

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-700 [1.16]

**Lead Drafter:** Kornberg  
**Co-Drafters:** Croker, Langford, Martinez  
**Meeting Date:** March 31 – April 1, 2016

### I. CURRENT CALIFORNIA RULE 3-700

#### Rule 3-700 Termination of Employment

(A) In General.

- (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) The client
  - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
  - (b) seeks to pursue an illegal course of conduct, or

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- (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
  - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
  - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
  - (f) breaches an agreement or obligation to the member as to expenses or fees.
- (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
  - (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
  - (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
  - (5) The client knowingly and freely assents to termination of the employment; or
  - (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (D) Papers, Property, and Fees.

A member whose employment has terminated shall:

- (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

### Discussion

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the

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clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member’s own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.

### II. DRAFTING TEAM’S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. PROPOSED RULE 1.16 (CLEAN)

#### Rule 1.16 Declining Or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) The lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
  - (2) **[ALT1]** the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;
  - (2) **[ALT2]** the lawyer knows or reasonably should know that the representation will result in violation of these Rules, the State Bar Act or other law;
  - (3) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
  - (4) the client discharges the lawyer.

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- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
  - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
  - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
  - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (6) the client knowingly and freely assents to termination of the representation;
  - (7) the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
  - (8) the lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively;
  - (9) **[ALT1]** a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
  - (9) **[ALT2]** a continuation of the representation is likely to result in a violation of these Rules, the State Bar Act or other law; or
  - (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with

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paragraph (e).

(e) Upon the termination of a representation for any reason:

- (1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
- (2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

### Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[4] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[5] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

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### IV. PROPOSED RULE 1.16 (REDLINE TO CURRENT CALIFORNIA RULE 3-700)

#### Rule ~~3-700~~ 1.16 ~~Termination of Employment~~ Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

~~(A) In General:~~

- ~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~
- ~~(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~(B) Mandatory Withdrawal:~~

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

- (1) The ~~member~~ lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; ~~or~~
- (2) **[ALT1]** ~~The member~~ the lawyer knows or reasonably should know that ~~continued employment~~ the representation will result in violation of these ~~rules~~ Rules or of the State Bar Act; ~~or~~
- (2) **[ALT2]** ~~The member~~ the lawyer knows or reasonably should know that ~~continued employment~~ the representation will result in violation of these ~~rules or of~~ Rules, the State Bar Act; or other law;
- (3) ~~The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.~~ the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or

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### ~~(G) Permissive Withdrawal.~~

~~If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:~~

~~(14)~~ ~~The~~the client discharges the lawyer.

### (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

~~(a1)~~ the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, ~~or;~~

~~(b2)~~ the client either seeks to pursue ~~an illegal~~ criminal or fraudulent course of conduct, or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;

~~(c3)~~ the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal or that is prohibited under these rules or the State Bar Act, or~~ criminal or fraudulent;

~~(d4)~~ the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer to carry out the employment effectively, ~~or;~~

~~(e)~~ ~~insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or~~

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

~~(f6)~~ ~~breaches an agreement or obligation to the member as to expenses or fees.~~the client knowingly and freely assents to termination of the representation;

~~(2)~~ ~~The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~

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- (37) ~~The~~the inability to work with co-counsel ~~indicates that~~makes it in the best interests of the client ~~likely will be served by withdrawal~~to withdraw from the representation; ~~or~~
  - (48) ~~The member's~~the lawyer's mental or physical condition renders it unreasonably difficult for the ~~member~~lawyer to carry out the employment effectively; ~~or~~
  - (5) ~~The client knowingly and freely assents to termination of the employment; or~~
  - (9) **[ALT1]** a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
  - (9) **[ALT2]** a continuation of the representation is likely to result in a violation of these Rules, the State Bar Act or other law; or
  - (610) ~~The member~~the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
  - (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.
  - (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
  - (De) ~~Papers, Property, and Fees.~~Upon the termination of a representation for any reason:
- ~~A member whose employment has terminated shall:~~
- (1) Subject to any applicable protective order ~~or~~, non-disclosure agreement, ~~or~~ statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all ~~the client~~ papers~~materials~~ and property. "Client ~~papers~~materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, ~~expert's reports~~whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
  - (2) ~~Promptly~~The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been earned~~ or incurred. This provision is not applicable to a true retainer fee ~~which is~~ paid solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.



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### ~~Discussion~~Comment

[1] This Rule applies, without limitation, to a sale of a law practice under Rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7, but that conflict might not arise in other representations of the client.

[3] Lawyers must comply with their obligations to their clients under Rule 1.6 and Business and Professions Code § 6068(e), and to the courts under Rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[4] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

~~Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.~~

~~Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).~~

[5] Paragraph (D)(1) does not intended to prohibit a memberlawyer from making, at the member'slawyer's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member'slawyer's expense in any subsequent legal proceeding.

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### V. PUBLIC COMMENTS SUMMARY

- **Glenn Alex, May 25, 2015:** Suggests an exception to the client consent requirement to allow public attorneys to merely inform clients of potential conflicts.

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

[Insert summary of comments.]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. OCTC generally supports this rule. However, OCTC is concerned that subparagraph (b)(1) and (3) should mandate withdrawal. Proposed rule 1.16(a)(1) requires an attorney to not represent or withdraw from representation if the lawyer knows or reasonably should know that the representation will result in a violation of these rules. If the client insists upon presenting a defense in litigation or asserting a position or making a demand that is not warranted under existing law and cannot be supported by a good faith argument an attorney's following the client's instruction would be a violation of Business & Professions Code sections 6068(c) and (g) and proposed rule 3.1. So, how can it just be permissive? OCTC recognizes that current rule 3-700 has the same language (although the current rule also had language requiring withdrawal if the client is bringing an action, conducting a defense, asserting a position, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. We assume this mandatory requirement was taken out because it is already covered by subparagraph (a)(1)). It makes no sense to make the taking of the position a violation but not require withdrawal for a client insisting (as compared to initially requesting) that the attorney take that position. Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. (See *Molski v. Evergreen Dynasty Corp* (9th Cir. 2007) 500 Fed.3d 1047, 1060-1, rehearing denied 521 Fed.3d 1215, cert denied 129 S. Ct. 594.) Likewise, withdrawal should be mandated if the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent since doing so would be a violation of these rules and the State Bar Act. Comment 2, in fact, seems inconsistent with placing proposed rule 1.16(b)(1) and (3) as permissive and consistent with OCTC's view that (b)(1) and (b)(3) should be mandatory.

2. Comments 4, 5, 6, 8, and the first sentence of Comment 9, seem more appropriate for treatises, law review articles, and ethics opinions.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC's recommends expanding the duties of an attorney when declining or terminating employment and adding to the rule more reasons which would support an attorney's withdrawing from representation.

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Revise the rule as follows:

### **Rule 3-700. ~~Termination of Employment~~ Declining or Terminating Employment.**

#### (A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. ~~When ordered to do so by a tribunal, a member shall continue the representation of a client notwithstanding good cause for terminating the representation.~~

(2) A member ~~shall~~ must not withdraw from employment until the member has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(3) Notwithstanding any other part of this rule, a member must comply with rules 3-700(A)(1) and (2) when withdrawing from representing a client.

#### (B) Mandatory Declining of Representation or Mandatory Withdrawal.

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

A member must not represent a client or, where representation has commenced, must withdraw, with the permission of the tribunal if required by its rules, from the representation of a client, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person or improperly delaying an action; or

(2) The member knows or should know that the employment or continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental, emotional or physical condition makes it unreasonably difficult to carry out the employment effectively; or

(4) The client persists in insisting that the member present a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(5) The member knows or should know that the client seeks to pursue an illegal course

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of conduct. However, in a criminal matter if the client insists on testifying falsely, the member will not be required to withdraw, but must attempt to convince the client to testify honestly or not at all. The member must not be a party to the false testimony, may not utilize it and must comply with all applicable law regarding such situations; or

(6) The client persists in insisting that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act; or

(7) The member is not hired by someone authorized to do so, or, if hired, is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, and subject to paragraph (A) of this rule, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

~~(b) seeks to pursue an illegal course of conduct, or~~

~~(c) (b) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act; or~~

~~(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.~~

~~(e) (c) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act; or~~

(d) insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(f) (e) breaches an agreement or obligation to the member as to expenses or fees and has been given a reasonable and timely warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(d) (f) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.~~

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act or any other law, or

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(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental, emotional, or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The representation will result in an unreasonable financial burden on the member; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees

A member ~~whose employment has terminated~~ shall:

(1) Subject to any protective order or non-disclosure agreement, promptly deliver ~~release~~ to the client or his or her representative at the request of the client all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, e-mail and computer generated files or writings, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) After termination or completion of all services in the matter promptly refund any part of the fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

In determining whether a member withdrew from employment in a matter without taking reasonable steps to avoid foreseeable prejudice to the rights of the client, the proximity of the withdrawal to any pending trial date or significant event should be considered. The closer to trial or the significant event the greater the justification required to withdraw. This rule recognizes that it is often difficult for a client to find a substitute lawyer close to a pending trial date and that undue pressure can be exerted by the member on the client when the member threatens to withdraw shortly before trial. A member should not put the client in a disadvantageous position by withdrawing or threatening to withdraw shortly before trial when the circumstances giving rise to the reasons for withdrawing

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have existed for some time.

. . .

In seeking to withdraw from representation, attorneys must always be mindful of their obligations to their clients to protect the client's rights and to protect and preserve the client's secrets under Business & Professions Code Section 6068(e). This may require not revealing certain information or facts or require ex parte or sealed pleadings or hearings regarding the motion to withdraw.

### OCTC COMMENTS:

This rule and its title should be changed to apply to declining employment as well as withdrawing from it.

In paragraph A of rule 3-700, OCTC recommends that a sentence be added to (A)(1) to remind members that, despite a valid reason to withdraw, if a tribunal requires them to continue to represent the client they are required to do so. The ABA has this provision in its proposed Model Rule 1.16. New paragraph (A)(3) would leave no doubt that notwithstanding any other rule a member must comply with paragraph A(1) and (2) when withdrawing from representing a client.

OCTC has left the language regarding foreseeable prejudice. The ABA uses the term material adverse effect. OCTC does not believe there is a significant difference.

In paragraph B, OCTC retitled the paragraph to express the proposed changes. The changes include rewriting the initial clause so that the rule also applies to accepting of representation as well as any attempt to withdraw from representation. There is no reason an attorney should not be disciplined for taking a case that would require mandatory withdrawal. Of course, if the attorney did not know of the conditions or facts requiring him or her to not take the case, there is no discipline unless the attorney fails to withdraw as required in these rules when he or she learns of the conditions or facts. The attorney must also as always give the client notice and avoid foreseeable prejudice to the client as a result of the withdrawal. We added language to remind attorneys of this duty.

OCTC added to paragraph (B)(3) emotional conditions that might not qualify as mental conditions but still could impact the representation. OCTC also recommends adding paragraph (B)(4). This paragraph is currently in the permissive withdrawal section as paragraph (C)(1)(a). It should be stricken from the permissive basis for withdrawal and placed in the mandatory section. Current rule 3-200 already prohibits this conduct and requires an attorney to "not seek, accept, or continue employment if the member knows or should know that the objective of such employment is to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." OCTC's proposed changes to rule 3-200 would still prohibit an attorney from bringing such



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actions. Hence, consistent with rule 3-200, this provision belongs in paragraph B of rule 2-700, mandating withdrawal, not in paragraph C, merely permitting an attorney to withdraw. OCTC also moved current subsections (b) and (c) of paragraph C to paragraph (B) and renumbered them. An attorney should never be a party, co-conspirator, or assist someone in pursuing an illegal act. That is already forbidden. (See current rule 3-210 and Business & Professions Code section 6068(a).) An attorney should also never continue representation when the client persists in requiring the member to pursue a course of action that is illegal or prohibited under these rules and the State Bar Act. Even if the attorney does not withdraw he or she should explain to the client that he or she cannot do what the client wants and attempt to persuade the client not to do it either. If the attorney cannot get the client to stop insisting on a certain course of action, then the attorney should withdraw so as to prevent being a party to or aiding in improper conduct. The only exception to this rule should be in criminal cases when the lawyer is aware that the client is going to testify falsely. In those cases, the attorney must do everything to persuade the client not to testify falsely. If the attorney cannot persuade the client to testify truthfully, the attorney must comply with applicable case law in this situation and in no event aid, support, or utilize that evidence.

OCTC also recommends that an attorney be required to refuse employment or withdraw from employment if the attorney is not hired by someone authorized to do so, or, if hired, is discharged. It should be self-evident that if a client discharges an attorney that he cannot continue to act for the client unless he is required to get court permission before withdrawing and then he must continue to act for the client until the court relieves him or her of responsibility for the matter..

Further, there have been situations when an individual not authorized to hire an attorney attempts to or hires an attorney to represent a person or entity. If the attorney knows or should know that the person is not authorized to hire him or her, the attorney should be prohibited from taking the case and be required to withdraw as soon as the attorney learns of the relevant facts. This has happened in minority shareholder cases where the minority shareholder attempts to hire the attorney to represent the entire entity when he or she has not been authorized to do so. In another case, an attorney filed and pursued a bankruptcy petition on behalf of an entity when he or she had never been hired by the entity's board. The attorney then continued that action even after the board informed him that there was no such authority and they did not want a bankruptcy petition filed or pursued. In other cases, attorneys have acted without authority or continued to perform after being told to stop, often charging the client for services not wanted. Under the current rule, there is no specific prohibition for this conduct unless the attorney makes an appearance for the client. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907.)

OCTC also recommends that the phrase "in a matter not pending before a tribunal" in current paragraph (c)(1)(e) be removed because it leaves the impression that, unless the matter is pending before a tribunal, the member may not withdraw even if the member is



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forced to engage in conduct that is contrary to the judgment and advice of the member.

While an attorney has primary control of and discretion over many tasks connected with a representation, such as which witnesses to call, whether to grant a continuance to the other party's attorney, other decisions, such as whether or not to settle a case, should be and are within the sole discretion of the client. However, an attorney should be able to withdraw if the client insists on an approach the member fundamentally disagrees with.

OCTC also recommends amending section (C)(1)(e) to include a provision that the client be given notice that the failure will result in the attorney seeking to withdraw. This notice should be reasonable and timely and not simply in the retainer agreement, but, in fact, provided shortly before the motion or withdrawal. We choose not to specify the actual period for the warning because it should depend on the particular case and the facts of the matter.

Paragraph (C)(4) should also include as a basis to withdraw emotional conditions as well as mental conditions. This does not mean that every time an attorney is having a difficult day or week they may withdraw, but that if an attorney feels that personal difficulties make it unreasonable for the attorney to continue with the representation her or she should have the right to withdraw so long as the client is not prejudiced.

Paragraph (C)(5) presents the ABA's recommendation that withdrawal be allowed when continued representation will result in an unreasonable financial burden on the for the attorney. There are situations – although rare – when the economics of continuing to represent a client may become too burdensome. Attorneys should be allowed to seek withdrawal on that basis.

In paragraph (D), OCTC recommends striking the phrase “whose employment has terminated” so it is clear that clients can obtain their papers prior to termination if they so desire.

OCTC also suggests we return to the use of the word “delivery” instead of “ release.” Attorneys have used the term to require that the clients come to the office to pick up their files. We also suggest adding words to indicate that papers include modern technological documents, communications or information stored by the attorney in a computer.

In the discussion section, we've added appropriate language to explain the revisions and we placed a commentary reminding attorneys that they still have a duty to protect their client's interests and preserve their client's secrets and confidences.

The Commission might want to explore the issue of true retainers. Some states have questioned whether they are proper (see *In the Matter of Cooperman* (NY 1993) 591 NYS 2d 855, aff'd 633 N.E. 2d 1069) and have required attorneys to mitigate any damages by attempting to find other work.

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### **VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)**

#### **Illinois Rule 1.16 Declining Or Terminating Representation**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the rules of professional conduct or other law;
  - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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The ABA State Adoption Chart for the ABA Model Rule 1.16, which is a direct counterpart to rule 3-700, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_16.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_16.pdf)
- Every jurisdiction has adopted some version of ABA Model Rule 1.16. Twenty jurisdictions have adopted the Model Rule verbatim,<sup>1</sup> 27 jurisdictions states have adopted a substantially similar rule,<sup>2</sup> and four jurisdictions have adopted a rule that is a substantial variation from the Model Rule: California, Massachusetts,<sup>3</sup> Minnesota,<sup>4</sup> and New York.<sup>5</sup>

<sup>1</sup> The twenty states are: Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.

<sup>2</sup> The twenty-seven jurisdictions are: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

<sup>3</sup> Massachusetts Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but includes a paragraph (e), which contains an expanded description of what constitutes a client file and provides:

(e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

(1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.

(2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials.

(3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

(4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.

(5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.

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(6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

(7) notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

<sup>4</sup> Like Massachusetts, Minnesota's Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but has adopted an expanded definition of "client papers and property," and several other provisions:

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

(1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;

(2) in pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

<sup>5</sup> New York, which was the last jurisdiction to abandon a set of rules based on the ABA Code of Professional Responsibility, has retained rule structure that is similar to California Rule 3-700, as both rules derive in large part from ABA Code, DR 2-110. New York also expands the section of its rule concerning permissive withdrawal.

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### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Recommend following ABA rule that applies to both acceptance and termination of representation and change title to “Declining or Terminating Representation” from “Termination of Employment”
  - Pros: The rule should apply both to the decision whether to accept or decline a representation and to the decision to withdraw from the representation.
  - Cons: There is no evidence that current rule 3-700 is not adequate.
2. Recommend following the ABA rule format and structure under which situations mandating withdrawal are set forth in paragraph (a), permissive withdrawal situations are in paragraph (b), and the provisions in current rule 3-700(A)(1) and (2) concerning a tribunal’s permission to withdraw and duty not prejudice the client are moved to paragraphs (c) and (d), respectively.
  - Pros: The current rule has a structure unique among jurisdictions. No substantive change is intended or will result from the reorganization and moving paragraphs (A)(1) and (2) to paragraphs that correspond to the model rule paragraphs will remove an unnecessary difference between California and other jurisdictions, promoting a national standard.
  - Cons: The current structure sets forth the primary considerations for a lawyer when withdrawing from a representation: the duty not to prejudice the client and the duty to inform the court of the withdrawal. These two duties should remain at the beginning of the rule.
3. Recommend retaining current rule (B)(1) as paragraph (a)(1), with only format and style changes, including the substitution of a defined term, “reasonably should know” for the current rule’s “should know”.
  - Pros: There is no evidence that this provision no longer remains relevant to a decision to decline or withdraw from a representation. Its language parallels the language in current rule 3-200(A), which the Supreme Court directed RRC1 to restore to its proposed Rule 3.1 and which this Commission has recommended be included in its proposed Rule 3.1.
  - Cons: None identified.
4. ALT1 – Paragraph (a)(2). Recommend retaining current rule 3-700(B)(2), with only format and style changes, including the substitution of a defined term, “reasonably should know” for the current rule’s “should know”.
  - Pros: No evidence there is a problem with the provision.
  - Cons: See Pros for ALT in paragraph 5, below.
5. ALT2 – Paragraph (a)(2). Recommend retaining current rule 3-700(B)(2), with format and style changes, including the substitution of a defined term, “reasonably should know” for the current rule’s “should know,” but also add the phrase “or other law” as in the Model Rule.
  - Pros: The rule should explicitly identify the “violation of other law” as mandating that a lawyer decline or withdraw from a representation. Although the current

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- rule arguably covers that situation by prohibiting a violation of “these Rules or the State Bar Act” which include, respectively, rule 3-200(A) and Bus. & Prof. Code § 6068(a) (It is the duty of an attorney “(a) To support the Constitution and laws of the United States and of this state”), rule 3-700 should not hide the ball by requiring such interpretative gymnastics.
- Cons: Including “or other law” would mandate withdrawal for every discovery violation in which a client might engage.
6. Recommend adoption of paragraph (a)(3), which carries forward the substance of current rule 3-700(B)(3), with some changes to clarify the rule’s application.
- Pros: The substance of current rule 3-700(B)(3) appropriately mandates that a lawyer withdraw from representation under the conditions described. The revised provision, however, sharpens the standard by substituting “impairs” for “renders it unreasonably difficult” and “competently” for “effectively.” Substituting “impair” and “competent” creates a clear standard. In particular, “competently,” which is a standard referenced throughout the proposed rules, “competently,” a word used throughout the proposed Rules, should be employed as the standard requiring *mandatory* termination of a representation. However, no substantive change is intended.
  - Cons: None identified.
7. Recommend addition of paragraph (a)(4), derived from Model Rule 1.16(a)(3), requiring withdrawal and compliance with the rule when the client discharges the lawyer.
- Pros: Although a client’s right to discharge his or her lawyer for any reason is well-settled in California case law, (see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]), there is no similar provision in current rule 3-700, so the inclusion of proposed subparagraph (a)(3) would be substantive change *to the Rules of Professional Conduct*, though it should not represent a change in a California lawyer’s duties. This is an important provision to have because lawyers will sometimes attempt to resist client’s attempts to discharge them. Making this a disciplinary offense should avert most such situations.
  - Cons: Proposed paragraph (a)(4) states the obvious. It is unnecessary.
8. Recommend retaining current rule 3-700(C)(1)(a), but clarify that it applies in both litigation and non-litigation matters.
- Pros: Adding the clause, “in litigation, or asserting a position or making a demand in a non-litigation matter” to the language in current rule 3-700(C)(1)(a) clarifies that the duty to withdraw applies in both litigation and non-litigation representations. Although the application of current rule 3-700(C)(1)(a) to non-litigation matters arguably can be implied, the express statement of its will leave no doubt.
  - Cons: None identified.
9. Recommend retaining current rule 3-700(C)(1)(b), but add a concept from MR 1.16(b)(2) that the lawyer’s withdrawal is permitted if the client used the lawyer’s services in committing a fraud.
- Pros: The situation permitting withdrawal in proposed subparagraph (b)(2) is described in substantially more detail than current rule 3-700(C)(1)(b). It is



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- appropriate in a rule provision that *permits* withdrawal to provide extra guidance on when withdrawal is permitted.
- Cons: None identified.
10. Recommend expanding the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in Model Rule 1.16(b)(5), so that withdrawal would be permitted when a client breaches any agreement or obligation to the lawyer, even if the breach is not related to an agreement or obligation regarding fees or expenses, and require that the lawyer warn the client that the lawyer will withdraw unless the client fulfills the obligation.
- Pros: Similar to the previous concept, a more detailed explanation of a lawyer's duties is appropriate in a provision permitting withdrawal. In addition, two points should be noted. *First*, the lawyer's right to withdraw is limited to the client's breach of a material term of an agreement with the lawyer. *Second*, the lawyer's obligation to warn the client of a possible termination must come after the client's breach so that, for example, a warning cannot be buried in the initial fee agreement.
  - Cons: None identified.
11. Recommend retaining the remaining permissive withdrawal provisions in rule 3-700(C) in substantially the same form as in the current rule, including carrying forward paragraphs (C)(2), (C)(3), (C)(4), (C)(5) and (C)(6) as proposed paragraphs (b)(9), (b)(7), (b)(8), (b)(6) and (b)(10), respectively.
- Pros: There is no evidence that these provisions have caused problems in interpretation or application.
  - Cons: None identified.
12. Recommend that current rule 3-700(D)(1) be revised in paragraph (e)(1) to clarify that "client materials and properties" may be in electronic or other forms in addition to "tangible" forms and that certain statutory obligations may restrict the lawyer's ability to provide the client with information from the file.
- Pros: Proposed paragraph (e)(1) makes two substantive changes that are warranted by law or the current state of technology in law practice. First, in adding a reference to limitations imposed by applicable protective orders, and non-disclosure agreements or statutes, it recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. Second, the proposed subparagraph also clarifies that the material to be returned may be "in tangible, *electronic*, or *other form*." (Emphasis added.) The current rule does not so expressly provide. Given the widespread maintenance of client files in electronic form, as exemplified by the extensive amendments to court procedural rules to address issues raised by electronic discovery, this clarification is an important addition to the rule.
  - Cons: None identified.
13. Recommend retaining as paragraph (e)(2) current rule 3-700(D)(2), modified to include the concept of returning expenses that have been advanced to the lawyer but not incurred.
- Pros: Expressly requiring the return of expenses that have been advanced to the lawyer but not incurred is client protective.



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- Cons: None identified.
- 14. Recommend adoption of five comments.
  - Pros: All five comments are concise and provide guidance in applying or interpreting the rule by delimiting the rule's scope: Comment [1] clarifies that the rule applies to the sale of a law practice. Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another matter in which the lawyer represents the same client. This is important in avoiding prejudice to the client. Comment [3] emphasizes the lawyer's duty of confidentiality when seeking permission from a tribunal to withdraw. Comment [4] provides citations to certain statutes that place limits on a lawyer's duty to provide the client with the file upon withdrawal. Comment [5] carries forward current Discussion ¶. 3 regarding a lawyer's right to make a copy of the file released to the client and to seek recovery of the lawyer's expense in doing so.
  - Cons: None.
- 15. Recommend rejection of all eight of the Model Rule comments.
  - Pros: The comments to Model Rule 1.16 are largely discursive practice pointers that repeat the black letter of the rule, state the obvious, and provide little if any interpretative guidance.
  - Cons: None identified.

### B. Concepts Rejected (Pros and Cons):

1. Retain in the proposed rule the substance of current rule 3-700(C)(1)(e), which permits withdrawal from representation when the client "insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act."
  - Pros: Although this provision is a carryover from the ABA Code of Professional Responsibility that was not incorporated into the Model Rules, it identifies a situation that warrants permissive withdrawal.
  - Cons: This provision was a carry-over from ABA Code of Professional Responsibility, DR 2-110(C)(1)(e). (The ABA did not carry the provision forward when it adopted Model Rule 1.16 in 1983). The corresponding model rule provision that was intended to cover conduct previously addressed by subparagraph (C)(1)(e) was subparagraph (b)(5) of the 1983 version of the Model Rule (since re-designated "(b)(6)"). Although the first clause of Model Rule 1.16(b)(6) regarding the representation creating an unreasonable financial burden on the lawyer was rejected, the concept in the second clause, i.e., that the representation "has been rendered unreasonably difficult by the client," is found in proposed rule 1.16(b)(4). Because that provision adequately covers the conduct addressed by current rule 3-700(C)(1)(e), it was determined the latter provision should be deleted from the proposed rule, bringing the California rule in line with the ABA model rule.
2. Retain current rule 3-700, Discussion ¶. 1, in the proposed rule as a comment.

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- Pros: Current Discussion ¶.1, regarding a lawyer's duty to take reasonable steps to avoid prejudicing the client when withdrawing, provides valuable guidance regarding what is arguably the p
- Cons: Discussion ¶.1 merely states the obvious, i.e., that what constitutes reasonable steps "will vary according to the circumstances." It provides little if any guidance of either an interpretative or practical nature.
- 3. Retain current rule 3-700, Discussion ¶. 1, in the proposed rule as a comment.
  - Pros: Discussion ¶.1 provides citations to case law to assist a lawyer in complying with the lawyer's duties under current rule 3-700(D) [proposed paragraph (e)].
  - Cons: Proposed paragraph (e) is sufficiently detailed and clearly written to provide adequate guidance.

### C. Changes in Duties/Substantive Changes to the Current Rule:

1. Addition of paragraph (a)(4) [MR 1.16(a)(3)] is a substantive change. (See VIII.A.7, above.)
2. The expanded coverage of paragraph (b)(5), based on 3-700(C)(1)(f) is a substantive change. (See VIII.A.10, above.)
3. Paragraph (e)(1)'s permitting lawyers to return files to the client in "in tangible, *electronic, or other form*," is a substantive change in the rule, though arguably it simply recognizes the modern practice of how files are commonly maintained. (See VIII.A.12, above.)
4. The addition of a duty to return advanced expenses that have not been spent in paragraph (e)(1) is a substantive change. (See VIII.A.13, above.)

### D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
  - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was

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drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. The reorganization of current rule 3-700 is a non-substantive change. (See VIII.A.2, above.)

**E. Alternatives Considered:**  
None.

### IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. The only open issue for the Commission to decide is whether to include the phrase “or other law” in proposed paragraphs (a)(2) and (b)(9). (See Section VIII.A.4 & 5, above.)

### X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

#### Kornberg

- [Date]: Email Comment
- [Date]: Email Comment

#### Croker

- [Date]: Email Comment
- [Date]: Email Comment

#### Langford

- [Date]: Email Comment
- [Date]: Email Comment

#### Martinez

- [Date]: Email Comment
- [Date]: Email Comment

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### **XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 1.16 [3-700] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1.16 [3-700] in the form attached to this Report and Recommendation.

### **XII. DISSENTING POSITION(S)**

None.

### **XIII. FINAL COMMISSION VOTE/ACTION**

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

**CURRENT CALIFORNIA RULE 3-700**  
**"Termination of Employment"**

***I. Text of Current Rule:***

**(A) In General.**

- (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

**(B) Mandatory Withdrawal.**

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

**(C) Permissive Withdrawal.**

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) The client
  - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
  - (b) seeks to pursue an illegal course of conduct, or

- (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
  - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
  - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
  - (f) breaches an agreement or obligation to the member as to expenses or fees.
- (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
  - (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
  - (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
  - (5) The client knowingly and freely assents to termination of the employment; or
  - (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

- (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

## Discussion:

Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member’s own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.

## II. **Background/Purpose:**

### A. Summary of 1989 Amendments

Rule 3-700 became operative on May 27, 1989. The predecessor to current rule 3-700, former rule 2-111, originally approved and made operative on January 1, 1975, was entitled “Withdrawal from Employment.” Prior to the enactment of rule 2-111, there was no Rule of Professional Conduct that governed a lawyer’s withdrawal from representation of a client. However, Code of Civil Procedure sections 284 – 285.1 set forth procedures governing withdrawal of a lawyer from proceedings *before a tribunal*.

Former rule 2-111 largely tracked Disciplinary Rule (DR) 2-110 of the ABA Model Code of Professional Responsibility (“ABA Code”) and governed withdrawal from representations in both litigation and non-litigation matters.<sup>1</sup> Aside from non-substantive changes such as substituting the term “member of the State Bar” for “lawyer” and the phrase “these Rules of the State Bar Act” for the term “a Disciplinary Rule,” former rule 2-111 changed DR 2-110 by adding concepts derived from the ABA Code, DR 5-101 and 5-102.<sup>2</sup> This resulted in the addition of several prophylactic provisions in paragraph

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<sup>1</sup> Chapter 2 of the 1975 Rules of Professional Conduct largely tracked the corresponding organization of the ABA Code. However, the 1975 Rules added rule 2-101 (General Prohibition Against Solicitation of Professional Employment), with the corresponding DR’s in the ABA Code being renumbered.

<sup>2</sup> DR 5-101 and 5-102 provided:

**DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.**



(A) that addressed the withdrawal of a lawyer, or a lawyer in lawyer's firm, when either might be called as a witness on behalf of the client in litigation concerning the subject matter of the representation, or if the lawyer's testimony might be prejudicial to the client.<sup>3</sup> Because the provisions addressing a lawyer as a witness have since been moved into current rule 5-210 (Member As Witness).<sup>4</sup>

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- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.
- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
  - (1) If the testimony will relate solely to an uncontested matter.
  - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
  - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
  - (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

**DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.**

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

<sup>3</sup> Specifically, former rule 2-111 added to DR 2-110(A) the following subparagraphs, (A)(4)(a) – (d) and (A)(5):

- (4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:
  - (a) If the member's testimony will relate solely to an uncontested matter; or
  - (b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or

Rule 2-111(A)(3) also contained a sentence not found in DR 2-110(A)(3), which clarified that the requirement to promptly refund unearned fees did not apply to a “true retainer.”<sup>5</sup> That sentence remains in current rule 3-700 and is carried forward in proposed rule 1.16(e)(2).

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-700, which became operative on May 27, 1989. Rule 3-700 for the most part adheres to the organizational structure and language of former rule 2-111, but it adds paragraph (D) and a Discussion section. The following legislative black line version of the rule shows the changes to the provisions of the 1979 version of former rule 2-111 that were carried forward into rule 3-700.<sup>6</sup>

**Rule ~~2-111. 3-700~~ Withdrawal from Termination of Employment**

(A) In ~~general~~ General.

- (1) If permission for ~~withdrawal from~~ termination of employment is required by the rules of a tribunal, a member ~~of the State Bar~~ shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) ~~In any event, a~~ A member ~~of the State Bar~~ shall not withdraw from employment until ~~he~~ the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of ~~his~~ the client, including giving due notice to ~~his~~ the client, allowing time for employment of other counsel, **[MOVED TO 3-700(D)(1)]** delivering

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- (c) If the member’s testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or
  - (d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.
  - (5) If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

<sup>4</sup> Any subsequent amendments to those provisions will be addressed by the rule 5-210 drafting team. The corresponding ABA Model Rule is numbered 3.7.

<sup>5</sup> Rule 2-111(A)(3) differed from DR 2-110(A)(3) as follows:

- (3) A ~~lawyer~~ member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.

<sup>6</sup> The deleted text of rule 2-111(A)(4) and (5), which was moved to current rule 5-210, is not shown.

~~to the client all papers and property to which the client is entitled complying with rule 3-700(D), and complying with applicable laws and rules.~~

~~[MOVED TO 3-700(D)(2)] (3) A member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.~~

\* \* \*

#### (B) Mandatory Withdrawal.

A member ~~of the State Bar~~ representing a client before a tribunal, shall withdraw from employment with its the permission of the tribunal, if required by its rules, ~~shall withdraw from employment,~~ and a member ~~of the State Bar~~ representing a client in other matters shall withdraw from employment, if:

- (1) ~~He~~ The member knows or should know that ~~his~~ the client is bringing ~~a legal an~~ action, conducting a defense, asserting a position in litigation, or ~~otherwise having steps taken for him solely taking an appeal, without probable cause and~~ for the purpose of harassing or maliciously injuring any person ~~or solely out of spite, or is taking or prosecuting an appeal merely for delay, or for any other reason not in good faith;~~ or
- (2) ~~He~~ The member knows or should know that ~~his~~ continued employment will result in violation of these ~~Rules of Professional Conduct~~ rules or of the State Bar Act; or
- (3) ~~His~~ The member's mental or physical condition renders it unreasonably difficult ~~for him~~ to carry out the employment effectively.

#### (C) Permissive Withdrawal.

If ~~Rule 2-111~~ rule 3-700 (B) is not applicable, a member ~~of the State Bar~~ may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) ~~His~~ The client:
  - (a) ~~Insists~~ insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good

faith argument for an extension, modification, or reversal of existing law;<sup>1</sup> or

- (b) ~~Personally~~ seeks to pursue an illegal course of conduct;<sup>1</sup> or
  - (c) ~~Insists~~ insists that the member ~~of the State Bar~~ pursue a course of conduct that is illegal or that is prohibited under these ~~Rules of Professional Conduct~~ rules or the State Bar Act;<sup>1</sup> or
  - (d) ~~By~~ by other conduct renders it unreasonably difficult for the member ~~of the State Bar~~ to carry out ~~his~~ the employment effectively;<sup>1</sup> or
  - (e) ~~Insists~~ insists, in a matter not pending before a tribunal, that the member ~~of the State Bar~~ engage in conduct that is contrary to the judgment and advice of the member ~~of the State Bar~~ but not prohibited under these ~~Rules of Professional Conduct~~ rules or the State Bar Act;<sup>1</sup> or
  - (f) ~~Deliberately disregards~~ breaches an agreement or obligation to the member ~~of the State Bar~~ as to expenses or fees;<sup>1</sup> ~~or~~.
- (2) ~~His~~ The continued employment is likely to result in a violation of these ~~Rules of Professional Conduct~~ rules or of the State Bar Act; or
  - (3) ~~His~~ The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
  - (4) ~~His~~ The member's mental or physical condition renders it difficult for ~~him~~ the member to carry out the employment effectively; or
  - (5) ~~His~~ The client knowingly and freely assents to termination of ~~his~~ the employment; or
  - (6) ~~He~~ The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

#### (D) Papers, Property, and Fees.

##### A member whose employment has terminated shall:

- (1) [MOVED FROM 2-111(A)(2)] Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports,

and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

[MOVED FROM 2-111(A)(3)] (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

The Rules Revision Commission explained the proposed revisions to former rule 2-111 that would result in rule 3-700:

Proposed rule 3-700 generally continues the regulations found in current rule 2-111 regarding termination of employment.

Proposed amendments to subparagraph (A)(1), which currently requires permission for withdrawal if such permission is required by a tribunal, make clear that the rule is applicable in all situations where termination of employment occurs and not merely in situations involving withdrawal from representation before a tribunal.

Subparagraph (A)(2), which currently prohibits an attorney from withdrawing until certain steps are taken to avoid foreseeable prejudice to the rights of the client, would be amended to specify a consistent standard: "reasonably foreseeable". This standard has been well-defined

by the courts. The requirement that the attorney deliver to the client all the client's papers and property, which is currently included in subparagraph (A)(2), has been moved to subparagraph (D)(1) of the proposed rule and has been expanded to clarify the troubling issue of what constitutes "client papers and property".

The deletion of subparagraph (A)(3), which requires an attorney who withdraws to promptly refund any part of a fee paid in advance that has not been earned, would not constitute a substantive change. The substance of this rule is continued in proposed new subparagraph (D)(2).

Subparagraphs (A)(4) and (A)(5), dealing with members as witnesses, have been consolidated and moved to a separate new rule 5-210. This important topic should have its own rule so that it may be more easily located.

No substantive changes are proposed to paragraph (B) which sets forth the circumstances under which an attorney must withdraw from employment.

No substantive changes are proposed to paragraph (C) which sets forth the circumstances under which an attorney may withdraw from employment, except that subparagraph (C)(1)(f) would be amended to provide that a member may withdraw if a client breaches an agreement or obligation to the member as to expenses or fees. This change is intended to prevent the disputes that have taken place under present rule 2-111(C)(1)(f) as what constitute a client's "willful disregard" of an obligation to pay fees. Note however, that in this circumstance, as in all circumstances in which termination of employment occurs, the attorney may not withdraw unless he or she complies with paragraph (A) of the rule.<sup>7</sup>

Paragraph (D), which was a codification of existing case law, was added to clarify the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It also required that the member "promptly" return unearned fees paid in advance and reinforced a member's duty to comply with rule 4-100(A)(2) if the client disputes the amount.<sup>8</sup>

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<sup>7</sup> See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987, at pages 40-41.

<sup>8</sup> Rule 4-100(A)(2) provides:

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or

## B. Summary of 1992 Proposed Amendments

Amendments to rule 3-700 were proposed in 1992 in conjunction with proposed amendments to rule 4-100.<sup>9</sup> The proposed amendments to rules 3-700 and 4-100 required that all advance fees for legal services received by a member should be deposited in the member's client trust account unless the member's written fee agreement with the client expressly provided that the fee paid in advance is earned when paid or is a "true retainer" (as set forth in rule 3-700(D)(2)). Although the proposed amendments avoided the use of the terms "fixed fee," "flat fee" or "non-refundable fee," such types of retainer fee agreements would have been permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provided that such fees, paid in advance of the provision of legal services, are earned when paid.

Proposed new subparagraph (B)(4) added a new requirement mandating that a member withdraw from representation of a client where the member or the member's law firm is discharged by the client. This requirement would have put lawyers on notice that a client has absolute power to terminate the attorney-client relationship.<sup>10</sup>

A proposed amendment to subparagraph (D)(2) would have expanded the definition of the term "true retainer fee" to include a fee paid solely for the purpose of ensuring the availability of the member either for a matter *or for a given period of time*:

- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the a matter or for a given period of time.

A proposed new third paragraph of the Discussion section would have taken the last two sentences of the second paragraph of the current rule Discussion and modified them in a nonsubstantive manner. New language would then have been added to clarify that: 1) the fact that an advance for legal fees need not be placed in a trust account pursuant to rule 4-100 does not by itself mean that the member may not have to refund a portion thereof (reference would be provided to rule 4-200 (Fees for Legal Services));

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law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

<sup>9</sup> See "Request that the Supreme Court of California Approve Amendments To Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," Supreme Court case number S029270, October 1992.

<sup>10</sup> See *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]. The same provision had been proposed by the 1972 Special Committee to Study the ABA Code of Professional Responsibility, but was not included in former rule 2-111.



and 2) all advances for costs and expenses must be placed in a trust account pursuant to rule 4-100 (case authority is provided in support of this proposition).

Subparagraph (D)(2) ~~also requires that the member “promptly” return an unearned fee paid in advance. If a client disputes the amount to be returned such a fee has~~ has been placed in a trust account pursuant to rule 4-100, the member shall comply with the provisions of rule 4-100(A)(2), should the client dispute the amount to be returned. The fact that such fee need not be placed in a trust account does not by itself mean that the member may not have to refund a portion thereof. (See also rule 4-200.) In any event, all advances for costs and expenses must be placed in a trust account. (See Stevens v. State Bar (1990) 51 Cal.3d 283 [272 Cal.Rptr. 167].)

The State Bar later withdrew request for the foregoing amendments following a letter inquiry from the Supreme Court that identified an ambiguity in the proposal:

The court wishes to advise the State Bar of a possible ambiguity in the proposed amendments to rules 3-700 and 4-100. If a fee agreement specifies that an advance fee is “earned” when paid, the fee does not fall within rule 3-700(D)(2)’s requirement that members return “unearned” advance fees. Similarly, the new discussion following that rule refers only to an “unearned” fee paid in advance and states that “such fee” may still have to be refunded even if not required to be in a trust account. (See also rule 1-100(C) [discussion cannot add independent basis for discipline].) Thus, the proposed rules appear to exempt advance fees designated as earned when paid from the requirement of refunding fees paid for services that are not performed.

No further amendments to rule 3-700 have been requested or approved since 1992.

### ***III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. **2015 Comments**. In a \_\_\_\_\_, 2016 memorandum from OCTC, OCTC provided the following comment on rule 3-700:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. **2010 Comments**. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 1.16:

#### **Rule 1.16. Declining or Terminating Representation.**

1. OCTC generally supports this rule. However, OCTC is concerned that subparagraph (b)(1) and (3) should mandate withdrawal. Proposed rule 1.16(a)(1) requires an attorney to not represent or withdraw from representation if

the lawyer knows or reasonably should know that the representation will result in a violation of these rules. If the client insists upon presenting a defense in litigation or asserting a position or making a demand that is not warranted under existing law and cannot be supported by a good faith argument an attorney's following the client's instruction would be a violation of Business & Professions Code sections 6068(c) and (g) and proposed rule 3.1. So, how can it just be permissive? OCTC recognizes that current rule 3-700 has the same language (although the current rule also had language requiring withdrawal if the client is bringing an action, conducting a defense, asserting a position, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. We assume this mandatory requirement was taken out because it is already covered by subparagraph (a)(1)). It makes no sense to make the taking of the position a violation but not require withdrawal for a client insisting (as compared to initially requesting) that the attorney take that position. Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. (See *Molski v. Evergreen Dynasty Corp* (9th Cir. 2007) 500 Fed.3d 1047, 1060-1, rehearing denied 521 Fed.3d 1215, cert denied 129 S. Ct. 594.) Likewise, withdrawal should be mandated if the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent since doing so would be a violation of these rules and the State Bar Act. Comment 2, in fact, seems inconsistent with placing proposed rule 1.16(b)(1) and (3) as permissive and consistent with OCTC's view that (b)(1) and (b)(3) should be mandatory.

2. Comments 4, 5, 6, 8, and the first sentence of Comment 9, seem more appropriate for treatises, law review articles, and ethics opinions.

C. **2001 Comments**. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 3-700:

OCTC's recommends expanding the duties of an attorney when declining or terminating employment and adding to the rule more reasons which would support an attorney's withdrawing from representation.

Revise the rule as follows:

**Rule 3-700. Termination of Employment Declining or Terminating Employment.**

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. ~~When ordered to do so by a tribunal, a member shall continue the representation of a client notwithstanding good cause for terminating the representation.~~

(2) A member shall must not withdraw from employment until the member has

taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(3) Notwithstanding any other part of this rule, a member must comply with rules 3- 700(A)(1) and (2) when withdrawing from representing a client.

(B) Mandatory Declining of Representation or Mandatory Withdrawal.

~~A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:~~

A member must not represent a client or, where representation has commenced, must withdraw, with the permission of the tribunal if required by its rules, from the representation of a client, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person or improperly delaying an action; or

(2) The member knows or should know that the employment or continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental, emotional or physical condition makes it unreasonably difficult to carry out the employment effectively; or

(4) The client persists in insisting that the member present a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(5) The member knows or should know that the client seeks to pursue an illegal course of conduct. However, in a criminal matter if the client insists on testifying falsely, the member will not be required to withdraw, but must attempt to convince the client to testify honestly or not at all. The member must not be a party to the false testimony, may not utilize it and must comply with all applicable law regarding such situations; or

(6) The client persists in insisting that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act; or

(7) The member is not hired by someone authorized to do so, or, if hired, is discharged.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, and subject to paragraph (A) of this rule, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

~~(b) seeks to pursue an illegal course of conduct, or~~

~~(c) (b)~~ insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act; or

~~(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.~~

~~(e) (c)~~ insists, ~~in a matter not pending before a tribunal,~~ that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act; or

(d) insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(f) (e) breaches an agreement or obligation to the member as to expenses or fees and has been given a reasonable and timely warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(d) (f)~~ by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act or any other law, or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental, emotional, or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The representation will result in an unreasonable financial burden on the member; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

#### (D) Papers, Property, and Fees

A member ~~whose employment has terminated~~ shall:

(1) Subject to any protective order or non-disclosure agreement, promptly deliver ~~release~~ to the client or his or her representative at the request of the client all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, e-mail and computer generated files or writings, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) After termination or completion of all services in the matter promptly refund any part of the fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

In determining whether a member withdrew from employment in a matter without taking reasonable steps to avoid foreseeable prejudice to the rights of the client, the proximity of the withdrawal to any pending trial date or significant event should be considered. The closer to trial or the significant event the greater the justification required to withdraw. This rule recognizes that it is often difficult for a client to find a substitute lawyer close to a pending trial date and that undue pressure can be exerted by the member on the client when the member threatens to withdraw shortly before trial. A member should not put the client in a disadvantageous position by withdrawing or threatening to withdraw shortly before trial when the circumstances giving rise to the reasons for withdrawing have existed for some time.

. . .

In seeking to withdraw from representation, attorneys must always be mindful of their obligations to their clients to protect the client's rights and to protect and preserve the client's secrets under Business & Professions Code Section 6068(e). This may require not revealing certain information or facts or require ex parte or sealed pleadings or hearings regarding the motion to withdraw.

## OCTC COMMENTS:

This rule and its title should be changed to apply to declining employment as well as withdrawing from it.

In paragraph A of rule 3-700, OCTC recommends that a sentence be added to (A)(1) to remind members that, despite a valid reason to withdraw, if a tribunal requires them to continue to represent the client they are required to do so. The ABA has this provision in its proposed Model Rule 1.16. New paragraph (A)(3) would leave no doubt that notwithstanding any other rule a member must comply with paragraph A(1) and (2) when withdrawing from representing a client.

OCTC has left the language regarding foreseeable prejudice. The ABA uses the term material adverse effect. OCTC does not believe there is a significant difference.

In paragraph B, OCTC retitled the paragraph to express the proposed changes. The changes include rewriting the initial clause so that the rule also applies to accepting of representation as well as any attempt to withdraw from representation. There is no reason an attorney should not be disciplined for taking a case that would require mandatory withdrawal. Of course, if the attorney did not know of the conditions or facts requiring him or her to not take the case, there is no discipline unless the attorney fails to withdraw as required in these rules when he or she learns of the conditions or facts. The attorney must also as always give the client notice and avoid foreseeable prejudice to the client as a result of the withdrawal. We added language to remind attorneys of this duty.

OCTC added to paragraph (B)(3) emotional conditions that might not qualify as mental conditions but still could impact the representation. OCTC also recommends adding paragraph (B)(4). This paragraph is currently in the permissive withdrawal section as paragraph (C)(1)(a). It should be stricken from the permissive basis for withdrawal and placed in the mandatory section. Current rule 3-200 already prohibits this conduct and requires an attorney to “not seek, accept, or continue employment if the member knows or should know that the objective of such employment is to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.” OCTC’s proposed changes to rule 3-200 would still prohibit an attorney from bringing such actions. Hence, consistent with rule 3-200, this provision belongs in paragraph B of rule 2-700, mandating withdrawal, not in paragraph C, merely permitting an attorney to withdraw. OCTC also moved current subsections (b) and (c) of paragraph C to paragraph (B) and renumbered them. An attorney should never be a party, co-conspirator, or assist someone in pursuing an illegal act. That is already forbidden. (See current rule 3-210 and Business & Professions Code section 6068(a).) An attorney should also never continue representation when the client persists in requiring the member to pursue a course of action that is illegal or prohibited under these rules and the State Bar

Act. Even if the attorney does not withdraw he or she should explain to the client that he or she cannot do what the client wants and attempt to persuade the client not to do it either. If the attorney cannot get the client to stop insisting on a certain course of action, then the attorney should withdraw so as to prevent being a party to or aiding in improper conduct. The only exception to this rule should be in criminal cases when the lawyer is aware that the client is going to testify falsely. In those cases, the attorney must do everything to persuade the client not to testify falsely. If the attorney cannot persuade the client to testify truthfully, the attorney must comply with applicable case law in this situation and in no event aid, support, or utilize that evidence.

OCTC also recommends that an attorney be required to refuse employment or withdraw from employment if the attorney is not hired by someone authorized to do so, or, if hired, is discharged. It should be self-evident that if a client discharges an attorney that he cannot continue to act for the client unless he is required to get court permission before withdrawing and then he must continue to act for the client until the court relieves him or her of responsibility for the matter..

Further, there have been situations when an individual not authorized to hire an attorney attempts to or hires an attorney to represent a person or entity. If the attorney knows or should know that the person is not authorized to hire him or her, the attorney should be prohibited from taking the case and be required to withdraw as soon as the attorney learns of the relevant facts. This has happened in minority shareholder cases where the minority shareholder attempts to hire the attorney to represent the entire entity when he or she has not been authorized to do so. In another case, an attorney filed and pursued a bankruptcy petition on behalf of an entity when he or she had never been hired by the entity's board. The attorney then continued that action even after the board informed him that there was no such authority and they did not want a bankruptcy petition filed or pursued. In other cases, attorneys have acted without authority or continued to perform after being told to stop, often charging the client for services not wanted. Under the current rule, there is no specific prohibition for this conduct unless the attorney makes an appearance for the client. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907.)

OCTC also recommends that the phrase "in a matter not pending before a tribunal" in current paragraph (c)(1)(e) be removed because it leaves the impression that, unless the matter is pending before a tribunal, the member may not withdraw even if the member is forced to engage in conduct that is contrary to the judgment and advice of the member.

While an attorney has primary control of and discretion over many tasks connected with a representation, such as which witnesses to call, whether to grant a continuance to the other party's attorney, other decisions, such as whether or not to settle a case, should be and are within the sole discretion of the client. However, an attorney should be able to withdraw if the client insists on an approach the member fundamentally disagrees with.



OCTC also recommends amending section (C)(1)(e) to include a provision that the client be given notice that the failure will result in the attorney seeking to withdraw. This notice should be reasonable and timely and not simply in the retainer agreement, but, in fact, provided shortly before the motion or withdrawal. We choose not to specify the actual period for the warning because it should depend on the particular case and the facts of the matter.

Paragraph (C)(4) should also include as a basis to withdraw emotional conditions as well as mental conditions. This does not mean that every time an attorney is having a difficult day or week they may withdraw, but that if an attorney feels that personal difficulties make it unreasonable for the attorney to continue with the representation her or she should have the right to withdraw so long as the client is not prejudiced.

Paragraph (C)(5) presents the ABA's recommendation that withdrawal be allowed when continued representation will result in an unreasonable financial burden on the for the attorney. There are situations – although rare – when the economics of continuing to represent a client may become too burdensome. Attorneys should be allowed to seek withdrawal on that basis.

In paragraph (D), OCTC recommends striking the phrase “whose employment has terminated” so it is clear that clients can obtain their papers prior to termination if they so desire.

OCTC also suggests we return to the use of the word “delivery” instead of “release.” Attorneys have used the term to require that the clients come to the office to pick up their files. We also suggest adding words to indicate that papers include modern technological documents, communications or information stored by the attorney in a computer.

In the discussion section, we've added appropriate language to explain the revisions and we placed a commentary reminding attorneys that they still have a duty to protect their client's interests and preserve their client's secrets and confidences.

The Commission might want to explore the issue of true retainers. Some states have questioned whether they are proper (see *In the Matter of Cooperman* (NY 1993) 591 NYS 2d 855, aff'd 633 N.E. 2d 1069) and have required attorneys to mitigate any damages by attempting to find other work.

#### **IV. *Potential Deficiencies in the Current Rule:***

A. See 2010 and 2001 input from OCTC, *above*.

C. Other Potential Deficiencies:

1. The proposed rule only addresses withdrawal from employment. Its scope should be expanded to prohibit a lawyer from accepting a representation that would otherwise require withdrawal.
2. The proposed rule should substitute the word “representation” for “employment.” The latter word is a relic from the terminology used in the ABA Code of Professional Responsibility (1969), which provided much of the content of the 1975 California Rules. The Code was superseded by the ABA Model Rules in 1983.
3. The structure of current rule 3-700, which is based on that of ABA Code, DR 2-110, diverges from the structure of Model Rule 1.16 and the corresponding rule adopted in nearly every other jurisdiction. The structure of the California Rule should be similar to that in other jurisdictions.
4. Unlike Model Rule 1.16(a)(1), current rule 3-700(B)(1), does not require that a lawyer withdraw if the representation results in violation of a rule of professional conduct or other law. Current rule 3-700(B)(1) only requires withdrawal if the employment will result in the violation of a rule of professional conduct. Adding the phrase “or other law” will clarify that it is not just a violation of a rule that mandates withdrawal.
5. The current rule does not contain a provision that mandates withdrawal when the client discharges the lawyer. See *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385] and section II,B (1992 Amendments), above.
6. The current rule does not expressly state that the rule is applicable in both litigation and non-litigation matters.
7. The current rule does not include the concepts in Model Rule 1.16(b)(2) and (3), which permit withdrawal from representation when a client seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer’s services in such conduct.
8. Current rule 3-700(C)(1)(f) is drawn more narrowly than Model Rule 1.16(b)(5), which permits withdrawal whenever a client breaches an agreement or obligation to the lawyer, even if the breach is not related to an agreement or obligation regarding fees or expenses (as limited in the current rule), and requires that the lawyer warn the client that the lawyer will withdraw unless the client fulfills the obligation. If such a change is made, then the amended provision should enhance the protections

available under Model Rule 1.16(b)(5) by requiring that the warning must be provided *after* the breach has occurred.

9. The current rule does not clarify that “client materials and properties” may be in electronic or other forms in addition to “tangible” forms. (Compare this Commission’s proposed Rule 1.4, which permits a lawyer to comply with a client’s request for documents by providing the client with “copies of significant documents by electronic or other means.”)
10. Current rule 3-700(B)(1) requires withdrawal from representation when the lawyer “knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.” If the Commission decides to adopt the Model Rule approach, which requires withdrawal from representation when “the representation will result in violation of the rules of professional conduct or other law,” question whether this provision is necessary.<sup>11</sup>
11. Current rule 3-700(C)(1)(e) permits withdrawal from representation when the client “insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act.” It is not necessary. If approved by the Commission, the concept found in Model Rule 1.16(b)(4), i.e., that the representation “has been rendered unreasonably difficult by the client,” adequately covers the conduct addressed by current rule 3-700(C)(1)(e), the latter would unnecessary.
12. Current rule 3-700 does not contain any reference to California statutory authority, e.g., Penal Code sections 1054.2 and 1054.10, which provide statutory restrictions on a lawyer’s release of client papers in criminal matters (e.g., prohibition on releasing the address or other information concerning a victim to the defendant or defendant’s family).

## **V. California Context:**

See Section IX., Research Resources, *below*.

## **VI. Approach In Other Jurisdictions (National Backdrop):**

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct Rule 1.16,” revised May 13, 2015, is available at:

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<sup>11</sup> On the other hand, in a 4/15/14 letter to the State Bar, the Supreme Court directed that a similar provision that RRC1 had excised from proposed Rule 3.1 [3-200] be restored to the proposed Rule. The issue is whether the “violation of a rule” provision, which would include a violation of Rule 3.1 (which expressly prohibits the malicious injury conduct), would be sufficient in this Rule.

Every jurisdiction has adopted some version of ABA Model Rule 1.16. Twenty jurisdictions have adopted the Model Rule verbatim,<sup>12</sup> 27 jurisdictions states have adopted a substantially similar rule,<sup>13</sup> and four jurisdictions have adopted a rule that is a substantial variation from the Model Rule: California, Massachusetts,<sup>14</sup> Minnesota,<sup>15</sup> and New York.<sup>16</sup>

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<sup>12</sup> The twenty states are: Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.

<sup>13</sup> The twenty-seven jurisdictions are: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

<sup>14</sup> Massachusetts Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but includes a paragraph (e), which contains an expanded description of what constitutes a client file and provides:

(e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

(1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.

(2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials.

(3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

(4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.

(5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.

(6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

## **VII. Public Comment Received by the First Commission:**

A. The clean text of proposed Rule 1.16 drafted by the first Commission and adopted by the Board to replace rule 3-700 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule

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(7) notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

<sup>15</sup> Like Massachusetts, Minnesota's Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but has adopted an expanded definition of "client papers and property," and several other provisions:

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

(1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;

(2) in pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

<sup>16</sup> New York, which was the last jurisdiction to abandon a set of rules based on the ABA Code of Professional Responsibility, has retained rule structure that is similar to California Rule 3-700, as both rules derive in large part from ABA Code, DR 2-110. New York also expands the section of its rule concerning permissive withdrawal.

and the full text of those comments. Although the proposed rules differ from current rule 3-700, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-700 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

***VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:***

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to expand the scope of current rule 3-700 to prohibit a lawyer from *accepting* a representation that would otherwise require withdrawal.

(2) Whether the proposed rule should substitute the word "representation" for "employment," the latter word being a relic from the terminology used in the ABA Code of Professional Responsibility (1969), which provided much of the content of the 1975 California Rules. The Code was superseded by the ABA Model Rules in 1983.

(3) Whether to adopt the structural framework of Model Rule 1.16, while largely carrying forward the substantive content of current rule 3-700.

(4) Whether to add a provision similar to Model Rule 1.16(a)(3) that would mandate that a lawyer terminate a representation when the client discharges the lawyer. See *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385] and section II,B (1992 Amendments), above.

(5) Whether to add to current rule 3-700(B)(1), similar Model Rule 1.16(a)(1), the requirement that a lawyer withdraw if the representation results in violation of a rule of professional conduct or other law. Current rule 3-700(B)(1) only requires withdrawal if the employment will result in the violation of a rule of professional conduct.

(6) Whether to clarify that current rule 3-700 applies in both litigation and non-litigation matters.

(7) Whether to adopt the concepts in Model Rule 1.16(b)(2) and (3), which permit withdrawal from representation when a client seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services in such conduct.

(8) Whether to expand the scope of current rule 3-700(C)(1)(f) by adopting the concepts in Model Rule 1.16(b)(5), so that withdrawal would be permitted when a client breaches an agreement or obligation to the lawyer, even if the breach is not related to an agreement or obligation regarding fees or expenses, and require that the lawyer warn the client that the lawyer will withdraw unless the client fulfills the obligation. If such a change is made, whether to correspondingly enhance the protections provided under Model Rule 1.16(b)(5) by requiring that the warning must be provided after the breach has occurred. [MR 1.16(b)(5)]

(9) Whether to clarify that "client materials and properties" may be in electronic or other forms in addition to "tangible" forms. (Compare this Commission's proposed Rule 1.4, which permits a lawyer to comply with a client's request for documents by providing the client with "copies of significant documents by electronic or other means.")

(10) Whether to delete current rule 3-700(B)(1), which requires withdrawal from representation when the lawyer "knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." If the Commission decides to adopt the Model Rule approach, which requires withdrawal from representation when "the representation will result in violation of the rules of professional conduct or other law," question whether this provision is necessary.<sup>17</sup>

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<sup>17</sup> On the other hand, in a 4/15/14 letter to the State Bar, the Supreme Court directed that a similar provision that RRC1 had excised from proposed Rule 3.1 [3-200] be restored to the proposed Rule. The issue is whether the "violation of a rule" provision, which would include a violation of Rule 3.1 (which expressly prohibits the malicious injury conduct), would be sufficient in this Rule.



(11) Whether to delete from the proposed rule the substance of current rule 3-700(C)(1)(e), which permits withdrawal from representation when the client “insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act.”

(12) Whether to include a comment similar to RRC1 proposed Rule 1.16, cmt. [9], which provided a cross-reference to California statutory authority, including a reference to Penal Code sections 1054.2 and 1054.10, which provide statutory restrictions on a lawyer’s release of client papers in criminal matters.<sup>18</sup>

#### **IX. Research Resources:**

- [Academy of California Optometrists v. Superior Court](#) (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]
- [Weiss v. Marcus](#) (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]
- *In the Matter of Shalant* (Review 2005) 4 Cal. State Bar Ct. Rptr. 829
- *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]
- [Penal Code §§ 1054.2 and 1054.10.](#)
- [In re Aguilar and Kent](#) (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]
- [CAL 2007-174](#) (Electronic Client Files)
- [CAL 1992-127](#) (Cooperation with Successor Counsel)

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<sup>18</sup> For example, Penal Code § 1054.2(a)(1) provides:

(a)(1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause.