

Rule 2.4 Lawyer as Third-Party Neutral
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in Rule 1.12.

[3] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

**Proposed Rule 2.4 Lawyer as Third-Party Neutral
Synopsis of Public Comments**

TOTAL = 2	A = 2
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43t	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A		Supports adoption of proposed Rule 2.4.	No response required.
X-2016-104ag	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		Supports adoption of proposed Rule 2.4.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)**

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

**Proposed Rule 2.4.1 [1-710] Lawyer as Temporary Judge,
Referee, or Court-Appointed Arbitrator
Synopsis of Public Comments**

TOTAL = 2	A = 1
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43u	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 2.4.1	No response required.
X-2016-104ah	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M		<p>1. OCTC supports this rule, but believes that the Commission should consider whether to put language in the rule in case the Code of Judicial Ethics is changed or renumbered.</p> <p>2. OCTC supports Comment 2, but finds Comment 1 unnecessary, as the rule on its face permits the discipline of attorneys for violations of the rule. (See proposed rule 1.0(b)(1).) Further, with the exception of public and private reprovals, the State Bar does not discipline attorneys. Only the Supreme Court can discipline attorneys.</p>	<p>1. The Commission has not made the suggested change. It has referenced the Code of Judicial Ethics so that if the Code should change, it would not be necessary to change the rule. The important concept is that the lawyer must comply with the Code, which regulates the lawyer in the stated circumstances.</p> <p>2. The Commission has retained Comment [1] as drafted. It appears in slightly different form in current rule 1-710 and was added at the request of the Supreme Court. The Commission is not aware of any misunderstandings or other problems that have resulted from its inclusion in the current rule.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.2 Delay of Litigation
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

**Proposed Rule 3.2 Delay of Litigation
Synopsis of Public Comments**

TOTAL = 4
A = 2
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43w	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	3.2	Insert "unduly" before "delay."	If the conduct of a lawyer has "no substantial purpose other than to delay or prolong the proceeding or ... cause needless expense" the conduct is unethical and subjects the attorney to discipline. Conduct which delays a proceeding but which has a substantial purpose other than simply delay or the purpose of causing needless expense, is not subject to the rule. The modifier "unduly" also creates ambiguity when the standard for culpability is a finding of "no substantial purpose." The Commission believes that adding the word "unduly" is inadvisable.
X-2016-66n	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	3.2	Comment that refers to rule 1.3 and Business and Professions Code section 6128 is helpful as lawyers may be unaware of these concepts	No response required.
X-2016-76i	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	3.2	ABA Rule 3.2 is superior because it recognizes lawyer's duty to expedite litigation and should be adopted instead of proposed rule.	Proposed Rule 3.2 is a disciplinary rule establishing standards of conduct. The language of ABA Model Rule 3.2 is aspirational and sets an amorphous standard that

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**Proposed Rule 3.2 Delay of Litigation
Synopsis of Public Comments**

TOTAL = 4 **A = 2**
 D = 0
 M = 2
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						would be difficult to enforce. Proposed Rule 3.2 sets forth a bright line standard whereas the ABA Model Rule does not.
X-2016-104aj	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	3.2	OCTC supports adoption of proposed Rule 3.2.	No response required.

Rule 3.7 [5-210] Lawyer as Witness
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
- (1) the lawyer's testimony relates to an uncontested issue or matter;
 - (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent,* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].

Proposed Rule 3.7 [5-210] Lawyer as Witness
Synopsis of Public Comments

TOTAL = 6 **A = 6**
D = 0
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32i	Law Professors (Zitrin) (07-25-16)	Yes	A	3.7	Agree that lawyers should be allowed to testify on behalf of their clients with the clients' informed consent.	No response required.
X-2016-43z	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	3.7	COPRAC supports the adoption of proposed Rule 3.7.	No response required.
X-2016-52i	Law Professors (Zitrin) (08-24-16)	Yes	A	3.7	See X-2016-32i Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32i for the Commission's response to the Law Professors' comments.
X-2016-66r	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	3.7	We support and approve the broader prohibition of the lawyer/advocate as witness than in current Rule 5-210 and believe it should apply as well to trials before a judge, administrative law judge or arbitrator as well as a jury (the current rule).	No response required.
X-2016-68i	Law Professors (Zitrin) (09-21-16)	Yes	A	3.7	See X-2016-32i Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32i for the Commission's response to the Law Professors' comments.
X-2016-ao	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	3.7	OCTC supports this rule and its Comments.	No response required.

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Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
(Commission's Revised Proposed Rule Adopted on
March 31 – April 1, 2016 – Clean Version)

[Note: This rule is being recommended for expedited processing to the Board.]

The prosecutor in a criminal case shall:

- (a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;
- (b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;
- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known* to the prosecutor that the prosecutor knows* or reasonably should know* mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
 - (2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) There is no other feasible alternative to obtain the information;
- (f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This Rule is intended to achieve those results. All lawyers in government service remain bound by Rules 3.1 and 3.4.

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

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

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

[4] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See Rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[6] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See Rule 4.2.)

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

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
D = 3
M = 1
NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-12	Loyola Law School Innocence Project (7-22-16)	Y	A	3.8	<p>California is last jurisdiction to adopt such a rule. The rule will help reduce wrongful convictions. It is a fair rule that only requires prosecutors to disclose information known or reasonably should be known to them.</p> <p>The rule will prevent injustice and will actually make prosecutors jobs easier for them.</p>	No response required.
X-2016-16	Santiago, David (8-1-2016)	No	M	3.8	<p>Rule should be expanded to include non-criminal cases. DAs will often prolong cases in search of experts who agree with them.</p> <p>Duty to disclose should also include materials used to impeach DA witnesses or that may undermine the legality of the charge/civil petition being filed.</p>	The rule addresses criminal cases only because of the unique nature of prosecutor's role in such cases. There are other rules that address some of the concerns in civil cases, such as Rules 1.3, 3.2 and 3.4.
X-2016-32j	Law Professors (Zitrin) (07-25-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that	No response required.

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Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
 D = 3
 M = 1
 NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					"tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	
X-2016-43aa	COPRAC (Baldwin) (8-12-16)	Y	A	3.8	Supports the rule.	No response required.
X-2016-49	Domenic Lombardo (8-19-16)	N	A	3.8	Rule will do a better job of making sure prosecutors adhere to their Brady duties especially in light of Penal Code section 1424.5.	No response required.
X-2016-52j	Law Professors (Zitrin) (08-24-16)	Y	A	3.8	In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond <i>Brady</i> " by providing to the defense all <i>information</i> that "tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role or prosecutors.	No response required.

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
D = 3
M = 1
NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-54	Paul Cadman (8-30-16)	N	D	3.8	<p>The last thing we need are more rules. Saddling honest, hard-working lawyers with more rules is a waste of time.</p> <p>Recounts example of honest prosecutor he knows and claims that rule creates a de facto presumption of dishonesty among prosecutors.</p> <p>Dishonest lawyers on both sides of criminal cases will be exposed. Don't need new rules.</p>	The Commission was presented with substantial evidence that the issues addressed by proposed Rule 3.8 are necessary to assure a fair trial to defendants. In addition, this Rule will bring California into alignment with the majority of states, one of the charges of the Commission.
X-2016-68j	Law Professors (Zitrin) (9-21-16)	Y	A	3.8	See X-2016-32j Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-69	California Police Chiefs Association (Ken Courney) (9-19-16)	Y	D	(f)	<p>No legal authority provides that prosecutors have such authority over law enforcement.</p> <p>Rule would muzzle law enforcement with regard to duties not associated with providing evidentiary testimony in a criminal trial.</p>	The Commission disagrees with the commenter's assessment of the proposed Rule. Paragraph (f) does not change the relationship between prosecutors and law enforcement, but rather states that prosecutors must control public statements of <i>any person they do supervise</i> . If a prosecutor has no supervisory authority over law enforcement personnel, the prosecutor cannot control their public comments. Comment 5 only notes that the prosecutor's

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
D = 3
M = 1
NI = 2

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						duties for those he or she does not supervise is to “issue the appropriate cautions.”
X-2016-93k	Los Angeles County Public Defender (Brown) (9-23-16)	Y	A	3.8	Supports adoption of a rule that mirrors ABA Model Rule 3.8, as the Commission has done.	No response required.
X-2016-105	California State Sheriffs Association (Coyne) (9-27-16)	Y	D	(f)	<p>Paragraph (f) would inappropriately direct prosecutors to exert control over law enforcement officers employed by outside agencies.</p> <p>Paragraph (f) would potentially conflict with law enforcement duties to communicate with public.</p> <p>Paragraph (f) creates unreasonable expectation that prosecutor and control the statements made by law enforcement and would thus invite defense counsel’s allegations of misconduct, jeopardizing otherwise meritorious cases.</p>	See response to California Police Chiefs Association, X-2016-69, above.
X-2016-104ap	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	NI		<p>Refers Commission to OCTC’s prior comments to the Board of Trustees on this rule.</p> <p>OCTC’s foremost concerns regarding any revisions to the Rules of Professional Conduct are that the rules protect the</p>	

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
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					<p>public and are clearly written so as to be understood by the membership and enforceable by OCTC. This comment is offered with those goals in mind.</p> <p>The proposed rule essentially tracks ABA Model Rule 3.8 and is consistent with established California discipline law. Additional clarification within the proposed rule would enhance notice to the membership and enforcement by this office.</p> <p>1. 5-110(B) [3.8(b)] should specify when a prosecutor is obligated to make reasonable efforts to assure that an individual has been advised of his or her right to counsel. In many instances, this responsibility is addressed by police officers at the time of an arrest. A prosecutor may not have knowledge, let alone control, of these events. Police Departments in California are generally independent of prosecutors' offices.</p> <p>2. Regarding 5-110(D) [3.8(d)], the requirement that disclosures be made "timely" is addressed in discussion point 3 which states that a "disclosure's timeliness will</p>	<p>1. The Commission has not made the suggested change. As the commenter notes, the responsibility is typically addressed by police officers at the time of arrest.</p> <p>2. The Commission has not made the suggested change. The purpose of the comment is to clarify the application of the rule. That is precisely what</p>

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
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					<p>vary with the circumstances: and the rule “is not intended to impose timing requirements different from those established” by law. It may be advisable to clarify and state this concept in the text of the rule.</p> <p>3. 5-110(D) [3.8(d)] requires disclosure of all information that “tends to negate” guilt or mitigate an offense. Discussion point number 3 then states that the disclosure obligation is “not limited to evidence or information that is material as defined by Brady ... and its progeny.” The discussion item notwithstanding, language similar to that recommended in the proposed section has been interpreted differently in some jurisdictions. Consequently, it may be advisable to state the Commission’s intention within the text of the rule itself, namely, that a prosecutor’s duty to disclose is broader than that which is material as defined in Brady. Additionally, the section should address whether the evidence and information to be disclosed includes that which may impeach or discredit a witness for the prosecution.</p>	<p>Comment [3] does.</p> <p>3. The Commission has not made the suggested change. As noted in the response to comment #2, above, the purpose of the comment is to clarify the application of the rule. That is precisely what Comment [4] does. It is not necessary to provide the clarification in the black letter, as the black letter does not state the “materiality” standard in Brady and its progeny.</p>

Proposed Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
Synopsis of Public Comments

TOTAL = 14 **A = 8**
D = 3
M = 1
NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					4. Finally, section 5-110(D) states that a prosecutor must disclose all evidence or information “known to the prosecutor.” It is not clear if this language refers to knowledge of the existence of evidence and information, or knowledge that the evidence and information tends to negate the guilt of the accused. Moreover, the section does not address a prosecutor’s duty to search for exculpatory evidence or whether a failure to comply with the section based upon reckless conduct or gross negligence is a basis to find a violation for disciplinary purposes.	4. The Commission addressed this issue in a previous draft of the Rule.
Public Hearing	Ogul, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 58-59 of the public hearing transcript.)	N	A	3.8	Prosecutor’s concerns regarding discipline for not disclosing impeachment materials are unfounded because impeachment evidence doesn’t meet the definition of exculpatory.	No response required.

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

**Proposed Rule 5.2 Responsibilities of a Subordinate Lawyer
Synopsis of Public Comments**

						TOTAL = 2 A = 1 D = X M = 1 NI = X
No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	
X-2016-43af	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-12-16)	Y	A	5.2	COPRAC supports the adoption of proposed Rule 5.2.	No response required A = 12
X-2016-104ax	OCTC (Dresser) (09-24-16)	Yes	M	5.2	<p>1. OCTC says the rule should be part of the duty of competence under Rule 1.1 but also says that it does not oppose having this ruler to clarify the duty of a subordinate lawyer.</p> <p>2. The Comment is unnecessary and merely repeats the Rule.</p>	<p>1. Taking the former as a part of OCTC's general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and 5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former.</p> <p>2. The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
(Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Synopsis of Public Comments

							TOTAL = 1 A = 2 D = 1 M = 1 NI = 0	
No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment			
X-2016-43ag	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	A	5.3	COPRAC supports the adoption of proposed Rule 5.3.	No response required		
X-2016-66x	S.D. Bar Assoc. (Riley) (09-15-16)	Yes	A	5.3	S.D. supports the adoption of proposed Rule 5.3	No response required		
X-2016-76o	L. A. County Bar Assoc. (Schmid) (09-24-16)	Yes	M	(a), (c)(2)	Paragraphs (a) and (c)(2) use of the phrase “managerial authority in a law firm” without defining the term, resulting in a lack of notice on who might have liability under the Rule.	The Commission believes that the term “managerial authority” as applied to a law firm, which applies to a wide variety of organizations, including private law firms, government and corporate law offices, and legal services organizations, is not susceptible to a succinct definition appropriate in rules of professional conduct. Moreover, the Commission believes that the concept – those with authority to set the policies for compliance with the Rules, is not a foreign concept that requires a detailed exposition.		
X-2016-104ay	OCTC (Dresser) (09-27-16)	Yes	D	5.3, comment	1. OCTC says the rule should be part of the duty of competence under Rule 1.1 but also says that it does not oppose having this rule to clarify the duty of a subordinate lawyer.	1. Taking the former as a part of OCTC’s general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and		

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Synopsis of Public Comments

No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					2. The Comment is unnecessary and merely repeats the Rule	5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former. The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

Rule 6.5 [1-650] Limited Legal Services Programs
(Commission's Proposed Rule Adopted on October 23, 2015 – Clean Version)

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
 - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows* that the representation of the client involves a conflict of interest; and
 - (2) is subject to Rule 1.10 only if the lawyer knows* that another lawyer associated with the lawyer in a law firm* is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Comment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1), Rule 1.6, and Rule 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows* that the representation presents a conflict of interest for the lawyer. In addition,

paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows* that another lawyer in the lawyer's law firm* would be disqualified under Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows* that any lawyer in the lawyer's firm* would be disqualified under Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm* or preclude the lawyer's law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

**Proposed Rule 6.5 [1-650] Limited Legal Services Programs
Synopsis of Public Comments**

TOTAL = 5
A = 4
D = 0
M = 0
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ak	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	6.5	COPRAC supports the adoption of proposed Rule 3.1.	No response required.
X-2016-94d	Disability Rights California (Mudryk) (09-27-16)	Yes	A	6.5	Agree with this proposed rule.	No response required.
X-2016-104be	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	6.5	OCTC is concerned that Comments 1, 3, and 4 are more appropriate for treatises, law review articles, and ethics opinions.	The Commission has made no change. The referenced comments provide interpretative guidance on the rule's application. Moreover, the Supreme Court recently approved the rule and the Commission is aware of no problems that warrant deleting these comments because they might have been misleading.
X-2016-121i	California Commission on Access to Justice (CAAJ) (Hartston) (10-03-16)	Yes	A	6.5	CAAJ supports proposed Rule 6.5 because it balances the need to check for conflicts at clinics with an understanding of the limited nature of assistance provided at clinics.	No response required.
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26, 2016. See pages 41-42 of the public hearing	Yes	NI		This rule essentially exempts lawyers in walk-in or phone-in clinics from performing a conflicts check for quick, one time answers. We would suggest that this exception be expanded to include any legal consultation of	The commenter appears to misunderstand the scope of the rule. It is intended to apply only in a narrow set of circumstances – a one-time access to legal services under specific conditions – where a

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 6.5 [1-650] Limited Legal Services Programs
Synopsis of Public Comments**

TOTAL = 5	A = 4
	D = 0
	M = 0
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
	transcript.)				a brief nature where the relationship with the client is not ongoing.	lawyer is volunteering time to assist the delivery of legal services to those people unable to afford lawyers. By temporarily suspending the application of conflicts rules, the rule is designed to encourage such volunteer activity by lawyers who otherwise would avoid such service because of the risk that engaging in these activities will result in a conflict with the lawyer's or the lawyer's firm's clients.

Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

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

Comment

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

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

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

Paying Others to Recommend a Lawyer

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

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule[s 2.1 and]¹ 5.4(c). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by Rule 1.5.1.

¹ The Rules Revision Commission has not made a recommendation to adopt or reject a counterpart to ABA Model Rule 2.1. This bracketed reference is a placeholder pending a recommendation from the Commission. Consideration of Model Rule 2.1 is anticipated for the Commission's August 26, 2016 meeting.

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ar	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	Cmt. [1]	<p>1. Rule permits better understanding of lawyer's duties relating to communications intended for the general public.</p> <p>2. Comment 1 should be amended to reference B&P Code 6158.2.</p>	<p>1. No response required.</p> <p>2. The Commission is not recommending the addition of a cross-reference to B&P §6158.2 in Rule 7.2 Cmt.[1] for two reasons. <i>First</i>, a cross reference to the entire State Bar Act article on lawyer advertising is included in Rule 7.1 Cmt.[6] and this renders it unnecessary to add a subsequent specific reference §6158.2. <i>Second</i>, § 6158.2 by its terms is limited to electronic media advertising and might lead to confusion about the scope of Rule 7.2 or the guidance in Cmt.[1], which do not share that limitation.</p>
X-2016-66z	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(b)	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.</p>	<p>1. The focus of proposed Rule 7.1 is the prohibition of false or misleading communications, and Rule 7.2 specifically addresses advertising to the general public. The Commission disagrees, however, that the other rules, which govern the special circumstances related to</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					2. Paragraph (b) of the rule should be revised to permit firms to compensate attorneys for internal referrals.	solicitation (7.3), specialization (7.4), and firm or trade names (7.5) do not raise concerns of public protection and should be relegated to administrative record-keeping. 2. The Commission declines to make the suggested change. There is nothing in proposed Rule 7.2 that precludes a law firm from compensate firm lawyers for internal referrals. Further, proposed Rule 1.5.1 [2-200] does not apply to referring lawyers in a firm.
X-2016-67f	Orange County Bar Association (OCBA) (Friedland) (9-16-16)	Y	A	7.2	Supports adoption of proposed Rule 7.2.	No response required.
X-2016-96d	Bar Association of San Francisco (BASF), Legal Ethics Committee (Banola) (9-27-16)	Y	A	(a), (b)(4)	1. Supports incorporation of standards into rule and the reference to public media. 2. Supports allowing cross-referrals between professions.	1. No response required. 2. No response required.
X-2016-104bg	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		1. Concerned about making the advertising rule into several different parts. 2. Comment 1 is unnecessary and merely repeats the rule.	1. Please refer to response to commenter regarding proposed Rule 7.1. 2. The Commission disagrees with the commenter's assessment. In addition to providing guidance as to the

**Proposed Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						scope of the rule's application, the Comment's last sentence carries forward the content of current Standard (14).
X-2016-120p	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.2	Supports adoption of proposed Rule 7.2.	No response required.

Rule 7.3 [1-400] Solicitation of Clients
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

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

Comment

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

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].

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

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

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6	A = 3
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43as	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	7.3	Supports adoption of proposed Rule 7.3.	No response required.
X-2016-66aa	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(a), cmts.	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be address administratively.</p> <p>2. Eliminate “real-time electronic contact” from rule as such communications are not equivalent to in-person or telephone communications.</p>	<p>1. Please refer to Response to commenter regarding proposed Rule 7.1.</p> <p>2. The Commission declines to make the suggested change. The Commission continues to believe that “real time electronic contact” should be treated the same as in-person and live telephonic communications because each of these types of communication permit immediate interactive exchanges that do not permit the potential client time to reflect and are susceptible to overreaching by a trained advocate. The rule provides the proper balance between a lawyer’s Constitutional right to communicate the lawyer’s availability to provide legal services and the public’s right to be free from overreaching.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>3. In paragraph (a), enumerate two categories of individual who may solicited in-person: sophisticated users of legal services and persons who needs to be notified about class action pursuant to court order.</p> <p>4. Comments should discuss what "prior professional relationship" means.</p>	<p>W = 0</p> <p>3. The Commission declines to make the suggested change. As to class action notices, comment [2] of proposed Rule 7.3 adequately addresses the issue. As to the former suggestion, the Commission believes that the concept of a "sophisticated user of legal services" is too vague. Further, the Supreme Court's decision in <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, where the court distinguished accountants from lawyers who are view as "skilled in the persuasive arts," militates against such a provision.</p> <p>4. An explication of "prior professional relationship," which can take on many shapes and forms, is better left for a law review article or ethics opinion.</p>
X-2016-82d	Polish, James (9-27-16)	N	D	(c)	1. Rule imposes restrictions not imposed on any other profession.	1. Proposed Rule 7.3, although patterned on the corresponding Model Rule, carries forward the substance of current rule 1-400 regarding solicitation. The Supreme Court has repeatedly recognized the potential dangers of lawyers soliciting clients in real time. (See also response to SDCBA, X-2016-66aa, above.)

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>2. Mandating “advertisement” on outside effectively tells the recipient to throw it away.</p> <p>3. Rule doesn’t just cover mass mailings but also narrow, targeted solicitations.</p> <p>4. Consumers are sophisticated enough to handle in person or telephone solicitations.</p>	<p>2. The Commission continues to believe that the requirement to include “advertisement” on an envelope or in an email is necessary to protect the public from solicitations that are designed to mimic official court documents.</p> <p>3. The rule is intended to cover targeted solicitations. The rule does not prohibit them but regulates their use to prevent misleading communications. See Response #2, above.</p> <p>4. The Commission is not aware of any study that has shown “consumers are sophisticated enough to handle in person or telephone communications” from a lawyer skilled in the art of persuasion. Case law, e.g., <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, suggests otherwise. (See also response to SDCBA, X-2016-66aa, above.)</p>
X-2016-96e	Bar Association of San Francisco (BASF), Legal Ethics Committee (Banola) (9-27-16)	Y	A	(d)	<p>1. Supports addition of term “real-time electronic contact.”</p> <p>2. Supports allowing solicitation of prepaid and group legal services participants.</p>	<p>1. No response required.</p> <p>2. No response required.</p>

**Proposed Rule 7.3 [1-400] Solicitation of Client
Synopsis of Public Comments**

TOTAL = 6 **A = 3**
D = 1
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-104bh	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	7.1 to 7.5	Concerned about making the advertising rule into several different parts.	Please refer to response to commenter re Rule 7.1.
X-2016-120q	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.3	Supports adoption of proposed Rule 7.3.	No response required.

**Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

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

**Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43at	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	(b)	Paragraph (b) should more closely parallel the model rule by allowing an attorney to refer to herself as a certified specialist as long as the bona fides of the accrediting authority are disclosed.	1. Although the commenter refers to para. (b) as the provision pertaining to certified specialists references, the Commission believes that proposed Rule 7.4 requires that para. (b) be read in conjunction with para. (a). When read together and compared Model Rule 7.4, it should become apparent that proposed Rule 7.4 is broader than the Model Rule in allowing truthful and non-deceptive information to be communicated to prospective clients. This, in turn, facilitates informed decisions by consumers in selecting a lawyer. Proposed Rule 7.4 is broader because it expressly permits truthful representations that a lawyer “specializes in” a particular field of law. It is not clear that such a communication would be permitted under Model Rule 7.4 because the Model Rule only allows a lawyer to state whether the lawyer “does or does not practice in particular fields.” In California, there may be fields of practice for

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>which certification as a specialist is not presently available (e.g., unmanned aircraft or vehicle (drone) laws). For a client who is seeking an attorney who possesses that expertise, a lawyer's ability to communicate that he or she has a practice that is "specializing in" or "concentrated in" that field is significant and promotes access to competent counsel.</p> <p>2. To the extent the commenter believes that paragraph (a) is too restrictive by requiring that a lawyer may seek certification only by a national entity accredited by the State Bar, the rule simply states the current regulatory framework for specialization in California.</p>
X-2016-66ab	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(a)(1)	<p>1. Only false and misleading advertising should result in discipline. The rest of the concepts in the advertising rules should be addressed administratively.</p> <p>2. An advertisement regarding being certified as a specialist is not false or misleading simply because the State Bar is not the</p>	<p>1. Please see response to commenter concerning proposed Rule 7.1.</p> <p>2. Please see response #2 to COPRAC, X-2016-43at, above.</p>

Proposed Rule 7.4 [1-400] Firm Names and Trade Names
Synopsis of Public Comments

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					certifying agency. Rule should parallel the Model Rules.	
X-2016-104bi	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	NI		Question whether rule is necessary in light of rules 7.1, 7.2, and 7.3.	The Commission continues to believe the proposed rule is necessary notwithstanding Rules 7.1 to 7.3 given the importance of a lawyer's claim of specialization to the lawyer's likelihood of being retained by a client and the State Bar's special rules regarding the accreditation of certifying entities.
X-2016-120r	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.4	Supports adoption of proposed Rule 7.4.	No response required.

Rule 7.5 [1-400] Firm* Names and Trade Names
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

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

Comment

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

**Proposed Rule 7.5 [1-400] Firm Names and Trade Names
Synopsis of Public Comments**

TOTAL = 4 **A = 3**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43au	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	7.5	Supports adoption of proposed Rule 7.5.	No response required.
X-2016-66ac	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A		Supports adoption of proposed Rule 7.5.	No response required.
X-2016-104bj	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M		Concerned about making the advertising rule into several different parts.	See response to Commenter concerning proposed Rule 7.1.
X-2016-120s	LGBT Bar Association of Los Angeles (LGBT Bar LA) (King) (9-27-16)	Y	A	7.5	Supports adoption of proposed Rule 7.5.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

