

Rule 1.0.1 [1-100(B)] Terminology

(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)

- (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 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 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.

**Proposed Rule 1.0.1 [1-100(B)] Terminology
Synopsis of Public Comments**

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| TOTAL = 10 | A = 1 |
| | D = 2 |
| | M = 5 |
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| No. | Commenter/Signatory | Comment on Behalf of Group? | A/D/M/NI ¹ | Rule Section or Cmt. | Comment | RRC Response |
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| 2016-32a | Law Professors (Zitrin) (07-25-16) | Y | M | (m) | The expanded definition of “tribunal,” although not quite as broad as the ABA definition that we suggested in the first ethics professors’ letter, is a marked improvement over the first rules commission’s draft. | No response required. |
| X-2016-43c | Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16) | Y | A | | COPRAC supports the adoption of proposed rule 1.0.1. | No response required. |
| 2016-52a | Law Professors (Zitrin) (08-24-16) | Y | M | (m) | The expanded definition of “tribunal,” although not quite as broad as the ABA definition that we suggested in the first ethics professors’ letter, is a marked improvement over the first rules commission’s draft. | No response required. |
| 7/26/16 Public Hearing Testimony | Miller, Jerry (Provided oral public hearing testimony on July 26, 2016. See pages 56-57 of the public hearing transcript.) | N | | | In reviewing the proposed new and amended rules, I notice that, unlike the existing rules, you have chosen not to give a definition to the word “member,” which is presently found in Rule 1-100(B)(2). 1-100(B)(3) contains a definition for the word “lawyer,” but no definition for that word is included in the proposed rules either. I am seeing omissions of what I consider to be important definitions. I don’t know the reason why they were dropped | The definition of “member” is no longer necessary because the proposed Rules have largely substituted “lawyer” for the term “member throughout, with the exception of rule 5.3.1 – which defines “member” for purposes of that rule. The former definition of “lawyer” was necessary to distinguish lawyer from member. This is no longer necessary, and the definition of lawyer is self-evident. |

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

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| | | | | | from the proposed rules. | |
| 2016-68a | Law Professors (Zitrin) (09-21-16) | Y | M | (m) | The expanded definition of “tribunal,” although not quite as broad as the ABA definition that we suggested in the first ethics professors’ letter, is a marked improvement over the first rules commission’s draft. | No response required. |
| X-2016-83d | Garrett, Christopher (09-26-16) | N | D | | 1. The proposed amendments to Rules 1.0.1 and 3.3 through 3.5 transform routine proceedings, hearings, and other meetings before municipal and other local governments into trial-like environments and therefore unnecessarily place licensed attorneys at risk for discipline even when exercising their free speech and petition rights before a public entity. | 1. The Commission disagrees that the rule unnecessarily complicates routine proceedings. The Commission found no reasoned basis for distinguishing an administrative body acting in an adjudicative capacity from an arbitrator or an ALJ. Like arbitrators and ALJs, administrative bodies acting in an adjudicative capacity apply specific rules, i.e., statutes, ordinances, and regulations, to specific facts. Adjudicative proceedings before administrative judges receive far greater protections, including greater judicial review by courts, than arbitration proceedings. Lawyers should be held to the same ethical standards when they appear before an administrative body acting in an adjudicative capacity |

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| | | | | | <p>2. Proposed rule 1.0.1 adds a number of new definitions to what is currently Rule 1-100(B). In particular, the new subdivision (m) defines “Tribunal” as either a “court, an arbitrator, an administrative law judge,” but also includes “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved.” The latter portion of the definition of tribunal arguably applies to hearings, petitions, and meetings with local governments, such as cities and counties. In combination with proposed Rules 3.3 through 3.5, which set forth trial-like rules for conduct before truly trial-type proceedings, the proposed Rules 1.0.1, 3.3, 3.4, and 3.5 are exceedingly overbroad and threaten the practicing lawyer’s ability to effectively advocate for his or her clients. Public agencies in California often act in both a quasi-legislative and a quasi-</p> | <p>because that body, like an arbitrator or ALJ, will presume that the lawyer is providing legal opinions and therefore adhering to his or her ethical obligations as a lawyer.</p> <p>2. The Commission did not remove an “administrative body” from the definition of “tribunal” in part because the definition contemplates action in an adjudicative capacity. California courts have determined what substantive and procedural limitations must be placed on adjudicatory decisions made by an administrative body. (See, for example, <i>Strumsky v. San Diego Employees Retirement Assn.</i> (1974) 11 Cal.3d 28, at p. 34, footnote 2.) In general, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts. To the extent there are some ambiguities, those ambiguities can be resolved in the ordinary course of litigation. The ABA definition of “tribunal” uses the</p> |

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| | | | | | <p>adjudicative capacity, and thus, the proposed rules seem likely to indirectly deprive both individuals and lawyer representatives of free speech and petition rights protected by the California Constitution.</p> <p>3. The proposed rules seem likely to facilitate strategic claims of ethical violations against lawyer representatives, thereby effectively depriving a party from legal representation in public hearings before cities and counties and favoring speech by non-lawyer representatives or other persons over the speech of a practicing lawyer. There is no rational basis for this distinction.</p> | <p>same distinction – “acting in an adjudicative capacity” – and applies that distinction more broadly to a “legislative body.” The Commission does not believe that extension of the definition is warranted.</p> <p>3. The Commission disagrees with this point in part because the rule imposes the same ethical standards as when a lawyer appears before an arbitrator or ALJ. (See above response to point #1.)</p> |
| X-2016-97a | Freedman, Daniel (09-27-16) | N | D | | Proposed Rule 1.0.1 includes within the definition of “tribunal” administrative bodies acting in an adjudicative capacity. As drafted, this rule is unclear as to its scope and creates significant uncertainty about professional standards required in connection with various administrative hearings, particularly those held on the local level. For instance, not considered in this definition is the reality that in many instances local bodies can act concurrently | See above response to point #2 from commenter Christopher Garrett, X-2016-83d. |

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| | | | | | <p>as an adjudicatory and administrative body within the same hearing, which makes it nearly impossible for an attorney to know what professional standards apply and when. In fact, in some instances, the issue of what capacity a local body acts under (i.e., administrative or adjudicative) is actually a triable issue. Accordingly, we believe this modified definition of tribunal is too vague as drafted, overly broad, and should not be adopted as drafted.</p> | |
| <p>X-2016-104b</p> | <p>Office of Chief Trial Counsel (Dresser) (09-27-16)</p> | <p>Y</p> | <p>M</p> | | <p>1. OCTC supports most of this proposed rule, but is concerned with the definition of “knowingly,” “known,” or “knows” in subsection (f) as meaning actual knowledge of the fact in question. As discussed in the General Section of this letter, the use of actual knowledge in several of the proposed rules is contrary to the State Bar Act and well-established disciplinary law in California; will lower the minimum professional standards required of attorneys in this State; mislead attorneys as to their professional obligations; and create confusion in disciplinary law. Moreover, this definition is</p> | <p>1. The Commission has not made any changes to the proposed definition of “knows.”</p> <p><i>First</i>, to the extent that the global definition might be too narrow for a particular rule, the mental state requirement for a violation can be expanded for that rule. For example, proposed Rule 8.2 does just that by prohibiting a lawyer from making “a statement of fact that the lawyer knows to be false or <i>with reckless disregard as to its truth or falsity</i>” The Commission therefore continues to believe there is no need to change the global definition of “knows.” Indeed, the Commission purposely</p> |

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| | | | | | <p>too narrow and will allow attorneys to use willful blindness or a lack of diligence in searching for facts or law when they have a duty to do so. Allowing knowledge to be proven by circumstantial evidence does not solve this problem. First, in State Bar proceedings, intent and facts are always provable by circumstantial evidence. (<i>Geffen v. State Bar</i> (1975) 14 Cal.3d 843, 853; <i>In the Matter of Petilla</i> (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.) Second, there is a difference between circumstantial evidence of intent and willful blindness or gross negligence. OCTC recommends that this definition include the following: “knowing” or “knowingly” means the attorney has actual knowledge of a fact or <i>deliberately closed his or her eyes to facts he or she had a duty to see or recklessly stated as facts things of which he or she was ignorant.</i></p> <p>2. OCTC supports the Comments to this rule.</p> | <p>limited the mental state requirement of many of the rules cited by OCTC to actual knowledge for legal and/or policy reasons.</p> <p><i>Second</i>, OCTC’s concerns about willful blindness appears overblown. In fact, the Review Department of the State Bar has recently held that “willful blindness . . . is tantamount to having actual knowledge . . .” (<i>In Matter of Carver</i> (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, *4.) In reaching this conclusion, the Review Department cited a 1901 California Supreme Court decision which recognized that “willing ignorance” may be “regarded as equivalent to actual knowledge.” (<i>Levy v. Levine</i> (1901) 134 Cal. 664, 671-672.) The Commission believes that the definition covers willful blindness by providing “knowledge can be inferred from circumstances.”</p> <p>2. No response required.</p> |

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| X-2016-115f | Lampert, Stanley (09-29-16) | N | M | | <p>The Proposed Rule definition of “Tribunal” should be revised to clarify that “the term ‘Tribunal’ relates to administrative agencies that exercise comparable judicial powers to courts and does not include public agencies acting in a legislative or quasi-adjudicatory capacity, such as when making a decision concerning land use.”</p> <p>Judicial/Adjudicatory proceedings and quasi-judicial/quasi-adjudicatory proceedings are not the same.</p> <p>The “Tribunal” definition is unclear.</p> <p>Proposed Rule 3.5 is not designed for quasi-adjudicatory proceedings.</p> <p>Extending the tribunal definition to quasi-adjudicatory proceedings exposes lawyers to unique risks that can adversely affect the representation of client.</p> <p>Quasi-adjudicatory proceedings are not subject to the same limitations on client conduct that exist in judicial proceedings.</p> | <p>See above response to point #2 from commenter Christopher Garrett, X-2016-83d.</p> <p>In addition, the California Supreme Court treats adjudicative decisions by local agencies no differently than adjudicative decisions by state agencies that cannot exercise judicial powers under the California Constitution. (See <i>Strumsky</i>, 11 Cal.3d at p. 44 [“the rule of review which was affirmed by us in <i>Bixby v. Pierno, supra</i>, for application to adjudicatory decisions by legislatively created agencies of statewide jurisdiction is equally applicable to adjudicatory decisions by ‘local agencies’ as well”].) Moreover, the Court has expressly recognized that both state and local agencies exercise “judicial-like” powers even though they may not exercise “true” judicial powers as defined by the California Constitution. (See <i>McHugh v. Santa Monica Rent Control Bd.</i> (1989) 49 Cal.3d 348, 372.)² The inability of local</p> |

² See also

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| | | | | | <p>I request “tribunal” be revised as follows (blue=additions; red=strike out):</p> <p>“Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body <u>exercising judicial powers conferred on the body by the California Constitution or by the Legislature</u> 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. <u>The term “Tribunal” does not include a public agency acting in a legislative or quasi-adjudicatory or quasi-judicial capacity, such as when making a decision concerning land use.</u></p> | <p>agencies to exercise judicial power under the California Constitution provides no basis for treating a local administrative body that is acting in an adjudicative capacity any differently than an arbitrator or ALJ, much less a state agency that acts in an adjudicative capacity without exercising judicial powers under the California Constitution.</p> <p>The Commission also notes that the commenter’s proposal is not consistent with his argument. The proposal would continue to include “an administrative body exercising <i>judicial powers</i> conferred on the body . . . by the Legislature” But the Legislature <u>cannot</u> confer “judicial powers” as defined by the California Constitution. (See <i>Strumsky, supra</i>, 11 Cal.3d at p. 41.) By including state administrative bodies that exercise “judicial-like” powers in the definition of tribunal, the commenter undercuts his own argument for excluding local agencies that exercise the same “judicial-like” powers.</p> |

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| | | | | | | |
| X-2016-126a | Ivester, David (09-27-16) | N | D | | Proposed Rule 1.0.1 would define "Tribunal" to include not only a "court, an arbitrator, [and] an administrative law judge," but also "an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved." This definition could be read to encompass many individuals in a position to make any of various decisions for federal, state, or local agencies: a District Engineer of the U.S. Army Corps of Engineers, a city planning administrator, the executive officer of a regional water quality control board, the general manager of a water agency or special district, the Executive Director of the Coastal Commission, the Environmental Program Manager of the Department of Fish and Wildlife (who may sign streambed alteration agreements), a city building inspector, and the list goes on. This broad definition would in effect extend the application of other rules such as Proposed Rules 3.3, 3.4 and 3.5, which are designed for judicial | See above response to point #2 from commenter Christopher Garrett, X-2016-83d. |

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| | | | | | proceedings, to all manner of communications and interactions with employees of administrative agencies. While such rules make sense for proceedings of courts, arbitrators, and administrative law judges since all three exclusively exercise the same type of judicial function, they are not designed for and do not make sense for the widely varied proceedings of federal, state, and local agencies that do not exclusively perform judicial functions. | |
| X-2016-129a | California Building Industry Association (Cammarota) (09-27-16) | Y | M | | <p>We draw your attention to the definition of “Tribunal” contained in Proposed Rule 1.01. The definition should make clear that “Tribunal” does not include public agencies acting in a legislative or quasi-adjudicatory capacity. When public agencies act on land use proposals they typically act in a quasi-adjudicator (or quasi-judicial) capacity.</p> <p>It may be appropriate to apply the Proposed Rules 3.3, 3.4, and 3.5 – which apply the definition of “Tribunal” – to courts, administrative law judges, arbitrators or even to a public agency that exclusively performs judicial functions. However, there are significant differences</p> | See above response to commenter Stanley Lampport X-2016-115f. |

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| | | | | | <p>between judicial proceedings and quasi-judicial proceedings that militate extending those restrictions.</p> <p>First, the California Constitution authorizes some agencies to exercise judicial powers (see, e.g., Art. 12, section 6), however it does not authorize local agencies – those involved in land use decision making such as cities, counties, cities and counties, regional agencies, public agencies and other political subdivisions – to exercise judicial powers. Local agencies instead exercise <i>quasi-judicial</i> powers in making land use decisions.</p> <p>Second, quasi-judicial proceedings are reviewed under Code of Civil Procedure section 1094.5. The standard of review is whether the findings support the decision and whether there is any substantial evidence in the record to support the findings. This is not a preponderance of the evidence standard. Rather, the decision will be upheld if any credible evidence supports the findings even if the preponderance of the evidence is to the contrary. See e.g., 14 California Code of</p> | |

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| | | | | | <p>Regulations, section 15384.</p> <p>Third, local elected officials – those who make land use approvals – are not expected to conduct themselves in the way judges do. “A councilman has not only a right but an obligation to discuss issues of vital concern to his constituents.... He may not be instructed on many of the technical matters to which he is called to pass judgment. He...talks with businessmen and voters about all sorts of questions that may come before the council.” <i>City of Fairfield v. Superior Court</i> (1975) 14 Cal.3d 768, 780-781.) Accordingly, it is for good reason that there is not the same strict prohibitions on ex parte communications for local decision makers as there is with judges.</p> <p>If Proposed Rule 3.5(b) is construed to prohibit ex parte communications in “quasi-judicial proceedings,” clients and other non-lawyers could engage in legal ex parte communications but lawyers who are hired specifically to communicate with government on their behalf, could not. This will have a chilling effect on the ability of builders and</p> | |

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| | | | | | <p>developers to retain counsel to represent them in the land use context.</p> <p>Disparate treatment against attorneys also runs counter to California’s Constitution. We believe that the public has a right to communicate with government in the context of land use proceedings. “The people have the right to instruct their representatives [and] petition government for redress of grievances.” (California Constitution Art. I, Section 3). This necessarily includes their legal representatives.</p> <p>In the judicial context, both lawyers and clients are subject to the same rules. That is not the case for all participants in the local land use decision making context. This chills the use of attorneys in communicating with local agencies to the extent that the term “tribunal” is also used in Proposed Rules 3.3 and 3.4.</p> <p>To rectify this disparate treatment, we recommend that the definition of “tribunal” in Proposed Rule 1.01 be modified as shown in the included redline.</p> | |

