THE STATE BAR
OF CALIFORNIA

COMMISSION FOR THE REVISION OF THE
RULES OF PROFESSIONAL CONDUCT

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State Bar Commission for the Revision of the Rules of Professional Conduct

RULES AND CONCEPTS THAT WERE CONSIDERED BUT ARE NOT RECOMMENDED FOR ADOPTION

Introduction:

The State Bar's Special Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Rules of Professional Conduct. The Commission considered each of the current California rules and the comparable rule, if any, adopted by a preponderance of United States jurisdictions. In many instances, the comparable rule adopted was identical to, or a variation of, an American Bar Association ("ABA") Model Rule. The examinations of Model Rules that do not have a current California counterpart were conducted in accordance with the Commission Charter that focuses on the rules as disciplinary standards and discourages the adoption of aspirational provisions. With this focus, the Commission determined not to recommend the adoption of eight Model Rules. The following discussion identifies these rules and summarizes the Commission's reasoning for not recommending adoption.

ABA Model Rules Considered but not Recommended for Adoption

Model Rule	Title
1.18	Duties to Prospective Clients
2.3	Evaluation for Use by Third Parties
5.7	Responsibilities Regarding Law Related Services
6.1	Voluntary Pro Bono Publico Service
6.2	Accepting Appointments
6.4	Law Reform Activities
7.6	Political Contributions to Obtain Government Engagements or Appointments by Judges
8.3	Reporting Professional Misconduct

1. Model Rule 1.18: Duties to Prospective Client

Model Rule 1.18 provides:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
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> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
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> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that

lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client

or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 1.18 are the following.

(1) The rule is primarily one of guidance for lawyers as to how to conform their communications during a consultation with a person regarding the provision of legal advice or the formation of a possible lawyer-client relationship. It functions less as a disciplinary rule and thus should not be included in a set of disciplinary rules.

(2) The guidance provided by proposed rule 1.18 is already adequately provided in the Evidence Code, §§ 950 through 962, State Bar Ethics opinions, (e.g., opinions 2003-161 and 2005-168), and case law.

(3) Paragraph (d)(2), which would permit a lawyer who actually acquired confidential information from a prospective client to be screened, would in effect enable a lawyer in a law firm to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then permit other lawyers in the same firm appear against that person in the very matter in which representation was sought. Permitting screening in a situation that is tantamount to a side-switching conflict is likely to harm public trust and confidence in the legal profession.

(4) In general, screening without client consent does not protect clients because it cannot be verified by a client. A client should not be forced to accept screening imposed unilaterally by a law firm. A client who has shared confidential information with a lawyer, would feel a sense of betrayal. There is no reason why a prospective client should feel any less sense of betrayal than a former client with whom the prohibited lawyer had formed a lawyer-client relationship. In either situation, the person who retained or consulted with the client has disclosed confidential information and that information should be maintained inviolate subject only to informed consent to do otherwise.

At the Commission's June 2-3, 2016 meeting, a motion to recommend the adoption of a version of Model Rule 1.18 failed (6-8-0).

2. Model Rule 2.3 Evaluation for Use by Third Parties

Model Rule 2.3 provides:

> (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
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> (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
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> (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.
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> Comment
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> *Definition*
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> [1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the

> lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).
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> *Financial Auditors' Requests for Information*
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> [6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 2.3 are the following.

(5) The rule is too vague and ambiguous for purposes of lawyer discipline. Consequently, although it arguably could provide guidance, it would be problematic as a disciplinary standard. For example, the following key phrases in paragraph (a) are unclear for disciplinary purposes: "evaluation of a matter affecting a client;" and "compatible with other aspects of the lawyer's relationship with the client."

(6) In comparison with the counterpart provision in the Restatement (§95), the versions of Model Rule 2.3 found in state variations often added rule language or comments in an apparent effort to articulate a more precise duty.

(7) Regardless of the precise language, policy concerns would remain. For example, research has revealed that the rule is more likely to be applied as a default civil standard in assessing whether a lawyer was negligent in preparing a third party opinion letter.

In addition to the foregoing, the Commission observed that both the current rules and case law, as well as the proposed new rules cover the conduct at issue in Model Rule 2.3. In particular, the conflict of interest rules and the duty of loyalty cases cover that conduct, and, more specifically, proposed rule 1.7(b) [3-310(B)] imparts the informed written consent requirement imposed by Model Rule 2.3(b). Proposing a new rule patterned on Model Rule 2.3 would thus be duplicative and unnecessary. Of some concern to the Commission was the fact that a majority of jurisdictions have adopted Model Rule 2.3. However, this was assuaged by the following information from the ABA Annotated Model Rules section on Model Rule 2.3 that reveals that the conduct covered by the rule rarely, if ever, arises in disciplinary cases:

> Rule 2.3 itself deals only with the lawyer's duty to the client, addressing the circumstances under which a lawyer may provide an evaluation to a third person and the extent to which information relating to the evaluation may be disclosed. The comment, however, goes further and provides guidance on information the evaluation may include, and how to deal with limitations on that information. The comment also points out that a lawyer may have a legal duty to the recipient of the evaluation, but that issues related to that legal duty are beyond the scope of the rule. In fact, it is those legal duties to third persons, as well as the lawyer's obligations under a variety of government regulations, that have created most of the case law and commentary on the subject. There is virtually no reported disciplinary authority construing and applying Rule 2.3.

The Commission's Charter emphasizes the function of the California rules as enforceable disciplinary standards. Although Model Rule 2.3 is a rule adopted in a preponderance of jurisdictions, it does not appear to function as a disciplinary rule.

At the Commission's June 2-3, 2016 meeting, the Commission members unanimously approved a recommendation not to adopt a version of Model Rule 2.3 (14-0-0).

3. Model Rule 5.7 Responsibilities Regarding Law Related Services

Model Rule 5.7 provides:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
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> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
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> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
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> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.
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> Comment
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> [1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.
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> [2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.
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> [3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the

Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, the conduct of nonlawyer employees in the distinct entity that the lawyer controls, complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work,

psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 5.7 are the following.

(1) Appropriate guidance is currently provided by other California authorities, including case law and ethics opinions. There appears to be no reason to supplement that authority.[1]

(2) Proposed rule 1.0, Comment [2], provides information that, along with the existing California law described in note 1, provides sufficient guidance to attorneys that they are subject to discipline for conduct in providing law-related services. Comment [2] states: "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity."

(3) The Commission is not aware of any problems regarding the inability to discipline lawyers due to the absence of Model Rule 5.7 in California.

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[1] See, e.g., *Libarian v. State Bar* (1944) 21 Cal.2d 862, 865 ("One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter."); *Marquette v. State Bar* (1988) 44 Cal.3d 253, 262 (attorney disciplined for violating Bus. & Prof. Code § 6106 for perjuring himself on a lease application even though application "did not relate to an issue bearing on the conduct of an attorney-client relationship."); *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 ("when an attorney serves a single client both as an attorney and as one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services."); see also, Cal. State Bar Opn. Nos. 1982-69, 1995-141, and 1999-154 which address an attorney's ethical responsibilities when rendering non-legal services to a client. Finally, some Business and Professions Code sections regulate the activities of a lawyer who also provides non-legal ancillary business services to a client, for example: Bus. & Prof. Code § 6009 (attorney lobbyists); Bus. & Prof. Code § 6009.3 (attorney tax preparers); Bus. & Prof. Code § 6077.5 (attorney debt collector); Bus. & Prof. Code § 6106.7 (attorney sports agent); and Bus. & Prof. Code § 6175.3 (attorney selling "financial products").

At the Commission's June 2-3, 2016 meeting, the Commission members unanimously approved a recommendation not to adopt a version of Model Rule 5.7 (12-0-0).

4. Model Rule 6.1 Voluntary Pro Bono Publico Service

Model Rule 6.1 provides:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
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> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.
>
> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.
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> Comment
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> [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to

provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

At the Commission's January 22, 2016 meeting, the Commission determined that a proposed California version of Model Rule 6.1 should not be recommended for adoption by the Board primarily because the aspirational nature of the proposed rule conflicted with the focus of the Commission's Charter on rules that will set minimal standards for discipline. Nevertheless, the Commission subsequently considered and adopted a new Comment [5] to proposed rule 1.0 (Purpose and Function of the Rules of Professional Conduct). This Comment provides that:

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

Professions Code § 6073 (financial support for programs providing pro bono legal services).

At the Commission's June 2-3, 2016 meeting, the Commission members approved the recommendation to adopt new Comment [5] to rule 1.0. (13-1-0)

Note: A member of the Commission submitted a written dissent to the above action. Refer to the Commission's executive summary of proposed rule 1.0 found in Attachment 2 to Board of Trustees Open Agenda Item 701 JUNE 2016 posted on the State Bar's website at: http://board.calbar.ca.gov/Agenda.aspx?id=11219&t=0&s=false

5. Model Rule 6.2 Accepting Appointments

Model Rule 6.2 provides:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
>
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
>
> Comment
>
> [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.
>
> *Appointed Counsel*
>
> [2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.
>
> [3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

The Commission is not recommending a version of Model Rule 6.2 primarily because the rule is ambiguous in regards to its scope. It is uncertain whether the Model Rule is intended to apply exclusively to pro bono appointments by a tribunal or also to the conduct of lawyers who serve on panels and accept appointments with compensation.[2] In addition, while the rule is consistent with a lawyer's responsibilities under Business and Profession Code section 6068(h), the terms of the rule are more detailed than existing law such section 6068(h) and might have the effect of constraining both lawyers and judges in taking a position on a lawyer's refusal to accept an appointment. For example, the rule includes the concept of a "repugnant client" and it is uncertain that existing California law or policy recognizes such a subjective assessment.

At the Commission's November 13-14, 2016 meeting, a motion to recommend the adoption of a version of Model Rule 6.2 failed (0-16-1).

6. Model Rule 6.4 Law Reform Activities Affecting Client Interests

Model Rule 6.4 provides:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.
>
> Comment
>
> [1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

The Commission is not recommending adoption of a version of Model Rule 6.4 due to concerns about the following unresolved issues:

(1) Whether the term "law reform organization" should be defined. For example, does the term include legislative bodies like Congress? Does the rule encompass reform activities regarding rules or is it limited to legislation? Does the organization to which the lawyer would belong need to have the power to promulgate, as opposed to recommend, changes in the law?);

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[2] Following inquiry, ABA Center on Professional Responsibility staff provided background materials indicating that rule 6.2 was intended to address the situation where a judge appoints a lawyer to represent a client pro bono and not intended to regulate public defenders and/or members of a paid appointment panel. The materials received are on file with Commission staff.

(2) What does “materially benefitted” in the rule’s second sentence mean and how direct a benefit must it be? A further question is whether the immediacy of the benefit matters since the rule is intended to encourage lawyer participation in such activities; and

(3) If the client would be materially harmed (as opposed to benefitted), the second sentence of the rule arguably would not apply, and, if so, what rule would protect the client’s interest, if any. (Cf, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 [duty to disclose any personal relationship or interest that the lawyer knew or reasonably should have known could substantially affect the exercise of his professional judgment].)

At the Commission’s November 13-14, 2016 meeting, a motion to recommend the adoption of a version of Model Rule 6.4 failed (0-14-0).

7. Model Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Model Rule 7.6 provides:

> A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
>
> Comment
>
> [1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.
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> [2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.
>
> [3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.
>
> [4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

> [5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.
>
> [6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 7.6 are the following.

(1) There is no evidence there is a problem in California that requires such a rule. (E.g., no public comment was received on the rule by the first Commission except two comments that supported its rejection.)

(2) The substance of Model Rule 7.6 is addressed adequately by Business and Professions Code section 6106 under the concept of moral turpitude. This encompasses various forms of egregious misconduct, including acts of dishonesty and corruption, and criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials.

(3) Very few jurisdictions have adopted such a rule (only eight jurisdictions have adopted a rule derived from Model Rule 7.6).

(4) The rule requires proof of the lawyer's "purpose" in giving money, making it difficult to prove a violation. The difficulty of proving "purpose" makes the rule a poor candidate as a minimum standard of discipline as contemplated by the Commission's Charter.

(5) The rule might be unconstitutional in light of *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310.

(6) The rule originates from a local issue that confronted the Association of the Bar of the City of New York. That Bar Association was the principal proponent in advocating for the ABA's adoption of a rule in 1997.

At the Commission's March 31–April 1, 2016 meeting, the Commission members unanimously approved the recommendation not to adopt a version of Model Rule 7.6 (14-0-0).

8. Model Rule 8.3 Reporting Professional Misconduct

Model Rule 8.3 provides:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.
>
> Comment
>
> [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
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> [2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.
>
> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.
>
> [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.
>
> [5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their

> professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Among the reasons for the Commission's decision not to recommend the adoption of Model Rule 8.3 are the following.

(1) Despite the recognition that reporting could be trumped by the duty of confidentiality with respect to information learned in the course of representation of a client, there remains a potential for conflict with that duty to the extent lawyers might feel obligated to seek a waiver of confidentiality to further the reporting interests of the lawyer rather than the client's own interests;

(2) The rule would pose a potential for conflicts with a lawyer's duty of loyalty in those specific instances where making the report would be detrimental to a current or former client's interests (for example, causing animosity with opposing counsel as the subject of a report that leads to the unwinding of a settlement that the client might otherwise have consummated); and

(3) The rule might be construed as inconsistent with the discretionary reporting policy reflected in Canon 3D(2) of the California Code of Judicial Ethics that states: "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which ***may include reporting the violation to the appropriate authority***." (Emphasis added.)

At the Commission's June 2-3, 2016 meeting, the Commission members approved a recommendation not to adopt a version of Model Rule 8.3 (10-4-0).