

**STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**

DRAFT OPEN SESSION ACTION SUMMARY

Thursday, March 31, 2016 (10:00 am – 4:30 pm)

Friday, April 1, 2016 (9:00 am – 4:30 pm)

State Bar of California
845 So. Figueroa Street
Room 2C-G, 2nd Floor
Los Angeles, CA 90017

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlander (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout and Mark Tuft.

Members Absent: Dean Zipser (Co-Vice-Chair).

Advisors Present: Wendy Chang, Hon. Richard Fybel, Edith Matthai and Heather Rosing.

Liaisons Present: Greg Fortescue (California Supreme Court) and Jason Lee (Board of Trustees).

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel) and Kevin Mohr (Consultant/Reporter).

Others Present: James Blume, Jose Castaneda, Stan Lamport, Laurie Levenson and Teresa Schmid.

I. CHAIR'S REMARKS

a. Oral Report

The Chair requested and Mr. Difuntorum provided an oral report on the Commission's presentation of executive summaries of selected rules the Commission has considered (1.5, 1.5.1, 1.8.9, 1.14, 4.2, 4.3 and 6.1) to the Board of Trustees Committee on Regulation and Discipline at the Board Committee's March 10, 2016 meeting. Appreciation was expressed for the participation of the following Commission representatives: Mr. Ham; Ms. Langford; Prof. Mohr; Mr. Rothschild; and Mr. Tuft. Mr. Eaton requested that staff distribute copies of the executive summaries to the Commission members.

b. Bagley-Keene Training

The Chair requested and Ms. Leighton summarized the open meeting requirements of the Bagley-Keene Act. It was emphasized that compliance with these requirements would be mandatory as of April 1, 2016 and, in particular, that telephone participation in meetings by a Commission member would only be permissible if all of the Bagley-Keene requirements were met.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

Approval of Action Summary - Regular Meeting on February 19 & 20, 2016 (Open Session).

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's February 19 & 20, 2016 meeting.

All members present voted yes with the exception of Ms. Inlander and Judge Stout who abstained.

III. ACTION

a. Post Public Comment Consideration of Rules 5-110 (Performing the Duty of Member in Government Service) and 5-220 (Suppression of Evidence) (including ABA Model Rule 3.8)

The Chair recognized Mr. Difuntorum who summarized the status of this proposal and the anticipated next steps should the Commission continue to recommend that this matter be handled by the Board on an expedited basis.

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. Following discussion, the version of proposed rule 5-110 submitted by the joint drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby adopts proposed amended rule 5-110 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

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

It was understood that the above vote would not preclude subsequent action to modify the safe harbor comment, Comment [9], to encompass a prosecutor's obligation under paragraph (d). Later, upon motion made and seconded, a vote was taken to make this modification to the safe harbor comment, but the motion failed (4 yes, 11 no, 0 abstain).

Mr. Rothschild presented proposed rule 5-220 clarifying that no changes were recommended to the version that was originally authorized for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby adopts proposed amended rule 5-220 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

The Chair requested and Mr. Rothschild presented the issue of whether the Commission should continue to recommend that the Board handle this proposal on an expedited basis.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission recommends that the Board prioritize consideration of proposed amended rules 5-110 and 5-220, and expedite the processing of these rules on a time-table independent of the Commission's anticipated comprehensive report and recommendation.

All members present voted yes.

b. Report and Recommendation on Rule 1-400 (Advertising and Solicitation) (including ABA Model Rules 7.1 – 7.5 re advertising, communications and direct contact).

The Chair recognized Ms. Langford who provided an overview of the report of the drafting team and explained that designated members of the team would separately present individual proposed rules. Ms. Langford then presented the drafting team's proposed new rule 7.1. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.1 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Ham and Mr. Kehr who voted no.

Mr. Tuft presented the drafting team's proposed new rule 7.2. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Prof. Mohr presented the drafting team's proposed new rule 7.3. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.3 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou and Mr. Ham who abstained.

Mr. Kornberg presented the drafting team's proposed new rule 7.4. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.4 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Ms. Langford presented the drafting team's proposed new rule 7.5. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.5 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Ms. Inlander reported on the drafting team's consideration of ABA Model Rule 7.6 indicating that this model rule was not adopted by a preponderance of United States jurisdictions and that the drafting team did not recommend adoption of this rule in California.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby recommends that no version of ABA Model Rule 7.6 be recommended for adoption in California.

All members present voted yes.

**c. Report and Recommendation on Rule 3-210 (Advising the Violation of Law)
(including ABA Model Rules 1.2 (Scope of Representation and Allocation of Authority
Between Client and Lawyer) and 1.2.1 (Counseling or Assisting the Violation of Law))**

The Chair recognized Ms. Langford who presented the report and recommendation of the drafting team with proposals for new rules 1.2 and 1.2.1. Following discussion, the version of proposed rule 1.2 submitted by the joint drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on Rule 3-210, the Commission hereby adopts proposed new rule 1.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Ms. Langford next presented the drafting team's proposal for new rule 1.2.1. Following discussion, the version of proposed rule 1.2.1 submitted by the joint drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-210, the Commission hereby adopts the text of proposed new rule 1.2.1 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

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

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-210, the Commission hereby adopts the Comments to proposed rule 1.2.1 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

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

**d. Recommendation for Possible Reconsideration of Proposed Rule 1.4 [3-500]
(Communication with Clients) Adopted by the Commission at the September 25 & 26,
2015 Meeting**

The Chair recognized Mr. Difuntorum who presented a staff report and recommendation on possible revisions to the Commission's proposed rule 1.4 intended to conform proposed rule 1.4 to proposed rule 1.2.1. Following discussion, the proposed revisions submitted by staff were amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of staff's report on possible conforming revisions to proposed rule 1.4, the Commission reconsiders previously adopted proposed rule 1.4 and hereby adopts revised proposed rule 1.4 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

**e. Report and Recommendation on Rule 3-310 (Avoiding the Representation of
Adverse Interests) (including ABA Model Rules 1.7, 1.8.6, 1.8.7 & 1.9)**

The Chair recognized Mr. Martinez who provided an overview of the report of the drafting team and noted that Mr. Cardona would present proposed new rule 1.9. Mr. Martinez then presented the drafting team's proposed new rule 1.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.7 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr, Ms. Langford and Mr. Tuft who voted no.

Mr. Martinez presented the drafting team's proposed new rule 1.8.6. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.6 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Mr. Martinez presented the drafting team's proposed new rule 1.8.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.7 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Mr. Martinez presented the drafting team's proposed new rule 1.8.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.7 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Mr. Cardona presented the drafting team's proposed new rule 1.9. Following discussion, the proposed rule submitted by the drafting team was amended. As listed below, votes were taken on the text of the rule with consideration of the comments postponed until the next meeting to give the drafting team an opportunity to conform the comments to the revised text. (It was understood that the votes taken on the text of the rule were tentative consensus votes pending the consideration of the comments at the Commission's next meeting.)

Revised paragraph (a)¹: All members present voted yes.

Paragraph (b) as submitted: All members present voted yes.

Paragraph (c)(1) as submitted: All members present voted yes with the exception of Ms. Langford who voted no.

¹ The tentatively adopted revision to paragraph (a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

Paragraph (c)(2) as submitted: All members present voted yes with the exception of Ms. Langford who voted no.

Revised paragraph (c)(3)²: All members present voted yes with the exception of Ms. Langford and Mr. Tuft.

f. Report and Recommendation on Rule 3-300 (Avoiding Interests Adverse to a Client) (including ABA Model Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules))

Matter not called for discussion.

g. Report and Recommendation on Rule 3-400 (Limiting Liability to Client) (including ABA Model Rule 1.8 Conflict of Interest: Current Clients: Specific Rules))

Matter not called for discussion.

Report and Recommendation on Rule 3-410 (Disclosure of Professional Liability Insurance) (including ABA Model Rule 1.4(a))

Matter not called for discussion.

Report and Recommendation on Rule 3-700 (Termination of Employment) (including ABA Model Rule 1.16 (Declining or Terminating Representation))

Matter not called for discussion.

Report and Recommendation on Rule 4-100 (Preserving Identify of Funds and Property of a Client) (including ABA Model Rule 1.15 (Safekeeping Property))

Matter not called for discussion.

Discussion of ABA Model Rules 1.10, 1.11, 1.12 & 1.18 and Guidance on Advance Consent/Waivers of Future Conflicts

Matter not called for discussion.

² The tentatively adopted revision to paragraph (c)(3) states: "without the informed written consent of the former client, accept representation adverse to the former client where, by reason of the representation of the former client, the lawyer has obtained confidential information material to the representation."

CLOSED SESSION

*None**

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**PROPOSED RULE 5-110 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING**

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
- (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
- (G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) Promptly disclose that evidence to an appropriate court or authority, and

- (2) If the conviction was obtained in the prosecutor's jurisdiction,
 - (a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

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

[3] The disclosure obligations in paragraph (D) include exculpatory and impeachment material relevant to guilt or punishment and are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Although rule 5-110 does not incorporate the *Brady* standard of materiality, it is not intended to require cumulative disclosures of information or the disclosure of information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[3A] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (F) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (F) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (F) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (G) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (G) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

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

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (G) and (H), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

**PROPOSED RULE 1.2 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 1.2 Scope of Representation and Allocation of Authority

- (a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

Independence from Client's Views or Activities

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

**PROPOSED RULE 1.2.1 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 1.2.1 Advising or Assisting the Violation of Law

- (a) A lawyer shall not advise or knowingly assist a client in the violation of any law, rule, or ruling of a tribunal unless the lawyer believes in good faith that such law, rule, or ruling is invalid. A lawyer may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.
- (b) A lawyer shall not advise or knowingly assist a client in a fraudulent act.
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Comment

[1] There is a critical distinction under this Rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the duty of confidentiality as provided in Rule 1.6 and Business and Professions Code § 6068(e)(1). In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rules 1.13 and [1.16].

[3] Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities.

[4] Paragraph ((c) authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

**PROPOSED RULE 1.7 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 1.7 Conflict of Interest: Current Clients

- (a) A lawyer shall not, without informed written consent from each client, represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent from each affected client, represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or the lawyer's own interests, including when:
 - (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer:
 - (i) knows the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (ii) knows or reasonably should know the previous relationship will materially limit the lawyer's representation; or
 - (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity the lawyer knows or reasonably should know will be affected substantially by resolution of the matter; or
 - (4) the lawyer has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, or personal interest in the subject matter of the representation that the lawyer knows or reasonably should know will materially limit the lawyer's representation; or
 - (5) the lawyer knows or reasonably should know that there is a reasonable likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.
- (c) A lawyer shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.
- (d) Representation is permitted under this Rule only if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) occurs when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; or (ii) a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent of the respective clients.

[2] Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless the interests of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the interests of one or more of the clients would be adversely affected, thus requiring that the clients provide informed written consent under paragraph (a), include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent as required under paragraph (b), and circumstances later develop indicating that direct adversity

exists between the clients, the lawyer must obtain further informed written consent of the clients under paragraph (a).

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

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client.

[6] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the information required to permit representation under this Rule. (See, e.g., Business and Professions Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[7] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[8] This Rule does not preclude an informed written consent to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. An advance consent cannot be effective if the circumstances that materialize in the future make

the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[9] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents. In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

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

**PROPOSED RULE 1.8.6 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 1.8.6 Compensation From One Other Than Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and
- (c) the lawyer obtains the client's informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable, provided that no disclosure or consent is required if:
 - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
 - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet

been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

**PROPOSED RULE 1.8.7 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 1.8.7 Aggregate Settlements

A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. This Rule does not apply to class action settlements subject to court approval.

**PROPOSED RULE 7.1 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 7.1 Communications Concerning A Lawyer's Services

- (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains an untrue statement, or a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
- (b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

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

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

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

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be

substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

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

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

**PROPOSED RULE 7.2 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 7.2 Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic means of communication, including public media.
- (b) A lawyer shall not compensate, promise or give anything of value to a person or entity for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral arrangement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the arrangement;
 - (5) offer or give a gift or gratuity to a person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and address of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability;

names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This Rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

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

Paying Others to Recommend a Lawyer

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

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

**PROPOSED RULE 7.3 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 7.3 Solicitation of Clients

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from any person known to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.
- (e) As used in this Rule, the terms "solicitation" and "solicit" refer to an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

Comment

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

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

[3] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

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

**PROPOSED RULE 7.4 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 7.4 Communications of Fields of Practice and Specialization

- (a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:
 - (1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- (b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of Rule 7.1.

**PROPOSED RULE 7.5 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE MARCH 31ST – APRIL 1ST MEETING

Rule 7.5 Firm Names and Trade Names

- (a) A lawyer shall not use a firm name, trade name or other professional designation that violates Rule 7.1.
- (b) A lawyer in private practice shall not use a firm name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates Rule 7.1.
- (c) A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm or other organization unless that is the fact.

Comment

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