). *Fourth*, including paragraph (c) regarding waiver will expressly permit what is already implied in current rule 3-310, i.e., that the client can consent to a conflicted representation.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential

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.

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 1.10 sets forth the default rule in the introductory clause: any prohibition on representation under rules 1.7 (current client conflict) or 1.9 (former client conflict) will be imputed to all lawyers in the firm unless either subparagraph (a)(1) or (2) applies.

Subparagraph (a)(1) provides that a prohibition based on a lawyer’s “personal interest” (e.g., close personal or professional relationship) is not imputed to other lawyers in the firm so long as that interest does not create a significant risk of materially limiting the representation of the firm’s client.

Subparagraph (a)(2), the screening provision, is derived from the corresponding paragraph in Model Rule 1.10 but has been modified to reflect that the rule is a disciplinary rule rather than a civil standard for disqualification (substitution of “prohibited” for “disqualified”). In addition, unlike the Model Rule, which broadly permits screening,³ subparagraph (a)(2) provides for screening only in limited circumstances.⁴ Under subparagraph (a)(2), a prohibited lawyer’s conflict will not be imputed to other lawyer’s in the firm so long as the prohibited lawyer did not substantially participate in the contested matter, is timely screened, and written notice is provided to any affected former client to enable the latter to ascertain compliance with the rule. Specifics on what constitutes an effective screen are provided in Rule 1.0.1(k) and associated comments.

The phrase “arises out of the personally prohibited lawyer’s association with a prior firm” further limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government

³ The term “**broadly permits screening**” is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client’s case, and even if the former and current clients’ cases were “substantially related.” A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who “personally and substantially participated” in the relevant matter can be screened.

Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming. Nevertheless, there are 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

⁴ The term “**limited screen**” is used to describe a screening provision that permits screening only if a lawyer did not “substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed “not material” to the current representation, or “is not likely to be significant.”

Fourteen jurisdictions permit screening in limited situations: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

lawyers (Rule 1.11) and former judicial personnel (Rule 1.12) only when such lawyers move to new employment.

Paragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116]. The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm.

Paragraph (c) expressly states what is already implied in current rule 3-310, which provides that a client can give informed written consent to a conflicted representation. If a client can consent to such a representation, then it should follow that a client can waive the imputation of one lawyer's conflict to other lawyers in the firm.

Paragraph (d) excludes government lawyers from the application of this Rule and directs such lawyers to Rule 1.11, which incorporates its own imputation provisions for conflicts involving current and former government lawyers.

There are five comments to proposed Rule 1.10, all of which provide interpretative guidance or clarify how the proposed rule, which identifies several situations under which imputation can be avoided or does not apply, should be applied. Comment [1] notes that the rule does not apply when the prohibited person is a nonlawyer, for example, a secretary, or a person who acquired confidential information as a nonlawyer, e.g., a law student, but cautions that such a person should be screened. Comment [2] clarifies the application of paragraph (a)(2)(ii) to partnership shares. Comment [3] clarifies that Rule 1.8.11, not rule 1.10, applies to conflicts that arise under the 1.8 series of rules. Comment [4] refers lawyers to the 5 series of rules involving supervisory duties within a law firm so that such lawyers can better comprehend their duties vis-à-vis screens. Comment [5] provides notes that this disciplinary rule does not necessarily govern disqualification motions in the courts.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

- (a) While lawyers are associated in a firm,* none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;* or
 - (2) the prohibition is based upon Rule 1.9(a), (b), or (c)(3) and arises out of the prohibited lawyer's association with a prior firm,* and
 - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
 - (ii) the prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] 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 Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e) 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] 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.

[2] 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.

[3] 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.

[4] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[5] 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].

**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.

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,

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

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 June 2 – 3, 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 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 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 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] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client.

[3] 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] 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] 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] 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] 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] 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] 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.*, 38 Cal. 4th at 847, 851-54 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).

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.

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 Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed Rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules will be addressed in separate executive summaries.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).²

2. **Recommendation of addressing duties of former judges, third party neutrals, and their staffs in a rule that tracks the organization of Model Rule 1.9.** There are four provisions in the proposed Rule, one which states the basic prohibition on representations of private clients after leaving service as a judge or third party neutral, or as legal staff thereto (paragraph (a)), one which sets forth the limitations on employment negotiations when still a sitting judge, third party neutral or staff (paragraph (b)), one that provides for imputation of the paragraph (a) prohibition to other lawyers in the firm to which the former judge, third party neutral or staff person has moved, and for the availability of screening to avoid the imputation (paragraph (c)), and a fourth provision that excepts from the rule a party arbitrator (paragraph (d).)

Proposed Rule 1.12 is the final piece in the trio of rules intended to regulate the lateral movement of lawyers between private firms (Rule 1.10), between government service and private practice (Rule 1.11), and between service in the judicial branch or as a third party neutral and practice in the private sector (Rule 1.12). If the first two rules are adopted, then Rule 1.12 should also be adopted in light of special concerns relating to the integrity of the judicial process and the critical need for clear guidance on precisely what conduct is permitted in negotiating for employment as a judicial employee and the necessary restrictions on the availability of an ethical screen to rebut the presumption of shared confidences by a former judicial employee in a private firm.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

² Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (a) states the general prohibition on a former judge, arbitrator, or other third party neutral, and members of their respective staffs, from participating in a case in which they were substantially involved as a judicial employee. It is identical to MR 1.12(a) except for (i) California's heightened consent requirement being substituted; (ii) the addition of the term "judicial staff attorney" to the introductory clause of paragraph (a) to accurately reflect the title of most lawyers who work in the California courts; and (iii) the deletion of the reference to "personally" participated as redundant, as case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation.

Paragraph (b) prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral. The Commission has recommended replacing the phrase "negotiate for" with the phrase "participate in discussions regarding prospective." This replacement language is taken from the first Commission's proposed rule 1.12. The language is consistent with the Model Rule in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as "employment negotiations." In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

Paragraph (c). The introductory clause of paragraph (c) is derived from the first Commission's Rule 1.12(c) and differs substantially from the Model Rule. The provision excludes from the availability of screening lawyers who previously served as mediators or settlement judges. This change was made because permitting screening of settlement judges and mediators, who not only receive confidential information from the parties but actively seek such information, would reduce confidence in the administration of justice. See *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863] (no amount of screening of a settlement judge who had received confidential information could assuage concerns of the parties to the settlement discussions). Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

Paragraph (d) is identical to Model Rule 1.12(d) and provides that a partisan party arbitrator does not raise the same administrative of justice concerns as an impartial judge or third party neutral, and so is not subject to the prohibitions of Rule 1.12.

There are three comments to Rule 1.12, all of which provide guidance in interpreting or applying the rule. Comment [1] is derived largely from the first Commission's modification of the Model Rule comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. This is similar to proposed Rule 1.9(b). Comment [2] alerts lawyers to the possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule. Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied. It corresponds to similar provisions in proposed Rules 1.10 and 1.11.

National Background – Adoption of Model Rule 1.12

Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.³ The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

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 June 2 – 3, 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 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 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 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 in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter unless:
 - (1) 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) 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 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) 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.

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 difficulty 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.

Rule 1.13 [3-600] Organization as Client
(Commission's Proposed Rule Adopted on February 19 – 20, 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 violate his or her duty of protecting all 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 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). 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).

[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). This Rule is not intended to limit that authority.

**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.

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule Adopted on January 22 – 23, 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 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 lawyer who takes protective action as authorized by 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 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 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 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).

[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 obtaining the assistance 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) to any third person.*

[6] This Rule 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 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.

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

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.

amended rule 4-100 to provide that: “Unless a written fee agreement expressly provides that a fee paid in advance is earned when paid or is a true retainer (as set forth in rule 3-700(D)(2)), all advance fees received shall be deposited in one or more [client trust accounts].” (See October 1992 State Bar rule filing, Supreme Court case no. S029270.) It also includes an effort in 1997 by the Committee on Professional Responsibility and Conduct (“COPRAC”) that would have 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.

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 of Funds and Property of Clients and Other Persons
(Commission's Proposed Rule Adopted on June 2 – 3, 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 labelled "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 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.

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 Model 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.

Rule 1.16 [3-700] Declining Or Terminating Representation
(Commission's Proposed Rule Adopted on June 2 – 3, 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 employment 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 or statutory limitation, 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] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), 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] 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] 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.

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.

Rule 1.17 [2-300] Sale of a Law Practice
(Commission's Proposed Rule Adopted on January 22 – 23, 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] The sale may not be financed by increases in fees charged to the client of the law practice. 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 fee arrangements between the purchaser and the client after the sale must comply with 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).

**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4
(No Current Rule)
Lawyer as Third-Party Neutral**

EXECUTIVE SUMMARY

In connection with the consideration of current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). 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. The result of the evaluation is proposed rule 2.4 (Lawyer as Third-Party Neutral). Although the Commission’s proposed rule has no direct counterpart in the current California rules, the general concept of regulating a lawyer’s conduct as a neutral rather than an advocate is found in current rule 1-710. 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 presented by this Commission study is whether a new rule should be adopted. The Commission is recommending adoption of a rule primarily because a new disciplinary standard that imposes duties on lawyers when acting in a “quasi-judicial” capacity would enhance public protection in an area of conduct engaged in by lawyers that has expanded¹ since the last comprehensive revision of the rules in 1989. Proposed new rule 2.4 would protect the public by helping to assure that a lawyer’s role is properly understood when it is intended to be distinct from the typical, and historically common, function of a lawyer as a client’s advocate. Specifically, the rule would require that a lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

In considering this rule, the Commission examined the underlying public policy issue of State Bar regulation of lawyers who engage in conduct that is judicial in nature. The Commission noted the analogous precedent of current rule 1-710 (applicable when a lawyer as a court-connected temporary judicial officer) and California Supreme Court decisional law recognizing the propriety of the State Bar discipline notwithstanding that misconduct occurred in judicial, as opposed to, lawyering activity. In *In re Scott* (1991) 52 Cal.3d 968 (“Scott”), the Supreme Court addressed the inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, respondent Michael Scott pled guilty to criminal charges of possession of cocaine and resigned his judicial post as a condition of a plea bargain. Following the entry of a guilty plea, the court referred Mr. Scott’s convictions to the State Bar for a report and

¹ See [Ethical Conundrums for the 21st Century Lawyer/Mediator – “Toto, I’ve Got a Feeling We’re Not in Kansas Any More,”](https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american) by Melvin A. Rubin and Brian F. Spector, posted online at: <https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american> in which the authors observe that: “21st Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice.”

recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme Court arguing, “the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment”

In rendering its decision, the California Supreme Court noted that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to “discipline him as a member of the judiciary,” and citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott’s resignation from the bench was “tantamount to a preemptive strike-precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance.” (*Scott* at p. 976.) Notwithstanding his resignation from the bench, the Court concluded that it retained jurisdiction in the attorney discipline system to determine Mr. Scott’s fitness to practice law:

“Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized.” *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law.] “[U]nder our inherent power we may discipline an attorney for conduct ‘either in or out of [his] profession’ which shows him to be unfit to practice” (Id. at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

Scott, at pages 976-977. Consistent with the foregoing, proposed new rule 2.4 would make clear in the rules that there can be attorney disciplinary consequences when a lawyer acts as a third-party neutral. The proposed comments also promote compliance with other related regulatory standards by including references to the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

National Background – Adoption of Model Rule 2.4

As California does not presently have a direct counterpart to Model Rule 2.4, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed rule 2.4 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf

Thirty-three jurisdictions have adopted Model Rule 2.4 verbatim (AK, AZ, AR, CO, CT, DE, DC, ID, IN, IA, KS, KY, LA, MN, MD, MI, MN, MS, MO, NE, NV, NH, NC, ND, OK, PA, RI, SD, VT, WA, WV, WI, WY); thirteen jurisdiction have adopted a rule substantially similar to Model Rule 2.4 (FL, HI, IL, MA, MT, NJ, NM, NY, OH, OR, SC, TN, UT); five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4 (AL, CA, GA, TX, VA).

Rule 2.4 Lawyer as Third-Party Neutral
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4.1
(Current Rule 1-710)
Lawyer as Third-Party Neutral

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)¹ 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. 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 2.4.1 (Lawyer as Third-Party Neutral). 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 2.4.1 carries forward current rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Like the current rule, the proposed rule provides a disciplinary path for lawyers who violate applicable judicial ethics standards. Current rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court’s consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the California Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court’s request, rule 1-710 was developed, adopted by the Board and subsequently approved by the Supreme Court operative March 18, 1999.

In studying the current rule, the Commission determined that no substantive changes were warranted but some amendments are recommended as indicated below.

In the black letter text, minor stylistic revisions are recommended for clarity, including the global substitution of “lawyer” for “member.”

The current second paragraph of the Discussion section to rule 1-710 is recommended to be omitted as unnecessary. There also was concern that retaining it might cause ambiguities in construing other rules.²

¹ There is no direct counterpart to this rule in the American Bar Association Model Rules; however, Model Rule 2.4 generally addresses lawyer conduct as a third-party neutral. Model Rule 2.4 is discussed in the executive summary of proposed rule 2.4.

² The current language states: “Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.” As a general proposition, this is true of every rule and the Commission believes that nothing in the instant rule suggests otherwise so as to justify its retention in proposed rule 2.4.1.

A new Comment [3] is recommended to clarify that the rule does not apply to a lawyer serving as a third-party neutral in a mediation or settlement conference or a neutral arbitrator pursuant to an arbitration agreement. This comment also provides a cross reference to proposed new rule 2.4 as that rule is intended apply to conduct not within the scope of proposed rule 2.4.1.

**Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
(Commission’s Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)**

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.

**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.

Rule 3.1 [3-200] Meritorious Claims and Contentions
(Commission's Proposed Rule Adopted on February 19 – 20, 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, may nevertheless defend the proceeding by requiring that every element of the case be established.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.2
(No Current Rule)
Delay of Litigation**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated American Bar Association (“ABA”) Model Rule 3.2 (Expediting Litigation) 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 the Commission’s evaluation is proposed rule 3.2 (Delay of Litigation). 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 3.2 in context within the Rules of Professional Conduct.

Proposed rule 3.2 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.

Proposed rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding, or to cause needless expense. The Commission recommends adoption of New York rule 3.2 (Delay of Litigation) instead of Model Rule 3.2 (Expediting Litigation),¹ which requires a lawyer to make reasonable efforts to “expedite” litigation, for several reasons. First, it has been widely recognized that delay tactics in litigation that greatly increase the cost for prosecuting a lawsuit threaten to limit access to the justice except for the most affluent. Second, prohibiting undue delay and needless expense are significant concerns in the litigation process that will help protect the administration of justice and the public. Such tactics are rightfully prohibited when they are used to frustrate an opposing party’s ability or attempt to obtain a rightful remedy or redress. Third, establishing such prohibitory conduct as a minimum standard of professional responsibility is consistent with the first principle of the Commission’s Charter: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public.” Finally, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, which is a rule structure more appropriate for an aspirational statement. The proposed rule prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.

There is one comment to the rule. The comment provides cross-reference to other rules addressing unnecessary delay. The reference to proposed rule 1.3 informs the reader that attorneys are required to act with reasonable diligence and the reference to proposed rule 3.1(b) is intended to address concerns that rule 3.2, standing alone, would prohibit use of delaying tactics by a lawyer who represents a criminal defendant in a capital case. The reference to Business and Professions Code section 6128(b) informs the reader that attorneys are guilty of a misdemeanor who willfully delay their client’s suit with a view to the lawyer’s own gain.

National Background – Adoption of Model Rule 3.2

As California does not presently have a direct counterpart to Model Rule 3.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.²

The ABA State Adoption Chart for ABA Model Rule 3.2 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.authcheckdam.pdf

Thirty-nine states have adopted Model Rule 3.2 verbatim.³ Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.⁴ Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.⁵

¹ ABA Model Rule 3.2 states:

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

² The three jurisdictions are: Ohio, Oregon, and Virginia.

³ The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland,

Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico (but uses a different rule number), North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The two jurisdictions are: New Jersey and Tennessee.

⁵ The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York, and Texas.

Rule 3.2 Delay of Litigation
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

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).

**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 Commission recommends adding language from rule 5-200(C), which

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.

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 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.

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].)

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.

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

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 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

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.

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 May 6 – 7, 2016 – Clean Version)

- (a) A lawyer shall not knowingly:
 - (1) 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 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). 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).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (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.

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)(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).

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 may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

Withdrawal

[7] 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) with respect to a request to withdraw that is premised on a client's misconduct.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.4
(Current Rules 5-310, 5-220 & 5-200(E))
Fairness to Opposing Party and Counsel

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rules 5-310 (Prohibited Contact With Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Asserting Personal Knowledge of Facts) 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 ABA counterpart, Model Rule 3.4 (Fairness to Opposing Party and Counsel). 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 3.4 (Fairness to Opposing Party and Counsel). 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 3.4 in context within the Rules of Professional Conduct. Proposed Rule 3.4 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 and, with respect to Rule 3.4, to reject the adoption of language in Model Rule that is vague or ambiguous.

Recommendation that proposed Rule 3.4 be circulated for public comment. Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice. Specifically, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, the Commission began its study of this rule topic with those California rules. However, in acknowledgement of its decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission largely agreed with the first Commission's approach to its proposed rule 3.4 by:

- (i) retaining rule 5-310 as paragraphs (d) and (e) largely unchanged in the structure of Model Rule 3.4, as these provisions contain specific prohibitions on lawyer conduct;
- (ii) retaining rule 5-220 as paragraph (b) as a general statement of the prohibition against suppressing evidence;
- (iii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe evidence-suppressing conduct that the rule is intended to prevent;
- (iv) retaining rule 5-200(E) in paragraph (g); and
- (v) rejecting several provisions of Model Rule 3.4 [MR 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

The principal reason for the foregoing approach is that a disciplinary rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than simply provide a generalized prohibition against suppressing evidence, (rule 5-220). There are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit. Specifically MR 3.4(a), (b) and (c) have been retained as paragraphs (a), (c) and (f). Several other Model Rule paragraphs, specifically paragraphs (d), (e) and (f), on the other hand, conflict with California law, are overbroad and likely to chill legitimate advocacy, or both.¹

¹ The rejected Model Rule 3.4 provisions provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Text of Rule 3.4.

Paragraph (a) is identical to Model Rule 3.4(a) and prohibits a lawyer from destroying or altering documents, or counseling or assisting another to do so.

Paragraph (b) carries forward rule 5-220 to provide a general statement prohibiting the suppression of evidence.

Paragraph (c) is identical to Model Rule 3.4 and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

Paragraph (d) carries forward rule 5-310(B) nearly verbatim, the only change being to substitute “lawyer” for “member”.

Paragraph (e) carries forward rule 5-310(A) verbatim.

Paragraph (f) is identical to Model Rule 3.4(c) and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

Paragraph (g) carries forward the language of rule 5-200(E), but adds a provision from Model Rule 3.4(e) that prohibits a lawyer from stating an opinion about the guilt or innocence of an accused.

There are two comments to proposed Rule 3.4, both of which explain how the rule should be applied. Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence. Comment [2] clarifies an important limitation on the rule’s application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

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 3.4

Every jurisdiction except California has adopted some version of Model Rule 3.4. Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.³ Seven jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.⁴

² The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

⁴ The seven jurisdictions are: Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

**Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

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.

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

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.

**Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (a) Except as permitted by 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 running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized 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) 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, duress or harassment; or
 - (4) the communication is intended 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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.6
(Current Rule 5-120)
Trial Publicity**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-120 (Trial Publicity) 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 3.6 (Trial Publicity). 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 3.6 (Trial Publicity). 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 3.6 in context within the Rules of Professional Conduct.

Proposed rule 3.6 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.

Proposed rule 3.6 carries forward the substance of current rule 5-120. The few significant changes to the current rule include the following. In paragraph (a), the “knows or reasonably should know standard” is moved in front of two roman numerals that were added to clarify the knowledge standard is applicable to both the means of dissemination and the likelihood of material prejudice. Paragraph (b) has been amended to place an outright condition that the subparagraphs of paragraph (b) are limited by the lawyer’s duty of confidentiality. The change was made to avoid a misinterpretation that the rule’s language provides an exception to the lawyer’s overriding duty to maintain a client’s confidential information. In paragraph (b)(6), language has been added to emphasize that the anticipated harm triggering this permissive category of information is harm to an individual or the public, and that dissemination of this information is limited to what is reasonably necessary to protect the individual or the public. This change also conforms paragraph (b)(6) to the limitation in current rule 3-100(D) [proposed rule 1.6(d)], which requires an attorney’s disclosure of information must be no more than is necessary to prevent the harm. Paragraph (b)(7)(i) has been amended by deleting “family status” and adding reference to “general area of” residence and occupation. This change was made in order to balance an accused right to privacy while also providing enough information so that the accused is not either misidentified, or confused with someone else. Finally, paragraph (d) was added to extend compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a).

There are two comments to the rule. Comment [1] adds cross references to relevant rules and adds clarifying changes to the language found in the second paragraph of the Discussion section of current rule. In comment [2], a cross reference is added to the special duties of prosecutors in proposed rule 3.8(f). Also, comment [2] retains language found in the current rule’s Discussion section which expressly states that the rule applies equally to prosecutors and criminal defense counsel.

Rule 3.6 [5-120] Trial Publicity
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)

- (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 Rule 1.6 and Business and Professions Code § 6068(e), 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 Rule 3.4(f) and Business and Professions Code § 6068(a), 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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.7
(Current Rule 5-210)
Lawyer as Witness**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-210 (Member as Witness) 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 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 3.7 (Lawyer as Witness). 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 3.7 in context within the Rules of Professional Conduct.

Proposed rule 3.7 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.

Proposed rule 3.7 carries forward the substance of current rule 5-210 that sets the requirements when a lawyer acts as a witness in a client’s matter pending before jury. The main issue was

whether to provide broader public protection by expanding the scope of the rule beyond matters before a jury to other proceedings, such as a proceeding before a trial judge, an administrative law judge or an arbitrator. The Commission is recommending that this change be implemented in the proposed rule. The Commission believes that the intended public protection afforded by the current rule applies equally to bench trials. A client's interest is promoted by requiring lawyers to obtain the client's informed written consent where required by the rule. The nature and extent of the disclosure might vary between a bench and jury trial setting, but that does not alter the benefits of requiring client consent. In addition, the rule's application to jury trials is the standard in the majority of jurisdictions that have adopted Model Rule 3.7. This substantive change is incorporated in proposed paragraph (a).

Paragraph (b) permits a lawyer to act as an advocate when another lawyer in the same firm is likely to be called as a witness, unless precluded by a conflict of interest.

Comment [1] clarifies that paragraph (a) only applies to trials before a jury, judge, administrative law judge or arbitrator and does not encompass other adversarial proceedings or non-adversarial proceedings. One example of a situation excluded from the ambit of the rule would be a client's matter where a lawyer will testify in a hearing before a legislative body.

Comment [2] explains that a client's "informed written consent" might be documented by a recital on the record that is thereafter included in a transcript. Comment [2] also includes a reference to the definition of "written" in proposed rule 1.0.1(n).

Comment [3] reaffirms a court's discretion to take action despite a lawyer's compliance with this rule (e.g., a lawyer who complies might nevertheless be subject to a disqualification motion). See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court* (Oliver) (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.) Compare *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 [135 Cal.Rptr.3d 545] (Applying Model Rule 3.7 rather than rule 5-210 in support of court's decision to disqualify lawyer-witness)

Rule 3.7 [5-210] Lawyer as Witness
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)

- (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].

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.8
(Current Rule 5-110)
Special Responsibilities of a Prosecutor**

EXECUTIVE SUMMARY

Proposed new rule 3.8 (Special Responsibilities of a Prosecutor) amends current rule 5-110 (Performing the Duty of a Member in Government Service) and addresses the duties of government lawyers, including a criminal prosecutor. In particular, the proposed rule states that it is the responsibility of a criminal prosecutor to make timely disclosure to the defense of exculpatory information.

At its November 20, 2015 meeting, the Board considered and granted a Commission request to authorize proposed amendments to current rules 5-110 and 5-220 (Suppression of Evidence) for a 90-day public comment period, and that the processing of these proposed amendments be prioritized and handled separately from the Commission's comprehensive proposed amendments to the rules. After the conclusion of the 90-day public comment period, which included a public hearing on February 3, 2016, the Commission met on March 31 and April 1, 2016 to consider all of the public comments received. In response to the public comments, the Commission further revised proposed rule 5-110¹ and, at the Board's May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to seek input on these changes.

See State Bar of California Board of Trustees Agenda Item 703 MAY 2016 posted on the State Bar's website at:

<http://www.calbar.ca.gov/Portals/0/documents/publicComment/2016/2nd-Pub-Cmt-Attach-3-Board-of-Trustees-Item-703-MAY-2016.pdf>

and the related pending request for public comment on proposed amended rules 5-110 and 5-220 at:

<http://www.calbar.ca.gov/AboutUs/PublicComment/201606.aspx> .

The Board of Trustees is considering amendments to current rules 5-110 and 5-220 on an expedited basis (e.g., as rule amendments that would fit within the framework of the current rules). However, a final decision to implement those expedited amendments prior to any action on the Board's anticipated recommendation for a comprehensive revision of the entire rules will appropriately rest with the Supreme Court of California. The Court might determine that the proposed amendments to rule 5-110 should be implemented together with the comprehensive rule revisions and not on a separate expedited basis. Accordingly, the Commission has prepared a version of proposed amended rule 5-110 formulated as a proposed rule 3.8 that could be acted on by the Supreme Court and implemented as a part of the State Bar's comprehensive revisions that are presently under consideration. Proposed rule 3.8 is substantively identical to proposed amended rule 5-110 and is summarized in the Board materials at the above State Bar website links.

¹ Proposed amended rule 5-220 was not modified by the Commission following consideration of public comment. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor."

Please note that even if the Court determines to implement amendments on an expedited basis, at the subsequent time when the State Bar's comprehensive revisions are considered by the Court, a version of amended rule 5-110 renumbered as rule 3.8 (and conformed to the format and style of the new rules) would be appropriate for consideration by the Court.

**Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
(Commission's Revised Proposed Rule Adopted on
March 31 – April 1, 2016 – Clean Version)**

[Note: This rule is being recommended for expedited processing to the Board.]

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.

Discussion

[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.

[3A] 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.

[4] 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).

[5] 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.

[6] 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.)

[7] 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.

[8] 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.

**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

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 June 2 – 3, 2016 – Clean Version)

A lawyer communicating in a representative capacity with 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.10
(Current Rule 5-100)
Threatening Criminal, Administrative, or Disciplinary Charges

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)¹ 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. 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 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges). 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 3.10 carries forward current rule 5-100. Only one substantive change is recommended in the black letter text of proposed rule 3.10. In paragraph (b), the Commission is recommending that the definition of “administrative charges” be expanded to encompass the filing of a complaint with a foreign governmental organization. Under current rule 5-100(B), “administrative charges” is limited to complaints filed with a “federal, state or local government entity.” The Commission understands that the policy of the current rule is to prohibit lawyer misconduct that is tantamount to extortion and that this policy logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule’s use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international multi-jurisdictional practice of law.

In addition to this one substantive change to the black letter of the rule, other proposed amendments include the following.

- In Comment [1], adding an explanation that the rule 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 additional clarification, this comment states that 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

¹ There is no corresponding American Bar Association (“ABA”) Model Rules. The predecessor to current California rule 5-100 is former rule 7-104 and that rule was derived from DR 7-105 of the ABA Model Code of Professional Responsibility. DR 7-105 of the Model Code differs from current California rule 5-100 in that DR 7-105 was limited only to threats of criminal prosecution. The DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules to replace the Model Code. Eleven jurisdictions, however, have carried forward the DR 7-105 prohibition as part of their current rules despite the omission of a counterpart in the current Model Rules. Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges. Accordingly while there is not a corresponding Model Rule, California is not alone in having a rule prohibiting this misconduct.

if the conduct continues the lawyer will report it to criminal or administrative authorities. However, that same 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. This is included by the Commission to address potential concerns that the concept of a prohibited threat is not sufficiently clear despite the fact that the rule is used for imposing discipline. (See, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company].)

- In Comment [2], clarifying that a mere statement that a lawyer will pursue “all available legal remedies” does not alone violate the rule and that finding a violation ordinarily requires consideration of the specific facts of a particular situation.
- In Comment [4], clarifying that the rule does not prohibit a government lawyer from engaging in a typical “release-dismissal” agreement in connection with related criminal, civil, or administrative matters.

**Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges
(Commission’s Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 4.1
(No Current Rule)
Truthfulness In Statements To Others**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 4.1 (Truthfulness In Statements To Others) 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 4.1 (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 4.1 prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer’s duties under rule 1.6 and Business and Professions Code section 6068(e). The main issue considered when evaluating this proposed rule was whether this rule was necessary as a rule of professional conduct in California.¹ The Commission recommends adoption of ABA Model Rule 4.1 for several reasons. First, the rule provides crucial public protection. The concept embodied in proposed rule 4.1 is an important part of the entire set of rules being recommended and it is intended to supplement other rules proscribing similar conduct in other situations, such as rule 3.3 (Candor to the Tribunal) and rule 1.2.1 (Advising a Client Regarding Criminal or Fraudulent Conduct). Second, the proposed rule provides language that is more precise than either Business and Professions Code sections 6068(d) or 6128 and therefore will provide a clearer disciplinary standard than either of those statutes. Finally, every other jurisdiction has adopted some version of Model Rule 4.1. Adopting this rule helps fulfill one of the principles of the Commission’s Charter which is to eliminate unnecessary differences between California’s rules and the rules used by a preponderance of states in order to help promote a national standard with respect to professional responsibility issues.

There are four comments to the rule. Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another’s falsehood into the lawyer’s statement or a material omission in a partially true statement can violate the rule. Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply. Comment [3] alerts lawyers to the relationship of rule 4.1 with rules 1.2.1 (Advising or Assisting the Violation of Law) and 1.16 (Declining or Terminating Representation). Comment [4] directs lawyers to Comment [5] of

¹ Some of the arguments made in opposition to the proposed rule included: (1) gross misconduct with respect to the subject of the proposed rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106; (2) the “knowledge” standard required by the rule may make it difficult to establish discipline under the rule; (3) the concept of a lawyer’s duty not to adopt or vouch for a client’s or witness’s falsehood is well-established in California; such a disciplinary rule is unnecessary; and (4) as to whether the proposed rule is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes an untrue statement, is well established.

proposed rule 8.4, which notes that a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to rule 4.1.

Although the concepts contained in proposed rule 4.1 are currently addressed in statutes and case law, this proposed rule is a substantive change to the current rules because these obligations are now being included as a rule of discipline.

Rule 4.1 Truthfulness in Statements to Others
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

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 Rule 1.6 or Business and Professions Code § 6068(e)(1).

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 Rule 8.4 and Business and Professions Code § 6106.

[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)(5) 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].

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.²

² One member of the Commission submitted a written dissent stating support for the Commission’s significant proposed change from “party” to “person” but objecting to some of the proposed Comments, including proposed Comment [2A] concerning the “actual knowledge” standard. The full text of the dissent is attached to this summary.

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 June 26, 2015 – 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) In any communication with a represented person* not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) 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)(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.

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.

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.

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 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).

Rule 4.3 Communicating with an Unrepresented Person
(Commission's Proposed Rule Adopted on August 14, 2015 – 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.

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 law¹ 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

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 review was reasonably necessary to draw that conclusion, and when counsel’s examination should have ended.”

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

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.

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

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 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.

Comment

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, the lawyer must communicate with the sender's counsel.

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.

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

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.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – 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 might not be required to implement particular measures under 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. 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] 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] 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] 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).

**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.2
(No Current Rule)
Responsibilities of a Subordinate Lawyer**

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 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 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.

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 5.2 (Responsibilities of a Subordinate Lawyer).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 5.2 adopts the substance of ABA Model Rule 5.2. Paragraph (a) provides that a subordinate lawyer has an independent duty to comply with the Rules of Professional Conduct. For example, a lawyer cannot claim he or she was just following the orders of a supervisor and therefore is not subject to discipline. However, paragraph (b) provides that when the supervising lawyer reasonably resolves an “arguable question of professional duty,” the subordinate does not commit a violation by following the supervisor’s direction.

There is one comment to the rule. The comment explains how the rule should be applied when a subordinate lawyer encounters a question involving professional judgment as to the lawyers’ responsibilities under the Rules of Professional Conduct or the State Bar Act.

National Background – Adoption of Model Rule 5.2

As California does not presently have a direct counterpart to Model Rule 5.2, 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 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.³ Five states have adopted a slightly modified version of Model Rule 5.2.⁴ Three states have not adopted a version of Model Rule 5.2.⁵

² The Executive Summaries for proposed Rules 5.1 and 5.3 are provided separately.

³ The forty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The five states are: Connecticut, Florida, Georgia, Ohio, and Texas.

⁵ The three states are: California, Kentucky, and Virginia.

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)

- (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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3
(Current Rule 3-110 Disc.)
Responsibilities Regarding Nonlawyer Assistants

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 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 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.

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 5.3 (Responsibilities Regarding Nonlawyer Assistants).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 5.3 adopts the substance of ABA Model Rule 5.3. Proposed rule 5.3 is very similar to proposed rule 5.1. The major difference is that proposed rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services, whereas proposed rule 5.1 applies to the supervision of lawyers. Proposed rule 5.3(a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that a nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Paragraph (b) requires that a lawyer who directly supervises a nonlawyer make “reasonable efforts to ensure” the nonlawyer’s conduct is compatible with the professional obligations of the lawyer, whether or not the nonlawyer is an employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for the conduct of a nonlawyer under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the nonlawyer, ((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 is one comment to the rule. The comment states the policy underlying the rule and explains the lawyer’s obligation in complying with the rule.

National Background – Adoption of Model Rule 5.3

As California does not presently have a direct counterpart to Model Rule 5.3, 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 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf

Thirty-four states have adopted Model Rule 5.3 verbatim.³ Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.⁴ Seven states have adopted a version of the rule that is substantially different to Model Rule 5.3.⁵ One state has not adopted a version Model Rule 5.1.⁶

² The Executive Summaries for proposed Rules 5.1 and 5.2 are provided separately.

³ The thirty-four states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

⁴ The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

⁵ The six states are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

⁶ The one state is California.

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
(Commission’s Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)**

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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3.1
(Current Rule 1-311)
Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member) 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. There is no counterpart to rule 1-311 in the American Bar Association (“ABA”) Model Rules. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of the Commission’s evaluation is proposed rule 5.3.1 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member). 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.

Current rule 1-311 governs the employment activities of certain lawyers who are not entitled to practice law, specifically disbarred, suspended, resigned, or involuntary inactive members who work in law offices. The rule imposes duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include a requirement to give notice to both the State Bar as well as to each client on whose specific matter such person will work. The notice to the State Bar ensures that the bar can provide oversight while the notice to client ensures greater transparency by giving the client an opportunity to object to the restricted attorney working on his or her case. In proposed rule 5.3.1, the Commission made no substantive changes to current rule 1-311. The Commission reasoned that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted attorney to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status.¹

The non-substantive changes proposed were intended to clarify, update and streamline the existing rule. Throughout the rule, conforming language changes include: the phrase “associate in practice” is substituted for “associate professionally with” the word “assist” is substituted for “aid” and “restricted lawyer” is defined. Other changes include the deletion of all the Discussion sections of the current rule except for language that clarifies a hiring lawyer’s obligation to give notice to a client when the client is an organization.

National Background – Adoption of Rule Addressing Law-related Activities of Disbarred, Suspended, Resigned or Involuntarily Inactive Attorneys

As there is currently no ABA Model Rule counterpart to the current or proposed California rules on this topic, this section reports on the adoption of a similar rule in other United States’ jurisdictions. Three states have adopted a rule of professional conduct similar to current rule

¹ One member of the Commission submitted a written dissent disagreeing with the Commission’s threshold determination that the current rule should be retained. The full text of the dissent is attached to this summary.

1-311 in that they require the employing attorney to provide notice when employing a suspended or disbarred attorney: Colorado, Maryland, Minnesota, and Alaska. Alaska incorporates a bar rule that similarly requires an employing attorney to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.²

Seven states prohibit suspended or disbarred attorneys from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine states partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred attorney from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law.))³

Finally, twenty states have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

² See, Colorado Rule of Professional Conduct 5.5; Maryland Rule of Professional Conduct 5.3; and Minnesota Rule of Professional Conduct 5.8; Alaska Bar Rule 15(c): Employment of Disbarred, Suspended or Resigned Attorney. Maryland and Minnesota require notice to be served upon the state bar, while Colorado requires written notice to be provided to the client.

³ Other states partially restricting the employment of suspended or disbarred members include: Florida (Rule of Discipline 3-6.1), Louisiana (Rule of Professional Conduct 5.5(e)), New Mexico (Rule of Professional Conduct 16-505(B) and (C)), North Carolina (Rule of Professional Conduct 5.5(e) and (f)), Virginia (Rule of Professional Conduct 5.5 (a) and (b)), Washington (Rule of Professional Conduct 5.8(b)), and Wyoming (Rules of Professional Conduct 8.4(g)).

**Commission Member Dissent to the Recommended Adoption
of Proposed Rule 5.3.1, Submitted by Daniel E. Eaton**

I believe that Rule 1-311, dealing with the employment of disempowered attorneys by members of the Bar, should be dropped from the revised Rules of Professional Conduct. The one piece of the rule worth saving should be moved to Rule 1-300. Keeping the rule retains an unnecessary non-conformity with the professional rules in effect in the preponderance of the states. Lawyers who employ disempowered attorneys don't need it to know how such sidelined members of the Bar may be engaged. State Bar prosecutors don't need it to be able to pursue discipline for employing attorneys who assist disempowered practice attorneys in practicing law. And disempowered attorneys don't need a rule not even directed at them to know what they may and may not do while they are sidelined. I respectfully dissent in principle from the Commission's retention of 1-311.

"The Rules of Professional Conduct are intended not only to establish ethical standards of members of the bar, but also designed to protect the members of the public." (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917, citations omitted, rejecting disciplined attorney's contention that consent of client or the fairness of an attorney-client transaction rendered professional conduct rule regulating such a transaction in operative.) The first principle of this Commission's Charter from the State Bar Board of Trustees captures that declaration: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public." (Commission Charter, Principle 1.)

Principle 3 of the Commission's Charter directs the analysis of whether a particular existing Rule should be revised and, if so, how: "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 promote a national standard with respect to professional responsibility issues **whenever possible**." (Emphasis added.)

Rule of Professional Conduct 1-311 is entitled "Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member." It was adopted by the California Supreme Court in 1996 over the dissent of Justice Joyce Kennard. The Rule has six subparts. Paragraph (A) defines the terms "employ," "involuntarily inactive member," and "resigned member." Paragraph (B), the core of the Rule, sets out six tasks the employing member of the Bar may not employ a disempowered attorney to do on behalf of the employing member's clients. Subparagraph 6 of this paragraph has the catchall prohibition on employing such an attorney to "[e]ngage in activities which constitute the practice of law." Paragraph (C) identifies three non-exhaustive types of "research, drafting or clerical activities" the employing attorney may employ a disempowered lawyer to do. Paragraph (D) requires the employing attorney to serve a written notice of the employment of the disbarred attorney on the State Bar, listing the prohibited activities in paragraph (B) and confirming that the disempowered attorney is not being employed to perform any of those activities. Paragraph (D) also requires the employing attorney to serve a similar written notice on each client on whose matter the disempowered attorney will work before or at the time the disempowered attorney begins to work on the client's matter and further requires the employing attorney to retain that notice for two years with proof that it was served. Paragraph (E) expressly allows the employing attorney, without notifying clients or the Bar, to hire the disempowered attorney exclusively to do such support services as typing,

catering, reception, and maintenance. Paragraph (F) requires the employing member to notify the Bar when the services of the disempowered attorney are terminated.

The substance of Rule 1-311 is not found in the ABA Model Rules and is not found in the professional rules of 46 other states. The continued presence of Rule 1-311 in the California Rules of Professional Conduct is an unnecessary non-conformity with the rules used by the preponderance of the states. The essence of the Rule would remain in Business and Professions Code § 6133: “Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline.” This provision was enacted in 1988. It captures all of paragraph (B) of the existing rule. Indeed, by requiring the employing attorney to supervise the disempowered attorney in the latter’s assigned duties, § 6133 appropriately goes beyond what is required by Rule 1-311. It is not clear that the continued presence of this Rule, with a limited exception addressed below, adds anything to the ability of the State Bar to prosecute those who would employ a disempowered attorney to practice law. And yet there it is.

Paragraph (B) is not necessary to tell the disempowered attorney and an attorney who would employ him what he may do. It is useful to repeat that Rule 1-311 is not directed at the disempowered attorney at all, only to the attorney who would employ him or her. Even without this Rule, the law is clear for both employer and employee that a disempowered attorney may not in any way, shape, or form practice law or be employed to do so. Period. Subparagraphs 1-5 of Paragraph (B) add nothing to subparagraph 6, which in turn adds nothing to Rule 1-300. Subparts 1-5 may confuse the practitioner seeking guidance, who may understandably assume that the activities listed in those subparts comprise some special category of activities that are not quite the practice of law prohibited by subpart 6. What it means to “practice law” has been ably handled by the courts, including the State Bar Review Department. (See e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 (collecting cases); *Farnham v. State Bar* (1976) 17 Cal.3d 605; *Estate of Condon v. McHenry* (1998) 65 Cal.App.4th 1138, 1142-1143.) That is where those looking for guidance on this question, both the disempowered attorney and the one who would employ him or her, should turn, not the Rules of Professional Conduct.

It may be argued that Paragraphs (C) and (E) are still important because they guide the employing attorney in assigning the disempowered attorney appropriate tasks and thereby encourage the rehabilitation of the disempowered attorney. There are at least two responses to that argument.

First, it should be self-evident that not all roads to vocational redemption for the disempowered lawyer lead through a law office. For one thing, seven states prohibit suspended or disbarred lawyers from engaging in any law-related activities, a bar that presumably does not preclude those lawyers’ rehabilitation through other means. There are other ways for a disempowered lawyer to carry the heavy burden of demonstrating the “exemplary” behavior “over a meaningful period of time” required for reinstatement. (*In re Gossage* (2000) 23 Cal.4th 1080, 1097.) That is why any defense of this Rule on the ground that its elimination would make the disempowered lawyer altogether unemployable makes no sense. The omission of these provisions would not even make the disempowered lawyer less employable since anyone at all may perform the tasks that are listed in Paragraphs (C) and (E), and there is nothing in the Rules that says that a disempowered lawyer may not be employed by an active lawyer at all.

Second, a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney. In any event are the Rules of Professional Conduct, given their purpose, really the place to advance even such a noble end?

All of that said, I would not discard Rule 1-311 in its entirety. The requirement that the employing attorney provide contemporaneous written notice to clients on whose matters the disempowered is being engaged to work serves the purpose of these Rules to protect the public, especially the public consisting of clients. The same could be said I suppose of a rule requiring written notice to a client of anyone convicted of criminal fraud to work on their matters. I would transfer this part of the Rule to Rule 1-300 (A), addressing the unauthorized practice of law.

Rule 1-300 (A) reads: "A member shall not aid any person or entity in the unauthorized practice of law." One of three other states that have such a rule, Colorado, places the substance of the current Rule 1-311 under its rule prohibiting an attorney to assist others in the unauthorized practice of law. (See, Colorado Rule 5.5.) Rule 5.5 also is the ABA Rule addressing the unauthorized practice of law. Annotations under Rule 5.5, as it has been adopted in other states deal with the same kind of conduct as addressed in Rule 1-311. See e.g., *Ky. Bar Ass'n v. Unnamed Attorney* (Ky. 2006) 191 S.W.3d 640 (Lawyer disciplined for employing suspended lawyer and telling clients that employee was not practicing law for "health" and other reasons.) I would make the client notification provision of Rule 1-311 new Paragraph (B) of Rule 1-300 and make what is now Paragraph 1-300(B) a new Paragraph 1-300(C).

But that is the only part of Rule 1-311 that I would keep. The Commission learned from the Office of Chief Trial Counsel that lawyers who have employed disempowered attorneys have filed over 1,000 written notices of having done so with the State Bar under this Rule. Impressive, but what ethical purpose does that really serve? Violation of the written notice provision gives the Bar an additional ground to punish a lawyer who has assisted a disempowered attorney in the practice of law. But the employing attorney is subject to discipline for that under Rule 1-300 anyway. And what of the lawyer who employs a disempowered attorney to perform non-legal tasks without serving the written notice with the Bar? In that case, violation of the notice furnishes a unique ground to seek discipline of the unwary employing lawyer. In my view, the provision requiring written notice to the Bar gives rise to what is essentially either redundant discipline or it is a trap for the unwary. Either way, it should go.

Yes, we start with the Rules as they exist, but our mandate goes beyond that. I regret that we have missed a rare opportunity to eliminate an unnecessary non-conformity with the rules prevailing in the vast majority of the states. I respectfully dissent.

**Rule 5.3.1 [1-311] Employment of Disbarred,
Suspended, Resigned, or Involuntarily Inactive Lawyer
(Commission’s Proposed Rule Adopted on June 26, 2015 – Clean Version)**

- (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.)

**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.4
(Current Rules 1-310; 1-320; 1-600)
Financial And Similar Arrangements With Nonlawyers**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated current rules 1-310 (Forming a Partnership With a Non-lawyer), 1-320 (Financial Arrangements With Non-Lawyers), and 1-600 (Legal Service Programs) in accordance with the Commission Charter, with a focus on the function of these rules as disciplinary standards, 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 which contains many of the concepts included in these three California rules in a single rule, Model Rule 5.4 (Professional Independence Of A Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. The result of the Commission’s evaluation is proposed rule 5.4 (Financial and Similar Arrangements With Nonlawyers). 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 evaluating these rules was whether to retain the existing rules separately, or to recommend adoption of a rule derived from ABA Model Rule 5.4. The recommendation is for a rule derived from ABA Model Rule 5.4 because the proposed rule gathers together in a single rule concepts that are intended to promote the independence of a lawyer’s professional judgment, as opposed to retaining these concepts in three separate rules. The proposed rule will improve public protection by providing broader prohibitions on a lawyer’s conduct and on relationships into which a lawyer might enter that could pose a threat to the lawyer’s exercise of independent professional judgment. In addition, the proposed rule provides greater public protection by expanding upon current rule 1-310¹ through not only prohibiting a lawyer from forming a partnership with a nonlawyer, but also any other organization with a nonlawyer if any of the activities of the organization consist of the practice of law. Finally, the proposed rule ensures California’s existing laws permitting lawyers to participate with governmental entities, legal services programs and certain other organizations continue to be honored.

Paragraph (a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer or with an organization that is not authorized to practice law. Paragraph (a) contains five subparagraphs providing guidance on the exceptions to the prohibition permitted under the rule. Paragraph (a) contains the substance of current rule 1-320(A).

Paragraph (b) prohibits a lawyer from forming a partnership or other organization with a nonlawyer if any of the activities of the partnership or organization consist of the practice of law. Paragraph (b) contains the substance of current rule 1-310 but, as stated above, expands upon the current rule by prohibiting a lawyer from forming any other organization, in addition to a partnership, with a nonlawyer to conduct the practice of law.

¹ Current Rule 1-310 (Forming a Partnership With a Non-Lawyer) provides:

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Paragraph (c) prohibits a lawyer from allowing a person who recommends, employs, or pays the lawyer to provide legal services for another to interfere with either the lawyer's independent professional judgment or with the lawyer-client relationship in rendering legal services.

Paragraph (d) prohibits a lawyer from practicing law 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;² (2) a nonlawyer is a director or officer of the corporation or holds a similar position of 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.

Paragraph (e) requires the Board of Trustees of the State Bar of California to formulate and adopt Minimum Standards for Lawyer Referral Services which are binding on lawyers in California. This paragraph also prohibits a lawyer from accepting a referral from, or otherwise participating in, a lawyer referral service unless it complies with the Minimum Standards for Lawyer Referral Services as adopted by the Board. Paragraph (e) contains the substance of current rule 1-600(B).

Paragraph (f) prohibits a lawyer from practicing law with or in the form of a nonprofit legal aid, mutual benefit, or advocacy group if such organization allows any third person or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or helps any person or organization to practice law in violation of the Rules of Professional Conduct or the State Bar Act. Paragraph (f) contains the substance of current rule 1-600(A).

There are four comments to the rule. Comment [1] states that paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to a nonlawyer employee so long as the arrangement does not interfere with the lawyer's independent professional judgment; however, the nonlawyer's compensation may not be based on a percentage or share of fees in specific cases or legal matters. Comment [2] states that paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to the lawyer so long as the compensation is not determined as a percentage or share of the lawyer's overall revenues, or tied to fees in specific cases or legal matters. Comment [3] clarifies that paragraph (a)(5)

² Proposed paragraph (d)(1) contains a limited exception which states: "except for allowing a fiduciary representative of a lawyer's estate to hold the lawyer's stock or interest for a reasonable time during administration." This is consistent with State Bar Rule 3.157(C) and Business and Professions Code section 6171(a).

State Bar Rule 3.157(C): "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death."

Bus. & Prof. Code § 6171(a):

With the approval of the Supreme Court, the State Bar may formulate and enforce rules and regulations to carry out the purposes and objectives of this article, including rules and regulations requiring all of the following:

- (a) That the articles of incorporation or bylaws of a law corporation shall include a provision whereby the capital stock of the corporation owned by a disqualified person (as defined in the Professional Corporation Act) or a deceased person shall be sold to the corporation or to the remaining shareholders of the corporation within such time as the rules and regulations may provide.

permits sharing with or paying court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. Comment [4] states that the rule is not intended to affect case law regarding the relationship between insurers and lawyer providing legal services to insureds.

**Rules 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements with Nonlawyers
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)**

- (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].

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.5
(Current Rule 1-300)
Unauthorized Practice of Law; Multijurisdictional Practice of Law

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-300 (Unauthorized Practice of Law) 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 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). 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 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice 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 5.5 amends current rule 1-300. In substance, it continues the prohibitions in rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the Commission is recommending that the rule also include the Model Rule 5.5 prohibitions against a lawyer who is not admitted to practice in California from maintaining an office or systematic presence in California and falsely holding out that he or she is admitted to practice law in California.

The main issue considered by the Commission in studying this rule was whether to propose paragraph (b) that implements the Model Rule prohibitions against a lawyer who is not admitted to practice in California from: (i) maintaining an office or systematic presence in California; and (ii) from holding out that he or she is admitted to practice law in California. Although the Commission recognized that such conduct presently is governed by well-established State Bar Act prohibitions against the unlawful practice of law (see Business and Professions Code §6125 et seq.), the Commission nevertheless recommends this amendment to the current rule. Three of the Commission’s reasons for this change are set forth below.

First, proposed rule 5.5 would serve as an entry point for out-of-state lawyers considering whether to practice in California and proposed paragraph (b) alerts such lawyers to limitations on their potential authorization to practice in California even if they believe that they would qualify to do so under one of the multijurisdictional practice of law (“MJP”) provisions in the California Rules of Court (i.e., MJP Rule of Court 9.46 authorizing a registered in-house counsel to engage in a limited practice exclusively for that lawyer’s employer).

Second, proposed paragraph (b) would prohibit all non-admitted lawyers, including those persons authorized to practice in California under the Rules of Court (i.e., under the MJP rules, the pro hac vice rule, and other rules) from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California as a member of the State Bar. For example, a non-admitted lawyer who is given narrow permission by a trial judge to appear as counsel pro hac vice in a single case should not thereafter hold himself or herself out as being admitted in California as that would be a misleading representation that the lawyer enjoys the same unlimited privilege of practicing law as an active member.

Third, proposed paragraph (b) would be a necessary predicate in the black letter of the rule for the important information provided in the proposed comment to the rule concerning California's regulatory structure for MJP which differs substantially from that in other jurisdictions where regulation of MJP is found in the Rules of Professional Conduct. In California, MJP is "codified" in the Rules of Court. The comment identifies the categories of authorized practice of law available to qualified lawyers who are not admitted in California and includes citations to the applicable Rules of Court.

**Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Commission's Proposed Rule Adopted on May 30, 2015 – Clean Version)**

- (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).

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.6
(Current Rule 1-500)
Restrictions on a Lawyer's Right to Practice

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-500 (Agreements Restricting a Member's 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 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 5.6 (Restrictions On Right To Practice). 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 5.6 (Restrictions on a Lawyer's Right to 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 main issue considered was whether to add an express exception that would permit a restrictive partnership, or similar, agreement which is "authorized by law" in order to address the wide range of restrictive arrangements that a law firm might employ which do not constitute a violation of the current rule (see *Howard v. Babcock* (1993) 6 Cal.4th 409, 425). The Commission voted to recommend adoption of this exception. Furthermore, the Commission recommends adoption of the rule structure of Model Rule 5.6 to eliminate unnecessary differences with the national standard of Model Rule 5.6 and to facilitate compliance in the case of partnership agreements among multijurisdictional law firms.

Paragraph (a) restricts a lawyer from participating in offering or making: (1) a restrictive law firm partnership, or similar, agreement; and (2) a restrictive agreement as part of a settlement of a client's case or matter. Paragraph (a) continues the concept of the existing exception for agreements that concern benefits upon retirement (current rule 1-500(A)(1)). Paragraph also adds the exception described above that permits agreements authorized by law.

Paragraph (b) continues the existing prohibition against a lawyer participating in, offering or making an agreement which precludes the reporting of a violation of the rules. Although this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection.

Paragraph (c) provides that the rule does not prohibit agreements that impose restrictions on practice as part of disciplinary proceedings. This continues paragraph (A)(3) of current rule 1-500.

Comment [1] cites to Business and Professions Code § 16602 and *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80] concerning the application of the wide range of restrictive arrangements that law firms might employ.

Comment [2] explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement cannot require that a lawyer refrain from representing other clients. This continues the guidance in the first Discussion paragraph in rule 1-500.

Comment [3] clarifies that the rule does not prohibit restrictions of the sale of a law practice, where agreements to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold.

**Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice
(Commission's Proposed Rule Adopted on October 23, 2015 – Clean Version)**

- (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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 6.3
(No Current Rule)
Membership in Legal Services Organization**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 6.3 (Membership in Legal Services Organization) 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 6.3 (Membership in Legal Services Organization). 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 6.3 is derived from ABA Model Rule 6.3. The proposed rule addresses a lawyer serving as an officer or member in a legal services organization while continuing to practice law in another capacity. The proposed rule’s aim is to provide assurance to lawyers that they will not disqualify themselves or their firm from participating as officers or members of a legal services organization. Such service is important and should be encouraged as long as it does not interfere with the lawyer’s duties to his or her clients.

Proposed rule 6.3 provides that a lawyer may serve as an officer or member of a legal services organization even where the organization serves persons whose interests are adverse to the lawyer’s clients. However, the lawyer is barred from participating in a decision or action of the legal services organization in the following situations.

First, paragraph (a) prohibits such participation if it would be incompatible with certain enumerated duties owed to the lawyer’s clients, including the duty of confidentiality. While ABA Model Rule 6.3 does not include a reference to confidentiality, California has a tradition of heightened client protection in this area.

Second, paragraph (b) prohibits a lawyer from participating in a decision or action of a legal services organization where it would have an adverse effect on the organization’s client whose interests are adverse to those of the lawyer’s client.

The comment provides that a lawyer participating as an officer or member of a legal services organization does not have a lawyer-client relationship with the persons served by the organization. The comment explains the policy underlying the proposed rule, namely, that without such a rule, the profession’s involvement in legal services organizations would be severely curtailed.

National Background – Adoption of Model Rule 6.3

As California does not presently have a direct counterpart to Model Rule 6.3, 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 6.3: Membership in Legal Services Organizations,” revised May 4, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.pdf

Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.¹ Seven states have adopted a slightly modified version of Model Rule 6.3.² Two states have adopted a version of the rule that is substantially different from Model Rule 6.3.³ Four states have not adopted any version of Model Rule 6.3.⁴

¹ The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

² The seven states are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

³ The two states are: Michigan and New Jersey.

⁴ The four states are: California, Kentucky, Ohio, and Texas.

Rule 6.3 Membership In Legal Services Organization
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

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 Rules 1.7 or 1.9, or Business and Professions Code § 6068(e)(1); 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 6.5
(Current Rule 1-650)
Limited Legal Services Programs

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-650 (Limited Legal Services Programs) 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 6.5 (Nonprofit And Court-Annexed Limited Legal Services Programs). 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 6.5 (Limited Legal Services Programs). 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 6.5 carries forward the substance of current rule 1-650, which was originally derived from Model Rule 6.5. The rule promotes legal services activities by lawyers and aids in addressing the current access to the justice crisis in California.

Paragraph (a) states that if a lawyer provides short-term limited legal services to a client through a program sponsored by a court, government agency, bar association, law school or nonprofit organization the lawyer is:

- (1) subject to rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients] if the lawyer knows that the representation of the client involves a conflict of interest;
- (2) subject to rule 1.10 [Imputation of Conflicts of Interest: General Rule] if the lawyer knows that an associated lawyer in a law firm is prohibited from representation by rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients].

Paragraph (b) clarifies that rule 1.10 [Imputation of Conflicts of Interest] is inapplicable to proposed rule 6.5 outside of the specific language of 6.5(a)(2).

Paragraph (c) states that personal disqualification of a lawyer in a legal services program will not be imputed to lawyers participating in the same program.

Comment [1] explains that there is no expectation that the lawyer’s representation of a client will continue beyond the limited consultation through legal services programs, in which it is unfeasible for a lawyer to systematically screen for conflicts of interest.

Comment [2] requires the client’s informed consent to the limited scope representation when a lawyer provides short-term limited legal services. Furthermore, a lawyer’s duty of confidentiality to the client are applicable to the limited representation.

Comment [3] reaffirms that the lawyer must have actual knowledge that the representation presents a conflict of interest for the lawyer.

Comment [4] reaffirms that imputation of conflicts of interest is applicable only when the lawyer has actual knowledge that another lawyer in the lawyer’s law firm would be disqualified. In

addition, imputation will not preclude the disqualified lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the legal service program's auspices.

Comment [5] clarifies that 1.7 [Conflict of Interest: Current Clients], 1.9 [Duties To Former Clients] and 1.10 [Imputation of Conflicts of Interest] are applicable when the lawyer undertakes to represent the client in the matter on an ongoing basis.

Rule 6.5 [1-650] Limited Legal Services Programs
(Commission's Proposed Rule Adopted on October 23, 2015 – Clean Version)

- (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), Rule 1.6, and Rule 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.

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.

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.

3. Recommendation to eliminate the record-keeping requirement. Following the lead of most jurisdictions in the country and the ABA itself, the Commission recommends eliminating the two-year record-keeping requirement in current rule 1-400(F). The ABA Ethics 2000 Commission explained the rationale:

"The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years." (See ABA Reporter's Explanation of Changes, Rule 7.2(b).)

The Commission also notes that because a "web page" is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), it would be extraordinarily burdensome to require a lawyer to retain copies of each web page given how often the information on web pages are changed, and how often web pages are deleted. Nevertheless, the Commission also notes that even with the deletion of the requirement in rule 1-400(F), a one-year retention requirement would remain in Business and Professions Code section 6159.1. To address this discrepancy, the rule submission to the Supreme Court should include a note to this effect and recommend

that, with the Supreme Court's approval, the State Bar approach the legislature with a recommendation to delete that requirement.

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 warranties 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.

Rule 7.2 (Advertising)

As noted, proposed Rule 7.2 will specifically address advertising, a subset of communication.

Paragraph (a), derived from MR 7.2(a) as modified, permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications). The addition to MR 7.2(a) language of the terms "any" and "means of" are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

Paragraph (b) prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances set forth in subparagraphs (b)(1) through (b)(5). Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not "preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment." The term "reasonable" was added to modify "costs" to ensure such advertising costs do not amount to impermissible fee sharing with a nonlawyer. Subparagraph (b)(2) clarifies that payment of "usual charges" to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. Subparagraph (b)(3) carries forward the exception in current rule 2-200(B). Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved. Subparagraph (b)(5) carries forward the substance of the second sentence of current rules 2-200(B) and 3-120(B), which permit such gifts to lawyers and nonlawyers, respectively.

Paragraph (c), derived from Model Rule 7.2(c), as modified, requires the name and address of at least one lawyer responsible for the advertisement's content. It carries forward the concept in current Standard No. 12.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] provides interpretive guidance on the kinds of information that would generally not be false or misleading by providing a non-exhaustive list of permissible information. The comment's last sentence carries forward the substance of rule 1-400, Standard No. 16 regarding misleading fee information. Comment [2] clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. Comment [3] provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside contractors to assist in the marketing the lawyer's services, subject to proposed Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). Comment [4] clarifies how the rule should be applied to reciprocal referral arrangements, as permitted under subparagraph (b)(4), specifically focusing on the concept that such arrangements must not compromise a lawyer's independent professional judgment.

Rule 7.3 (Solicitation of Clients)

As noted, 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 through other means, e.g., letter, email, text, etc. It carries forward concepts that are found in current rule 1-400(B), (C), (D)(5) and Standard Nos. 3, 4 and 5.

Paragraph (a), derived from MR 7.3(a), carries forward the concept of current rule 1-400(C), which contains the basic prohibition against what is traditionally understood to constitute improper "solicitation" of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their "skills in the persuasive arts" to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision. The provision thus eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The term "real-time electronic contact" has been added

from Model Rule 7.3 because the same concerns regarding in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer.

Paragraph (b), derived from MR 7.3(b), is a codification of *Shapiro v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, in which the Supreme Court held that a state could not absolutely prohibit direct targeted mailings. The provision, however, recognizes that there are instances in which even any kind of communication with a client, including those permitted under Rule 7.2, are prohibited. Such circumstances include when the person being solicited has made known to the lawyer a desire not to be contacted or when the solicitation by the lawyer “is transmitted in any manner which involves intrusion, coercion, duress or harassment.” The latter situation largely carries forward the prohibition in current rule 1-400(D)(5). The Commission, however, determined that additional language in the latter provision, i.e., “compulsion,” “intimidation,” “threats” and “vexatious conduct,” are subsumed in the four recommended terms: “intrusion, coercion, duress and harassment.”

Paragraph (c), derived from MR 7.3(c), largely carries forward current rule 1-400, Standard No. 5, and requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter, i.e., direct targeted communications, must include the words “Advertising Material” or words of similar import. The provision is intended to avoid members of the public being misled into believing that a lawyer’s solicitation is an official document that requires their response.

Paragraph (d), derived from MR 7.3(d), would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members. Such plans hold promise for improving access to justice. Further, unlike a lawyer’s solicitation of a potential client for a particular matter where there exists a substantial concern for overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization.

Paragraph (e), derived in part from MR 7.3, cmt. [1], has been added to the black letter to clarify that a solicitation covered by this Rule: (i) can be oral, (paragraph (a)) or written (paragraph (b)); and (ii) is a communication initiated by or on behalf of the lawyer. The first point is important because the traditional concept of a “solicitation” is of a “live” oral communication in-person or by phone. The second point is an important reminder that a lawyer cannot avoid the application of the rule by acting through a surrogate, e.g., runner or capper.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] clarifies that a communication to the general public or in response to an inquiry is not a solicitation. Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in the cited Supreme Court opinion, *In re Primus*, are not prohibited. Comment [3] clarifies the application of paragraph (d). Comment [4] clarifies that regardless of whether the lawyer is providing services under the auspices of a permitted legal services plan, the lawyer must comply with the cited rules.

Savings Clause. In addition to the foregoing recommended adoptions, the Commission recommends the deletion of the savings clause in current rule 1-400(C) (“unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.”) The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*, when it was uncertain the extent to which limitations placed on lawyer commercial speech could survive Constitutional challenge. The clause’s continued vitality is questionable at best. Through its decisions in the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The Commission concluded that the clause is no longer necessary.

Current Rule 1-400(B)(2)(b). The Commission also recommends the deletion of current rule 1-400(B)(2)(b), which includes in that rule’s definition of “solicitation” a communication delivered in person or by telephone that is “(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.” In recommending its deletion, the Commission reasoned that although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, the provision does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.

Rule 7.4 (Communication of Fields of Practice and Specialization)

As noted, proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization. It carries forward concepts that are found in current rule 1-400(D)(6).

Paragraph (a), derived from MR 7.4(d), as modified, states the general prohibition against a lawyer claiming to be a “certified specialist” unless the lawyer has been so certified by the Board of Legal Specialization or any accrediting entity designated by the Board. Placing this provision first is a departure from the Model Rule paragraph order. However, in conformance with the general style format for disciplinary rules, the Commission concluded that this prohibitory provision should come first, followed by paragraph (b), which identifies statements a lawyer is permitted to make regarding limitations on the lawyer’s practice.

Paragraph (b), derived from MR 7.4(a), permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer’s practice specializes in, is limited to, or is concentrated in a particular field of law.

The Commission does not believe any comments are necessary to clarify the black letter of the proposed rule.

Recommended rejections of Model Rule provisions. The Commission does not recommend adoption of MR 7.4(b) or (c), both of which are statements regarding practice limitations or specializations that have been traditionally recognized (patent law in MR 7.4(b) and admiralty law in MR 7.4(c)), but which come within the more general permissive language of proposed paragraph (b).

Rule 7.5 (Firm Names and Trade Names)

As noted, proposed Rule 7.5 will regulate the use of firm names and trade names. It carries forward concepts in current rule 1-400(A), which identifies the kinds of communications the rule is intended to regulate, and Standard Nos. 6 through 9.

Paragraph (a) sets forth the general prohibition by clarifying that any use of a firm name, trade name or other professional designation is a “communication” within the meaning of proposed Rule 7.1(a) and, therefore must not be false or misleading. The Commission, however, recommends departing from both current rule 1-400 and MR 7.5 by eliminating the term “letterhead,” which is merely a subset of “professional designation” and has largely been supplanted by email signature blocks. (See also discussion re the single comment to this Rule.

Paragraph (b), derived from the second sentence of MR 7.5(a), as modified to be prohibitory rather than permissive, carries forward the concept in Standard No. 6 regarding communications that state or imply a relationship between a lawyer and a government agency.¹

Paragraph (c), derived from MR 7.5(d), as modified to be prohibitory rather than permissive, carries forward the concepts in Standard Nos. 7 and 8 that prohibit communications that state or imply a relationship between a lawyer and a law firm or other organization unless such a relationship exists.²

There is a single comment that provides an explanation of the scope of the term, “other professional designation,” which includes not only letterheads but also more recent law marketing innovations such as logos, URLs and signature blocks.

¹ Standard No. 6 provides the following is a presumed violation of rule 1-400:

(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.

² Standard Nos. 7 and 8 provide the following are presumed violations of rule 1-400:

(7) 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 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.

(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.

**Rule 7.1 [1-400] Communications Concerning A Lawyer's Services
(Commission's Proposed Rule Adopted on March 31 – April 1, 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 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 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (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 Rule[s 2.1 and]¹ 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.

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 7.3 [1-400] Solicitation of Clients
(Commission’s Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

- (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
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (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
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

- (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.

**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 known to be false, equally apply to lawyers who are supporting or opposing the application of another person.

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.

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.

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."

**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, Readmission, Certification or Registration
(Commission's Proposed Rule Adopted on May 30, 2015 – Clean 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) An applicant for admission, readmission, certification or registration shall not knowingly* make a false statement of material fact, fail to disclose a material fact, or fail to correct a statement known* to be false.
- (c) A lawyer supporting or opposing another person's application for admission, readmission, certification or registration, 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.
- (d) This Rule does not apply to a lawyer in representing an applicant in proceedings relating to admission, readmission, certification or registration.

Comment

[1] A person* who makes a false statement in connection with that person's own application can be subject to discipline under this Rule or to later cancellation of that person's admission or other authorization.

[2] In representing an applicant for admission, readmission, certification or registration, a lawyer is subject to other applicable rules and the State Bar Act.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1.1
(Current Rule 1-110)
Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-110 (Disciplinary Authority of the State Bar) 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. There is no corresponding American Bar Association (“ABA”) Model Rule to current rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules for Lawyer Disciplinary Enforcement. The result of the Commission’s evaluation is proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline). 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.

Current rule 1-110 states: “A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19 California Rules of Court.” Rule 10(B) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that “[w]ritten conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.”

The Commission is recommending two clarifying revisions to the current rule. First, the Commission is recommending the addition of a reference to “an agreement in lieu of discipline.” An agreement in lieu of discipline is a disposition of a disciplinary matter that might include “conditions” with which a lawyer should be required to comply. Second, the Commission is recommending substituting the phrase “the terms and conditions” for “conditions” as the former is a more inclusive reference than the later. The Commission believes that both changes further the function of the rule as a charging vehicle that helps assure that lawyers can be held accountable if terms or conditions of a disciplinary disposition are violated.

The single comment recommended in proposed rule 8.1.1, recognizes that there are other provisions which also require a lawyer to comply with conditions of discipline. See e.g., Business and Professions Code § 6068 subdivisions (k) and (l).

**Rule 8.1.1 [1-110] Compliance with Conditions of Discipline
and Agreements in Lieu of Discipline
(Commission's Proposed Rule Adopted on May 29, 2015 – Clean Version)**

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reproof, 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).

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.2
(Current Rule 1-700)
Judicial Officials

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-700 (Member as Candidate for Judicial Office) 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 8.2 (Judicial And Legal Officials). 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 8.2 (Judicial Officials). 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.

Current rule 1-700 requires that a member who is a candidate for judicial office comply with Canon 5 of the Code of Judicial Ethics. The current rule, includes a provision defining “candidate for judicial office” describing when such candidacy starts and ends (the Model rule does not). Both Model Rule 8.2 and current rule 1-700 require compliance with the applicable provision of the Code of Judicial Ethics. Model Rule 8.2 also prohibits lawyers from making false statements of fact concerning the qualifications or integrity of a judge, legal officer or candidate for election or appointment to judicial or legal office. Proposed rule 8.2 tracks this aspect of Model Rule 8.2 by including a revision to paragraph (a) prohibiting lawyers from making false or reckless statements concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

Paragraph (a) of proposed rule 8.2 prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. The rationale for adding this provision is to enhance public confidence in the legal profession. This concept has precedent generally in a lawyer’s duty of respect to the courts and judicial officers (Bus. & Prof. Code § 6068 (b)) and specifically in disciplinary case law (*In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370 [during a lawyer’s campaign for judicial election, the lawyer made false statements regarding his opponent’s involvement in fraudulent activities]).

Paragraph (b) of proposed rule 8.2 makes clear that a lawyer who is a candidate for judicial office shall comply with Canon 5 of the California Code of Judicial Ethics. Like current rule 1-700(B), proposed rule 8.2 defines “candidate for judicial office” and addresses the determination of when a member is a candidate for judicial office as well as sets forth the criteria for determination of when the lawyer’s judicial candidacy ends.

Paragraph (c) is a new paragraph that governs the conduct of a lawyer who seeks appointment to judicial office and requires the candidate’s compliance with Canon 5B(1) of the California Code of Judicial Ethics. Similar to the policy and intended function of the current rule, new paragraph (c) could result in State Bar disciplinary charges for violations of the applicable provisions of the Code of Judicial Ethics.

There are two new comments to proposed rule 8.2. Both new comments promote lawyer compliance with obligations imposed by the rule and are revisions to the corresponding ABA Model Rule 8.2. Comment [1] recognizes the duties of lawyers to maintain respect due to the courts and judges (Bus. & Prof. Code § 6068(b)) and encourages lawyers to defend judges and courts unjustly criticized. Comment [2] in part explains that false statements by lawyers about candidates for judicial office harm confidence in the legal profession.

Rule 8.2 [1-700] Judicial Officials

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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

[1] 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).

[2] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons* being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

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.

Rule 8.4 [1-120] Misconduct

(Commission's Proposed Rule Adopted on January 22 – 23, 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 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, § 2 of the California Constitution.

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

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

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.

**Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Commission's Proposed Rule Adopted on February 19 – 20, 2016 – Clean Version)**

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (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) discriminate or knowingly* permit unlawful discrimination;
 - (2) 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) 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.
- (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" means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by 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 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 and the United States Department of Justice, Coordination and Review Section.
 - (2) 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 prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

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 supervisory 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 challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] 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-supervisory 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] 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] 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] 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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 8.5
(Current Rule 1-100(D))
Disciplinary Authority; Choice of Law**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-100(D) (Rules of Professional Conduct, in General – Geographic Scope of the Rules) 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 8.5 (Disciplinary Authority; Choice of Law). 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 8.5 (Disciplinary Authority; Choice 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.

This proposal responds to multijurisdictional practice considerations that have expanded in recent years. Proposed rule 8.5 departs from the standard in current rule 1-100(D).¹ The Commission is recommending a new rule derived from Model Rule 8.5 in order to eliminate unnecessary differences with the national standard. The Commission believes this is particularly significant for the topics of choice of law and the extraterritorial application of the rules. Twenty-four states have adopted Model Rule 8.5 verbatim.² Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.³ Nine states have adopted a version of

¹ Current rule 1-100(D) (Geographic Scope of Rules) provides that:

(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.

² The twenty-four states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

³ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

the rule that is substantially different to Model Rule 8.5.”⁴ One state has not adopted a version of Model Rule 8.5.⁵

Paragraph (a) clarifies that a lawyer who is admitted to practice in California is subject to discipline regardless of where their conduct occurs, while a lawyer who is not admitted in California is subject to California disciplinary authority if the lawyer provides or offers legal services in California. A lawyer may be subject to discipline in California and another jurisdiction for the same conduct.

Paragraph (b) clarifies the choice of law to be applied by the disciplinary authority of California. The rules of professional conduct to be applied shall be as follows:

- (1) matters pending before a tribunal shall use rules of the jurisdiction in which the tribunal sits, unless the tribunal provides otherwise;
- (2) for any other conduct, rules of the jurisdiction in which the lawyer’s conduct occurred or where the predominant effect of the conduct occurred.

The one recommended Comment to proposed rule 8.5 is derived from Comment [1] to Model Rule 8.5, but cites to relevant California statutory law. Comment [1] reaffirms that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Furthermore, a lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct.

⁴ The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁵ The one states is: Alabama.

Rule 8.5 Disciplinary Authority; Choice of Law
(Commission's Proposed Rule Adopted on October 23, 2015 – Clean Version)

- (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.