September 21, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

At our last meeting it was decided that comments by commission members on the proposed rules that are out for public comment should be sent to the drafting team for consideration.

I have the followed non-substantive suggestions on Comments [3] and [5] to Rule 1.0.1

I would end the first sentence in Comment [3] with a period after "or failed to inform" and begin the second sentence with "Requiring the proof of these elements. . . "

In the first sentence in Comment [5], I think we should put "prospective client" in brackets since we have not decided whether to recommend a version of Rule 1.18 that has a screening component.

In the third sentence in Comment [5], the phrase "promptly shall be informed" should be changed to "shall promptly be informed."

September 25, 2016 Mohr Email re 1.0.1 to Rule 1.4 Drafting Team, cc Difuntorum, McCurdy & Lee:

To respond to your question whether the reader will know what the asterisk means, the Cal. Code of Judicial Ethics provides at the beginning of its Terminology Section the following in bold font:

> The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk.

We expect to include a similar statement in rule 1.0.1, w/ the asterisk not being limited to the first time the term is used in a rule:

> Whenever a term listed below is used in a Rule in its defined sense, it is followed by an asterisk.

Including the asterisk for every use makes more sense because a judge or lawyer will not necessarily read every section of a lengthy rule and see that a particular term in a later section being read is defined. Any harm to our distant arboreal relatives from universally deploying asterisks throughout the Rules should be minimal. Thanks,

Rule 1.0.1 [1-100(B)] Terminology

(a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) [Reserved]

(c) "Firm" or "law firm" means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(g-1) "Person" means a natural person or an organization.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

(l) "Substantial" when used in reference to degree or extent means a material matter of clear and weighty importance.

(m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(n) "Writing" or "written" has the meaning stated in Evidence Code § 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Firm or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term "of counsel" implies that the lawyer so designated has a relationship with the law firm,* other than as a partner*or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as "of counsel" or by a similar term should be deemed a member of a law firm* for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

*Fraud**

[3] When the terms "fraud"* or "fraudulent"* are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. ~~because requiring~~ Requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term "fraud"* or "fraudulent"* when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed consent and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

[Screened]*

[5] The purpose of screening is to assure the affected client, former client, or [prospective client] that confidential information known* by the personally prohibited lawyer is neither

disclosed to other law firm* lawyers or nonlawyer personnel nor used to the detriment of the person* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm* who are working on the matter ~~promptly~~ shall promptly be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm* personnel of the presence of the screening, it may be appropriate for the law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to avoid any communication with other law firm* personnel and any contact with any law firm* files or other materials relating to the matter, written* notice and instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm* personnel.

[6] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm* knows* or reasonably should know* that there is a need for screening.