



# THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL COMPETENCE  
PLANNING, AND DEVELOPMENT

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## MEMORANDUM

**DATE:** February 22, 2016

**TO:** Members, Regulation and Discipline Committee

**FROM:** Randall Difuntorum, Director, Professional Competence Programs

**SUBJECT:** Commission for the Revision of the Rules of Professional Conduct of the State Bar of California – Executive Summaries of Selected Proposed Rules

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By statute, the Board of Trustees ("Board") has the authority to adopt amendments to the Rules of Professional Conduct of the State Bar of California that are binding upon all members of the State Bar once those rules are approved by the California Supreme Court. (Business and Professions Code sections 6076 and 6077.) The Board has assigned the Commission for the Revision of the Rules of Professional Conduct ("Commission") to conduct a study of the Rules of Professional Conduct and to recommend comprehensive amendments. No Board action is requested at this time.

The Commission's proposed new and amended rules are anticipated to be considered by the Board at a special meeting in June. In preparation for that June meeting, Commission staff has prepared executive summaries of selected proposed rules to give Board members an early opportunity to become familiar with certain key substantive and policy issues. More executive summaries are planned for RAD's May meeting. Board members with questions may contact Randall Difuntorum at (415) 538-2161.

### *Executive Summaries Attached:*

- Proposed Rule 4.2 (CA Rule 2-100) "Communication with a Represented Person"
- Proposed Rule 4.3 (no CA rule) "Communicating With an Unrepresented Person"
- Proposed Rule 1.5 (CA Rule 4-200) "Fees For Legal Services"
- Proposed Rule 1.5.1 (CA Rule 2-200) "Fee Divisions Among Lawyers"
- Proposed Rule 1.8.9 (CA Rule 4-300) "Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review"
- Proposed Rule 1.14 (no CA rule) "Client With Diminished Capacity"
- Consideration of ABA Model Rule 6.1 (no CA rule) "Voluntary Pro Bono Publico Service"

**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.<sup>1</sup> 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

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<sup>1</sup> 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.”

**Comments to proposed Rule 4.2.** 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.

**CLEAN VERSION**  
**Proposed Rule 4.2 Communication With a Represented Person**  
**(Adopted by the Commission on August 14, 2015)**

**Rule 2-100 [4.2] Communication With a Represented Person**

- (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] [PLACEHOLDER] 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.<sup>2</sup>

[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, section 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

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<sup>2</sup> Comment [2A] was designated as a placeholder pending consideration of a global terminology rule and a definition of “know”. The Commission has concluded its study of that Rule, proposed Rule 1.0.1, and has recommended adoption of a definition of “know” identical to Comment [2A]. If that definition is adopted by the Board, Comment [2A] should be deleted before proposed Rule 4.2 is circulated for public comment.

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) 660F.3d 360; *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.<sup>1</sup> 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.

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<sup>1</sup> 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.

**CLEAN VERSION**  
**Rule 4.3 Communicating with an Unrepresented Person**  
**(Adopted by the Commission on September 25, 2015)**

- (a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.
- (b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

**Comment**

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

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

[3] [PLACEHOLDER] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.<sup>2</sup>

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<sup>2</sup> The concept of Comment [3] has been moved to proposed Rule 8.4.

**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 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.<sup>1</sup> 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

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<sup>1</sup> 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.4<sup>th</sup> 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.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission’s general proposal to use the mode rule numbering system and the substitution of the term “lawyer” for “member.”

**CLEAN VERSION**  
**Rule 4-200 [1.5] Fees for Legal Services**  
**(Adopted by the Commission on October 23, 2015)**

- (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 [2-200].

**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 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.

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."



**CLEAN VERSION**  
**Proposed Rule 1.5.1 Fee Divisions Among Lawyers**  
**(Adopted by the Commission on October 23, 2015)**

- (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.
- [(c) Except as permitted in paragraph (a) of this Rule or Rule 1.17 [2-300], a lawyer shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.]<sup>1</sup>

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<sup>1</sup> At the Commission's September 9, 2015 meeting, The Commission determined to postpone a final decision on whether the concept of gifts and gratuities given in response to a client referral ought be retained in this rule or be relocated to the solicitation rule. Relocating this provision would be consistent with the recommendation of the prior Rules Revision Commission and also would track the approach taken in the Model Rules.

**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 process<sup>1</sup> 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.<sup>2</sup> Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

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

<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>3</sup> 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 4-300 [1.8.9] Purchasing Property at a Foreclosure  
or a Sale Subject to Judicial Review  
(Adopted by the Commission on January 22, 2016)**

- (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 1.14**  
**(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.

**CLEAN VERSION**  
**Rule 1.14 Client With Diminished Capacity**  
**(Adopted by the Commission on February 19, 2016)**

- (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 (1) a minor, (2) involved in a criminal matter, (3) is the subject of a conservatorship; or (4) 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; [Code Civ. Pro. §§ 372-376].

**RULE REVISION CONSIDERED BUT NOT RECOMMENDED FOR ADOPTION  
(No Current Rule)  
ABA Model Rule 6.1 Voluntary Pro Bono Publico Service**

**EXECUTIVE SUMMARY**

At its January 22, 2016 meeting, the Commission for the Revision of the Rules of Professional Conduct (“Commission”) considered a report and recommendation on ABA Model Rule 6.1 (Voluntary Pro Bono Publico Service). The report included the “State Bar of California Pro Bono Resolution” as last amended by the Board on June 22, 2002. Following discussion of the report, the Commission determined that a proposed California version of Model 6.1 should not be recommended at this time. An excerpt from the Commission’s January 22, 2016 open session action summary is set forth below. Also provided below are: (1) the full text of ABA Model Rule 6.1; are (2) the State Bar of California Pro Bono Resolution. As indicated in the action summary excerpt, the Commission is contemplating discussion of other possible options for addressing the subject of pro bono, such as inclusion in a new Preamble to the Rules.

*COMMISSION ACTION SUMMARY EXCERPT:*

**III. ACTION**

**a. Report and Recommendation on Rule 1-650 (Limited Legal Services Programs)  
(ABA Model Rule 6.1 Pro Bono Publico Service)**

The Chair recognized Mr. Martinez who, before deferring to Mr. Rothschild to make the presentation of the report and recommendation of the drafting team concerning proposed Rule 6.1, raised the policy issue of whether the Rules of Professional Conduct should include a voluntary pro bono rule that is not intended to be enforced through attorney discipline (hereinafter “aspirational rule”).

Following discussion, the Commission considered a recommendation that an aspirational pro bono rule should not be adopted.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-650 drafting team, the Commission hereby adopts the position that an aspirational pro bono rule should not be included as a proposed rule in the Commission’s comprehensive set of proposed new and amended Rules of Professional Conduct.

All members present voted yes with the exception of Mr. Rothschild and Mr. Tuft who voted no.

It was understood that the foregoing vote did not foreclose the consideration of other potential drafting team recommendations to respond to the recognized need for voluntary pro bono services in California. Among the options that the drafting team was encouraged to consider were: (1) adding a new comment to proposed amended rule 1-100 [1.0] (re purpose and function of the rules) emphasizing the importance of voluntary pro bono; (2) adding a new preamble to the rules on voluntary pro bono; (3) drafting a mandatory rule to be enforced through attorney discipline; or (4) including the text of an aspirational pro bono rule in the

materials submitted to the Board but with a proviso explaining that although the Commission has rejected a Rule of Professional Conduct, the Board might consider other options for “codifying” an aspirational rule, such as a State Bar rule or as a Rule of Court.

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## **ABA MODEL RULE 6.1**

### **Voluntary Pro Bono Publico Service**

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

### **Comment**

[1] Every lawyer, regardless of professional prominence or professional workload, 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 lawyers' 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 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.

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### **STATE BAR OF CALIFORNIA PRO BONO RESOLUTION**

(Adopted by the Board of Governors of the State Bar of California  
at its December 9, 1989 meeting and amended at its June 22, 2002 Meeting)

**RESOLVED** that the Board hereby adopts the following resolution and urges local bar associations to adopt similar resolutions:

**WHEREAS**, there is an increasingly dire need for pro bono legal services for the needy and disadvantaged; and

**WHEREAS**, the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; and

**WHEREAS**, lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and

**WHEREAS**, the Chief Justice of the California Supreme Court, the Judicial Council of California and Judicial Officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice; and

**WHEREAS**, California Business and Professions Code Section 6068(h) establishes that it is the duty of a lawyer “Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed”; now, therefore, it is

**RESOLVED** that the Board of Governors of the State Bar of California:

- (1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;
- (2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;
- (3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and
- (4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.