

**Rule 1.8.2 Use of Current Client's Information**

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6 to the disadvantage of the client unless the client gives informed consent,\* except as permitted by these Rules or the State Bar Act.

**Comment**

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6 to the disadvantage of a current client.

**Rule 1.8.2 Use of Current Client's Information**

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) [and Rule 1.6](#) to the disadvantage of the client unless the client gives informed consent,\* except as permitted by these Rules or the State Bar Act.

**Comment**

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) [and Rule 1.6](#) to the disadvantage of a current client.

**Proposed Rule 1.8.2 Use of Current Client's Information**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43n	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-02-16)	Yes	A	1.8.2	COPRAC supports the adoption of proposed Rule 1.8.2.	No response required.
X-2016-104o	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.8.2	OCTC supports the rule and especially the use of informed written consent.  However, The Comment, which is a philosophical discussion of the reasons for the rule, is obvious and unnecessary.	No response required.  The Commission did not delete the comment because it explains that although this would be a "new" rule, the historical basis of this duty resides in California statute (§6068(e)) and the common law duty of loyalty.
X-2016-115b	Lamport, Stanley (10-03-16)	No	M	1.8.2	Rule 1.9(c) refers to both Business and Professions Code § 6068(e)(1) and Rule 1.6. Since Proposed Rule 1.8.2 is the current client version of the rule, it should use the same references.  The Comment should either be deleted or revised because it is not necessary. It does not aid in the application of the rule. If the Comment is retained, it should be revised to restate the duty in Section 6068(e)(1).	The Commission agreed and made the requested addition of a reference to Rule 1.6  The Commission did not delete the comment because it explains that although this would be a "new" rule, the historical basis of this duty resides in California statute (§6068(e)) and the common law duty of loyalty.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 1.8.2 Use of Current Client's Information  
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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-120d	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.2	LGBT supports this rule.	No response required.

**Rule 3.6 [5-120] Trial Publicity**  
**(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows\* or reasonably should know\* will (i) be disseminated by means of public communication and (ii) have a substantial\* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), lawyer may state:
  - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons\* involved;
  - (2) information contained in a public record;
  - (3) that an investigation of a matter is in progress;
  - (4) the scheduling or result of any step in litigation;
  - (5) a request for assistance in obtaining evidence and information necessary thereto;
  - (6) a warning of danger concerning the behavior of a person\* involved, when there is reason to believe that there exists the likelihood of substantial\* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably\* necessary to protect the individual or the public; and
  - (7) in a criminal case, in addition to subparagraphs (1) through (6):
    - (i) the identity, general area of residence, and occupation of the accused;
    - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
    - (iii) the fact, time, and place of arrest; and
    - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable\* lawyer would believe is required to protect a client from the substantial\* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be

limited to such information as is necessary to mitigate the recent adverse publicity.

- (d) No lawyer associated in a law firm\* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

### **Comment**

[1] Whether an extrajudicial statement violates this Rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows\* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

**Proposed Rule 3.6 [5-120] Trial Publicity  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response A = 12      NI = 0
x-2016-43y	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-22-16)	Yes	A	3.6	COPRAC supports the adoption of proposed Rule 3.6.	No response required.
X-2016-93j	Los Angeles County Public Defender (Brown) (09-27-16)	Yes	A	3.6	The Los Angeles County Public Defender supports this proposed rule.	No response required.
X-2016-104an	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	<div>3.6</div> <div>Cmt.[1]</div> <div>Cmt.[1]</div>	<div>1. OCTC supports this rule.</div> <div>2. OCTC is concerned with the use of the term “knows” in regards to section (ii) of Comment 1 for the reasons expressed in OCTC’s comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter.</div> <div>3. OCTC is also concerned that section (ii) of Comment 1 may allow misleading statements. No distinction should be made among concealment, half-truth, and false statement of fact.</div>	<div>1. No response required.</div> <div>2. The Commission disagrees that “knows” is an inappropriate standard for this rule. Under proposed rule 1.0.1(f), although “knows” means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.</div> <div>3. Comment 1 enumerates factors to consider in applying the rule and does not limit the scope of the rule to false statements. In addition, the Comment incorporates by reference Bus. &amp; Prof. Code § 6068(d) that imposes a duty to use means consistent with truth and not seek to mislead a</div>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 3.6 [5-120] Trial Publicity  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	<b>RRC Response</b> A = 12 <del>NI = 0</del>
						tribunal by an artifice.



**Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges  
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons\* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

**Comment**

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes\* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing

an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

**Proposed Rule 3.10 [5-100] Threatening Criminal, Administrative,  
or Disciplinary Charges  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ab	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	Cmt. 1, 2	Comments 1 and 2 provide much needed guidance to the profession.	No response required.
X-2016-104ar	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	Cmt. 1, 2	Comments 1 and 2 are unnecessary as they merely repeat the rule.	The Commission disagrees with the commenter's assessment. Both comments clarify the how the rule is applied, which is an appropriate function of a comment. Neither repeats the rule.
X-2016-122	Beverly Hills Bar Association (Fisher) (9-28-16)	Y	D	3.10	California should join the majority of jurisdictions and drop this rule.	The Commission disagrees. Proposed rule 3.9, which carries forward current rule 5-100, prohibits conduct that a lawyer might otherwise believe is permitted because it does not rise to level of criminal extortion. However, a lawyer's threat to report a lawyer to the State Bar poses a danger to the effective operation of the legal system by having an adverse effect on the lawyer-client relationship between the threatened lawyer and the lawyer's client.  The Commission also notes that the Model Rule's removal

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

**Proposed Rule 3.10 [5-100] Threatening Criminal, Administrative,  
or Disciplinary Charges  
Synopsis of Public Comments**

<b>TOTAL = 3</b>	<b>A = 2</b>
	<b>D = 1</b>
	<b>M = 0</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						of ABA DR 7-105 has not been followed by a substantial majority of jurisdictions. Eleven jurisdictions have carried forward as part of their rules ABA DR 7-105, which prohibits threats of criminal charges. Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges.

**Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law  
(Commission's Proposed Rule Adopted on May 30, 2015 – Clean Version)**

- (a) A lawyer admitted to practice law in California shall not:
  - (1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.
  - (2) knowingly\* assist a person\* or entity in the unauthorized practice of law.
- (b) A lawyer who is not admitted to practice law in California shall not:
  - (1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

**Comment**

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).



**Proposed Rule 5.5 [1-300] Unauthorized Practice of Law;  
Multijurisdictional Practice of Law  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 3</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Responsive Law (Gordon, Tom) (Provided oral public hearing testimony on July 26v, 2016. See page 46-47 of the public hearing transcript.)	Yes	M		I believe the Multijurisdictional Practice Rule, under the new Rule 5.5 could use some clarification. A lawyer who's not a member of the California Bar may not have a "systemic or continuous presence in California". It's unclear from the rule and the comments whether, for example, a Denver-based lawyer with an online presence answering questions about Colorado law for a California resident would have a systemic or continuous presence in California. These types of services are becoming more common as lawyers expand their online practices, and it would be helpful if this rule could be made more clear so hopefully, services of this type are not in violation of the Rules of Professional Conduct. This will clear the way for more consumers to be able to receive legal services online and expand the options available therein resolving their legal matters.	No change is recommended. Paragraph (b)(1) follows the language in California Rules of Court, Rules 9.47(d)(2) and 9.48((d)(2), restricting the right of a non-admitted attorney to practice temporarily in California. The phrase "systematic or continuous" also tracks the language in ABA Model Rule 5.5(b)(1). Application of the rule in providing online legal services in California by a non-admitted lawyer would require an analysis of the particular facts and circumstances and would be better addressed in an ethics opinion or other form of guidance.
X-2016-43a1	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Yes	A		COPRAC supports the adoption of proposed Rule 5.5.	No response required.

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

**Proposed Rule 5.5 [1-300] Unauthorized Practice of Law;  
Multijurisdictional Practice of Law  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 3</b>
	<b>NI = 0</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-76r	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (9-24-16)	Yes	M	Paragraph (b)(1)	Paragraph (b)(1) of Proposed Rule 5.5 [Unauthorized Practice of Law; Multijurisdictional Practice of Law (current Rule 1-300)] includes the term “resident office,” which is undefined and uncertain. The word “resident” is unnecessary and should be deleted. In the event it is decided that the word “resident” should be retained, we recommend that the term “resident office” be defined or clarified.	The Commission did not make the suggested change. The language of paragraph (b)(1) is taken nearly verbatim from the Rules of Court, which regulate multijurisdictional practice in California. See Rules 9.47(c)(2), 9.48(c)(2). The Commission believes that the following clause, “or other systematic or continuous presence in California for the practice of law” provides sufficient guidance regarding the meaning of “resident office.”
X-2016-104bb	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Yes	M		<p>1. OCTC is concerned that subparagraph (a)(2) of this proposed rule requires “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. Requiring “knowingly” permits an attorney not to research whether the person they are aiding is an attorney in California, or currently permitted to practice law in California.</p> <p>2. OCTC supports the Comment.</p>	<p>1. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge the lawyer being assisted was not permitted to practice law in California. With this definition, the Commission believes that the “knowingly” standard is appropriately used in this Rule.</p> <p>2. No response required.</p>