

## ATTACHMENT 2

### Executive Summaries, Clean and Redline Rule Drafts, Public Comment/Testimony Synopsis Tables

#### **Attachment 2 includes the following:**

- Executive Summaries
- Proposed Rules Recommended for Adoption
- Redline to Public Comment Draft of the Proposed Rule (if applicable)
- Redline to the Current California Rule (if applicable)
- Redline to the ABA Model Rule (if applicable)
- Public Comment Synopsis Table with Commission's response

#### **The following rules are being recommended for adoption and are included in Attachment 2:**

- Rule 1.0.1 [1-100(B)] Terminology
- Rule 1.1 [3-110] Competence
- Rule 1.2 [3-210] Scope of Representation and Allocation of Authority
- Rule 1.4 [3-500] Communication with Clients
- Rule 1.4.1 [3-510] Communication of Settlement Offers
- Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
- Rule 1.5.1 [2-200] Fee Divisions Among Lawyers
- Rule 1.6 [3-100] Confidential Information of a Client
- Rule 1.8.2 Use of Current Client's Information
- Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
- Rule 1.8.8 [3-400] Limiting Liability to Client
- Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
- Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
- Rule 1.10 Imputation of Conflicts of Interest: General Rule
- Rule 2.4 Lawyer as Third-Party Neutral
- Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
- Rule 3.2 Delay of Litigation
- Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel
- Rule 3.6 [5-120] Trial Publicity
- Rule 3.7 [5-210] Lawyer as Witness
- Rule 3.8 [5-110] Special Responsibilities of a Prosecutor
- Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges
- Rule 4.1 Truthfulness in Statements to Others
- Rule 5.2 Responsibilities of a Subordinate Lawyer
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
- Rule 5.3.1 [1-311] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer
- Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements with Nonlawyers
- Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law
- Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice
- Rule 6.3 Membership in Legal Services Organization
- Rule 6.5 [1-650] Limited Legal Services Programs
- Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising
- Rule 7.3 [1-400] Solicitation of Clients
- Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice and Specialization
- Rule 7.5 [1-400] Firm\* Names and Trade Names
- Rule 8.1.1 [1-110] Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
- Rule 8.2 [1-700] Judicial Officials
- Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.0.1**  
**(Current Rule 1-100(B))**  
**Terminology**

**EXECUTIVE SUMMARY**

In connection with consideration of current rule 1-100 (Rules of Professional Conduct, In General), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated current rule 1-100(B) (Definitions) in accordance with the Commission Charter, with a focus on the function of the entire set of rules as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, ABA Model Rule 1.0 (Terminology), as well as the Terminology section of the California Code of Judicial Ethics. The result of this evaluation is proposed rule 1.0.1 (Terminology) which expands upon the five definitions currently contained in rule 1-100(B). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The proposed rule provides a global terminology section with definitions of terms that are used throughout the proposed Rules of Professional Conduct. Similar to the ABA Model Rules and the California Code of Judicial Ethics, proposed rule 1.0.1 would provide a central location for significant terms whose meaning is critical to understanding the duties contained in the proposed Rules of Professional Conduct. Adoption of proposed rule 1.0.1 would obviate a lawyer’s need to consult case law or ethics opinions to comprehend the legal standard with which he or she must comply, thereby enhancing both enforcement and compliance with the rules.

The content of the definitions is derived from ABA Model Rule 1.0 where the Model Rule and California meanings of a term are aligned. The Commission believes adopting the Model Rule definition will remove unnecessary differences between the California rule and the corresponding rule in other jurisdictions, an important consideration in regulating lawyers from other jurisdictions who practice in California under one of the multijurisdictional practice rules of court.<sup>1</sup> However, where the Model Rule definition and California law or settled public policy are not aligned, the Commission revised those definitions to reflect California law or policy to ensure continuation of important public policies, including client protection, that are reflected in the California approach.<sup>2</sup>

Paragraph (a) of proposed rule 1.0.1 defines “belief” of “believes” and is nearly identical to ABA Model Rule 1.0(a). The only changes are non-substantive and they include substituting “means”

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<sup>1</sup> See, e.g., California Rules of Court 9.45 – 9.48.

<sup>2</sup> An example of this is California’s approach to “informed written consent” which is a heightened standard requiring that both the client’s consent, as well as the attorney’s disclosure to the client of the relevant circumstances and the material risks, including reasonably foreseeable adverse consequences, be in writing. The Model Rules approach is for the client to confirm in writing that the lawyer orally communicated adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.

for “denotes,”<sup>3</sup> and the present tense “supposes” for “supposed” to correspond to the tense of “believes.”

Paragraph (c) defines “firm” or “law firm” and is derived from ABA Model Rule 1.0(c). The proposed rule includes a reference to a government organization. This addition emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers.<sup>4</sup> The proposed rule substitutes “engaged in” for “authorized to,” as stated in the Model Rule, to assure that the requirements of the rules apply to everyone acting as a law firm even if not authorized to do so.<sup>5</sup>

Paragraph (d) defines “fraud” or “fraudulent” and is nearly identical to ABA Model Rule 1.0(d). The Commission believes it is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction.<sup>6</sup> In addition, Comment [3], discussed below, clarifies that neither damages nor reliance need to be proven because that would frustrate the rule’s intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder.

Paragraph (e) provides a definition for “informed consent” and differs from ABA Model Rule 1.0(e) by, among other things, adding the term “relevant circumstances” and the phrase “actual and reasonably foreseeable” to the required disclosure points for obtaining informed consent. These terms are consistent with California policy and case law. (See, e.g., current rule 3-310(A)(1) and *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 410, 429-31.)

Paragraph (e-1) defines “informed written consent” which has no counterpart in the Model Rule. The definition is based on current rule 3-310(A)(2). Unlike the Model Rules, or the jurisdictions that have largely adopted the Model Rules approach to consent, California has a heightened standard that requires a client’s consent not only be informed, but also in writing. This means that not only must the client’s consent be in writing but also that the disclosure be in writing. California’s current approach to this standard is more client protective.

Paragraph (f) defines “knowingly,” “known,” or “knows” and is nearly identical to ABA Model Rule 1.0(f).

Paragraph (g) defines “partner” and is nearly identical to ABA Model Rule 1.0(g).

Paragraph (g-1) defines “person” which has no counterpart in the Model Rule. The proposed definition will eliminate potential confusion over whether the term “person” when used throughout the rules includes an organization. Six other jurisdictions have adopted a definition for the term “person.”

Paragraph (h) defines “reasonable” or “reasonably” and is identical to ABA Model Rule 1.0(h).

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<sup>3</sup> The Commission has substituted “means” for “denotes” throughout the rule because the Commission believes “means” is more specific and definite than “denotes.”

<sup>4</sup> See, *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.

<sup>5</sup> Maryland, Michigan, and South Carolina have similarly removed the phrase “authorized to.”

<sup>6</sup> See, proposed rule 8.5(b), concerning choice of law.

Paragraph (i) defines “reasonable belief” or “reasonably believes” and is identical to ABA Model Rule 1.0(i).

Paragraph (j) defines “reasonably should know” and is identical to ABA Model Rule 1.0(j).

Paragraph (k) defines “screened” and modifies ABA Model Rule 1.0(k) primarily by adding the clause “(ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.”

Paragraph (l) defines “substantial” and is identical to ABA Model Rule 1.0(l).

Paragraph (m) defines “tribunal” and differs from ABA Model Rule 1.0(m). There was debate as to whether the definition should reference “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved” for fear that imposing the same duties of candor on lawyers appearing before such a body as they owe courts of general jurisdiction may violate the lawyer’s client’s right of petition. Ultimately, the Commission determined that the proposed definition would not inhibit a client’s right of petition because the definition is limited to administrative bodies acting in an adjudicative capacity. The Commission could not find anything to suggest that the right to petition is different in scope when a court, arbitrator, or administrative law judge is acting in an adjudicative capacity versus when an administrative body is acting in an adjudicative capacity. The Commission is not aware of any issues relating to the right to petition in the numerous jurisdictions that have adopted the ABA Model Rule definition of “tribunal.”

Paragraph (n) defines “writing” or “written” which is based on Evidence Code section 250 and includes a second sentence clarifying that an elective signature (or other modern forms of signature) are sufficient to establish that a writing is “signed.”

There are six comments to the rule. Comment [1] provides interpretative guidance for determining whether a grouping of lawyers might constitute a law firm. Comment [2] provides interpretative guidance concerning use of the term “of counsel.” Comment [3] provides important qualifications on what constitutes fraud for purposes of the rules and also provides an explanation for the qualifications. Neither damages nor reliance need to be proven because as the term “fraud” is typically used in these rules, it is as a “trigger” for imposing a lawyer’s duty to prevent fraud or avoid assisting a client in perpetrating a fraud. Comment [4] clarifies the term “informed consent” and “informed written consent.” Comments [5] and [6] provide guidance on the implementation of an effective ethical screen for purposes of these rules.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.



**Rule 1.0.1 [1-100(B)] Terminology**  
**(Commission's Proposed Rule Adopted on October 21–22, 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.



**Rule 1.0.1 [1-100(B)] Terminology  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
Redline to Public Comment Draft 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.



**Rule 1.0.1 [1-100(B)] ~~Rules of Professional Conduct, in General~~ Terminology**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

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- (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) ~~Definitions.~~
  - (1) ~~“Law Firm” means:~~
    - (a) ~~two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~
    - (b) ~~a law corporation which employs more than one lawyer; or~~ [Reserved]
    - (c) ~~a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~ “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) ~~a publicly funded entity which employs more than one lawyer to perform legal services~~ “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.
    - (2g) ~~“Member”~~ “Partner” means a member of ~~the State Bar of California~~ a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
      - (3) ~~“Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to~~

~~practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

- (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.
- (4j) ~~“Associate” means an employee or fellow employee who is employed as~~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.
- (5) ~~“Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~
- (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.

\* \* \* \* \*

### **Discussion:**

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~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~

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

**TOTAL = 10**     **A = 1**  
**D = 2**  
**M = 5**  
**NI = 2**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
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.

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

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

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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					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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Synopsis of Public Comments**

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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		<p>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</p>	<p>See above response to point #2 from commenter Christopher Garrett, X-2016-83d.</p>

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

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					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.	
X-2016-104b	Office of Chief Trial Counsel (Dresser) (09-27-16)	Y	M		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	1. The Commission has not made any changes to the proposed definition of “knows.”  <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 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

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Synopsis of Public Comments**

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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	Lamport, 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</i>, <i>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.)<sup>2</sup> The inability of local</p>

<sup>2</sup> 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> <del>acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved</del>; 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 . . . <i>by the Legislature</i> . . . .” 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 Lamport 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>	





**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.1**  
**(Current Rule 3-110)**  
**Competence**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-110 (Failing to Act Competently) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.1 (Competence). The result of the Commission’s evaluation is proposed rule 1.1 (Competence). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered when drafting proposed Rule 1.1 was whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence in order to substitute a standard like Model Rule 1.1 which states affirmatively that a lawyer must provide competent representation to a client. The Commission is recommending that the current California standard be retained as this is consistent with applicable Supreme Court precedent that has been repeatedly applied in State Bar Court disciplinary proceedings.

In *Lewis v. State Bar* (1981) 28 Cal.3d 683, the Supreme Court reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue: “This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence.” In *In Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149, the State Bar Review Department emphasized: “We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation.” It is important to note that under California’s approach a lawyer’s single act of gross negligence is not given a free pass. The Commission is recommending that paragraph (a) of the proposed rule be amended to include an explicit reference to gross negligence. In addition, gross negligence might also be regarded as an act constituting moral turpitude (See Business and Professions Code § 6106 and proposed rule 8.4).

Although the essential prohibition of the current rule is retained, proposed rule 1.1 includes three substantive changes. First, the concept of “diligence” as a component in the definition of competence has been deleted. The Commission is recommending a separate rule on a lawyer’s duty of diligence consistent with the approach used in most jurisdictions (see the executive summary of proposed rule 1.3 (Diligence)). A new comment in proposed rule 1.1, Comment [2], would cross reference rule 1.3.

Second, in paragraph (c), in situations where a lawyer lacks sufficient learning and skill to handle a client’s case or matter, the Commission is recommending the addition of an option for the lawyer to refer a matter to another attorney whom the lawyer reasonably believes is competent.

Third, the Commission is recommending deletion of the existing Discussion paragraph that provides case citations addressing a lawyer's supervision obligations. Rather than relying on case citations, the Commission is recommending three new separate rules on supervision (see the executive summaries of proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistants). This is consistent with the approach to the duty of supervision in most jurisdictions.

#### **Post-Public Comment Revisions**

None.

**Rule 1.1 [3-110] Competence**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes\* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes\* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably\* necessary in the circumstances.

**Comment**

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable\* diligence.



**Rule 1.1 [3-110] ~~Failing to Act Competently~~ Competence**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (Bb) For purposes of this ~~rule~~, "Rule, "competence"" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably\* necessary for the performance of such service.
- (Cc) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service~~ is services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services competently~~may provide competent representation by (1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~believes\* to be competent, ~~or~~ (2) ~~by~~ acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes\* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency, ~~however, assistance should~~ must be limited to that reasonably\* necessary in the circumstances.

**Discussion ~~Comment~~**

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable\* diligence.



**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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-2016-32b	Law Professors (Zitrin) (07-25-16)	Yes	A		We are gratified to see the inclusion of a separate rule on diligence along with a definition of diligence. Moreover, the commission has corrected the overly narrow standard required for a violation of MR 1.1 by adding the phrase "gross negligence" to the rule itself and eliminating the comment to MR 1.1 regarding "a single act of negligent conduct..."	No response required.
X-2016-43d	Committee on Professional Responsibility and Conduct (Baldwin) (08-12-16)	Yes	A		COPRAC supports the revised Rule as proposed	No response required.
X-2016-52b	Law Professors (Zitrin) (08-24-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission's response to the Law Professors' comments.
X-2016-68b	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission's response to the Law Professors' comments.

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

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

**TOTAL = 7**      **A = 4**  
**D = 1**  
**M = 2**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Castaneda, Jose (Provided oral public hearing testimony on July 26, 2016. See pages 81-82 of the public hearing transcript.)	Uncertain			The Castaneda comments at the public hearing related personal experiences and were not directed to the content of the proposed rule	No response required.
X-2016-104c	OCTC	Yes	M		<p>1. OCTC supports adding gross negligence to this rule because that is consistent with case law.</p> <p>2. OCTC is concerned with the proposals to separate competence, diligence, and supervision into separate rules. Current rule 3-110 works well, is well understood, and enforceable. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Further, there is well-established case law concerning the current rule.</p> <p>3. A failure to perform diligently is a failure to perform competently, because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping.</p>	<p>1. No response required.</p> <p>2 – 5. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).</p>



**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
					<p>Choosing the wrong rule to charge will result in a dismissal even though respondent was on notice as to what the charge was about. For instance, if an attorney does not know or learn the time lines for filing pleadings in a case and, thus, does not perform them in a timely manner, is that a failure to perform diligently or a failure to perform competently? At the very least, it will cause an unnecessary proliferation of the charges filed against attorneys and make enforcement more difficult.</p> <p>4. Segregating supervision from competence is even more difficult, confusing, and artificial than separating diligence and competence. It will make proper charging of respondents more difficult. Supervision by an attorney is a part of lawyer competence. (See <i>In the Matter of Valinoti</i> (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3–110(A)), to</p>	

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
					<p>adequately communicate with his clients (rule 3–500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4–100)]; <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847; <i>Bernstein v. State Bar</i> (1990) 50 Cal.3d 221; <i>Gadda v. State Bar</i> (1990) 50 Cal.3d 344, 353-354; <i>In the Matter of Blum</i> (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.)</p> <p>5. Also, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry, unclear, and overlapping. Choosing the wrong rule to charge will result in a dismissal, even though respondent was on notice as to the basis of the charge. For instance, many attorneys dispute allegations, but never contend that the misconduct occurred because of a lack of supervision until they are testifying at trial, long after</p>	

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
					<p>the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. (See e.g. <i>In the Matter of Bolanos</i>, Case No. 15-O-10896 [dismissing failure to communicate allegation, although conduct could have been classified as a competence issue].)</p> <p>6.OCTC is concerned about Comments 1 and 2. Those Comments are not necessary or correct, even if the concepts of competence, diligence, and supervision are separated. The Comments are unnecessary because each rule already explains what it governs. Further, as discussed, supervision of an attorney's employees, office, and case is an essential part of lawyer competence and cannot be separated from competence.</p>	<p>6. The Commission believes it is important to retain Comments [1] and [2], which provide cross-references to the supervision rules [5.1 to 5.3] and the diligence rule [1.3], respectively. It is important to provide those references because those concepts had both previously been found within the competence rule.</p>
X-2016-76b	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los	Yes	M		PREC notes that subpart (a) of Proposed Rule 1.1 [Competence (current Rule 3-110)] adds the term “with gross negligence” to the list of conduct in which a	Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that “gross negligence” is an existing basis for discipline.

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
	Angeles (PREC) (Schmid) (09-24-16)				<p>lawyer may not engage if his or her obligation to perform legal services with competence is to be met. PREC believes that discipline relating to a lawyer's failure to practice in a competent manner should be limited in this rule to conduct that is repeated, intentional, or reckless, as in currently Rule 3-110. PREC is concerned that including gross negligence among the conduct supporting a finding of a lack of competence creates a significant risk that a lawyer who is found to have acted with gross negligence, and therefore not competently, will also be found to have engaged in an act of moral turpitude.</p> <p>Cases dealing with lawyer competence typically do not involve the habitual disregard of client interests and therefore could not support a finding of moral turpitude. Nevertheless, if gross negligence is incorporated into the lawyer competency rule, PREC believes this will result not only in charges regarding a lawyer's competence, but also in additional, unnecessary charges of moral turpitude. Such a result is inconsistent with the definition of "competence" set forth in subpart (b) of Proposed Rule 1.1,</p>	

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
					which does not include acts of moral turpitude. Moreover, because charges are posted on the State Bar website as soon as they are filed (although there is a disclaimer that they are allegations only), those charged with competence issues could be prejudiced by allegations that they engaged in an act of moral turpitude even though the facts underlying the competency charge do not involve a habitual disregard of client interests. Furthermore, even if a competency case does demonstrate a habitual disregard of client interests, and therefore involves moral turpitude, it would be duplicative to charge an attorney with a violation of Proposed Rule 1.1, given that the lawyer could be charged with a violation of Business and Professions Code section 6106, which would support greater discipline.	
X-2016-76I	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	D		<u>Supplemental comment.</u> 1. As Proposed Rule 1.1 [Competence] defines competence to include diligence, PREC believes Proposed Rule 1.3 [Diligence] is unnecessary and inappropriate.	1. Rule 1.1 does not define competence to include diligence.

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

<b>TOTAL = 7</b>	<b>A = 4</b>
	<b>D = 1</b>
	<b>M = 2</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
					2. Unlike Proposed Rule 1.1, a violation of Proposed Rule 1.3 does not necessarily implicate the duty of loyalty or require harm or the potential for harm to the client. PREC recommends that the definition of "reasonable diligence" in subpart (b) of Proposed Rule 1.3 be moved to Proposed Rule 1.1, and the term "diligence" in Proposed Rule 1.1 be modified to be "reasonable diligence."	2. The Commission has not made the suggested change. The decision to separate diligence and competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid. Most of the comments the Commission has received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).
X-2016-75a	Steven Kerins	No	M		<p>1. The existing "competence bases" for imposing discipline are more than adequate for public protection, and gross negligence should not be added to intentional, reckless, or repeated conduct as a basis for possible discipline.</p> <p>2. A comment should be added to address "competence creep", or the effect of specialization on the legal profession. It should be clarified that generalists' learning and skill will be judged against that of other generalists - a matter of particular significance to attorneys practicing in rural areas, and presumably, to their</p>	<p>Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that "gross negligence" is an existing basis for discipline.</p> <p>2. The Commission has not made the suggested change. The Commission is not aware of any effort to discipline lawyers based on the level of skill of a specialist or expert, although it believes that would be proper for a lawyer who claims to be an expert.</p>

**Proposed Rule 1.1 [3-110] Competence  
Synopsis of Public Comments**

**TOTAL = 7**      **A = 4**  
**D = 1**  
**M = 2**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					clients.	
X-2016-66a	San Diego County Bar Assoc.	Yes	A		We commend and support the Commission's choice of a separate rule that establishes an ethical duty of diligence, removing it from the Comment in the current competence rule, Rule 3-110, and also providing a definition of "reasonable diligence" for purposes of discipline. While the concepts of competence and diligence are linked, we believe they are sufficiently different, particularly from a client's perspective, that they warrant separate treatment. A lawyer may be technically competent—i.e., have the requisite skill—but still not pay adequate attention to, or even grossly neglect obligations to, a client. This addition of proposed Rule 1.3 makes clear that a lawyer has the ethical obligation both to be competent and to act with commitment and dedication to the interests of the client. We also support the inclusion of "gross negligence" into the scope of both the competence and the diligence rule.	No response required.





**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.2**  
**(Current Rule 3-210)**  
**Scope of Representation and Allocation of Authority**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-210 (Advising the Violation of Law) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.2 (Scope Of Representation and Allocation Of Authority Between Client and Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although this proposed rule has no direct counterpart in the current California Rules of Professional Conduct, the concept of limiting the scope of representation is addressed in California Rules of Court 3.35-3.37 & 5.425. The concept of allocation of authority is derived from the California Constitution, the California Penal Code, and California Supreme Court precedent. The result of this evaluation is proposed rule 1.2 (Scope of Representation and Allocation of Authority). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The concepts addressed in current rule 3-210 are carried forward with modification in proposed rule 1.2.1. An executive summary for proposed rule 1.2.1 is provided separately. Proposed rule 1.2 addresses the allocation of authority within the lawyer-client relationship and the ability of a lawyer to undertake representation on a limited scope basis.

The primary objectives of proposed rule 1.2 were to clarify the relationship between lawyer and client, to contribute to access to justice, and to eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of ABA Model Rule 1.2. In furthering its objectives, the Commission considered whether the concepts addressed in the proposed rule were necessary in the disciplinary rules in light of the fact that they were already present in statutes or case law.

Paragraph (a) is derived from ABA Model Rule 1.2(a) relating to the allocation of authority within the lawyer-client relationship. Under the proposed rule, the client retains authority to make decisions concerning the objectives of the representation, including whether to settle, which plea to enter, whether to waive a jury trial, and whether to testify, while the lawyer is impliedly authorized to take such action on behalf of the client as long as lawyer can do so without disclosing confidential communications.

Paragraph (b) relates to a lawyer’s ability to limit the scope of representation. Allowing lawyers and clients to engage in limited scope agreements is consistent with California case law and rules of court, and contributes to access to justice by making the availability of legal services more affordable.

Comment [1] identifies the specific statutory authority for the express exception in paragraph (a) regarding the client’s right to enter a plea in a criminal matter. The comment likewise identifies the seminal California Supreme Court case regarding the allocation of authority between lawyer and client.

Comment [2] clarifies that while a client possesses the authority to settle, a lawyer may settle a matter on the client's behalf with client's advance authorization.

Comment [3] addresses the concept that a lawyer's decision to undertake a client's matter does not constitute an endorsement of the client's views or activities. Including this concept as part of the rules was criticized as being aspirational and was stricken from the black letter of an earlier draft version of the rule.

Comment [4] provides interpretive guidance regarding the application of paragraph (c) as well as providing cross-references to the California Rules of Court expressly permitting limited scope representation under certain conditions.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

**Rule 1.2 [3-210] Scope of Representation and Allocation of Authority**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

**Comment**

*Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

*Independence from Client's Views or Activities*

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

*Agreements Limiting Scope of Representation*

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).



**Rule 1.2 [3-210] Scope of Representation and Allocation of Authority  
(Commission's Proposed Rule Adopted on October 21–22, 2016 –  
Redline to Public Comment Draft Version)**

- (a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*  
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**Comment**

*Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

*Independence from Client's Views or Activities*

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

*Agreements Limiting Scope of Representation*

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).



**Rule 1.2 [3-210] ~~Advising the Violation of Law~~ Scope of Representation and Allocation of Authority**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

~~A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.~~

- (a) Subject to Rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

**Discussion Comment**

~~Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)~~

**Allocation of Authority between Client and Lawyer**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. *Blanton v. Womanicare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material

change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

#### *Independence from Client's Views or Activities*

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

#### *Agreements Limiting Scope of Representation*

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).



**Proposed Rule 1.2 [3-210] Scope of Representation and Allocation of Authority**  
**Synopsis of Public Comments**

<b>TOTAL = 2</b>	<b>A = 0</b>
	<b>D = 0</b>
	<b>M = 2</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-2016-43e	Committee on Professional Responsibility and Conduct (Baldwin) (8-12-16)	Y	M	1.2	The language "Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation" is ambiguous or confusing.	The Commission made no change to this language. Including the restrictive reference to the duty of confidentiality is necessary because unlike Model Rule 1.6, neither § 6068(e) nor proposed rule 1.6 [3-100] includes the concept of implied authorization.
X-2016-104d	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(b), cmt. 3, cmt. 4	<p>Subsection (b) should require that limitation be fully explained to client and that client's consent be in writing.</p> <p>Comment 3 is aspirational and should be deleted.</p> <p>Comment 4 is unnecessary and likewise fails to explain lawyer's duty to alert client to legal issues according to case law.</p>	<p>The Commission agrees and has revised paragraph (b) to require that a client's consent be in writing. Thus, the rule will use the phrase "informed written consent" which is defined in proposed rule 1.0.1(e-1) and encompasses an explanation of relevant circumstances and material risks.</p> <p>The Commission did not make the requested change because this comment incorporates Model Rule 1.2(b) but as a comment rather than black letter text.</p> <p>The Commission did not make the requested change because this comment promotes client protection by assuring that a</p>

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 1.2 [3-210] Scope of Representation and Allocation of Authority  
Synopsis of Public Comments**

<b>TOTAL = 2</b>	<b>A = 0</b>
	<b>D = 0</b>
	<b>M = 2</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
						lawyer who renders limited scope services is on notice that there might be other applicable law outside of the Rules of Professional Conduct, in particular Rules of Court for certain types of cases.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4**  
**(Current Rule 3-500)**  
**Communication with Clients**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-500 (Communication) in accordance with the Commission Charter, with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.4 (Communications). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 1.4 (Communication with Clients). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.4 is generally consistent with current rule 3-500 but has adopted clarifying language from ABA Model Rule 1.4 which has been adopted by the majority of jurisdictions. This language is intended to enhance public protection by more clearly stating a lawyer’s obligations to clients with regard to communication.

Paragraph (a)(1) provides a duty to inform clients when written disclosure or informed consent is required.

Paragraph (a)(2) provides a duty to discuss the means by which to accomplish a client’s representation objectives.

Paragraph (a)(3) most closely resembles current rule 3-500 and provides a duty to keep the client reasonably informed about significant developments relating to the representation, including providing access to significant documents.

Paragraph (a)(4) requires a lawyer to advise the client about any ethical limitations the lawyer faces when a client expects assistance barred by the rules or the law.

Paragraph (b) provides a duty to sufficiently explain a matter to a client so that the client can make informed decisions regarding the representation.

Paragraph (c) permits a lawyer to delay transmission of information to the client if doing so would prevent a client from harming himself or others.

Paragraph (d) provides that a lawyer’s obligation to provide information or documents is subject to any applicable order, agreement, or law.

Comment [1] provides that a lawyer will not be disciplined for failing to disclose insignificant or irrelevant information to a client.

Comment [2] provides that a lawyer may provide documents or information electronically and that the rule does not prevent the attorney for recouping expenses for such in a subsequent legal proceeding.

Comment [3] provides that paragraph (c) applies only during the representation and does not alter a lawyer's duties at the termination of the representation.

Comment [4] provides that the rule does not affect a lawyer's obligation to provide work product to a client.

### **Post-Public Comment Revisions**

A non-substantive change was made that was not a grammatical, stylistic, or streamlining edit.

After consideration of public comment, the Commission has revised paragraph (d) to include a reference to "decisional law" in order to carry forward the concept found in the discussion section of the current rule 3-500, that a lawyer need not provide information to the client where there is an exception permitted by decisional or statutory law.

**Rule 1.4 [3-500] Communication with Clients**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,\* is required by these Rules or the State Bar Act;
  - (2) reasonably\* consult with the client about the means by which to accomplish the client's objectives in the representation;
  - (3) keep the client reasonably\* informed about significant developments relating to the representation, including promptly complying with reasonable\* requests for information and copies of significant documents when necessary to keep the client so informed; and
  - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows\* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably\* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

**Comment**

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

**Rule 1.4 [3-500] Communication with Clients**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 –**  
**Redline to Public Comment Draft Version)**

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,\* is required by these Rules or the State Bar Act;
  - (2) reasonably\* consult with the client about the means by which to accomplish the client's objectives in the representation;
  - (3) keep the client reasonably\* informed about significant developments relating to the representation, including promptly complying with reasonable\* requests for information and copies of significant documents when necessary to keep the client so informed; and
  - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows\* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably\* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or [limitation under](#) statutory ~~limitation~~ [or decisional law](#).

**Comment**

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.



**Rule 1.4 [3-500] Communication with Clients**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent,\* is required by these Rules or the State Bar Act;
  - (2) reasonably\* consult with the client about the means by which to accomplish the client's objectives in the representation;
  - (3) ~~A member shall~~ keep a the client reasonably\* informed about significant developments relating to the ~~employment or~~ representation, including promptly complying with reasonable\* requests for information and copies of significant documents when necessary to keep the client so informed;~~;~~  
and
  - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows\* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably\* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

**Comment**~~Discussion~~

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, ~~subd.~~ (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. ~~Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined~~

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

~~A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.~~

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see Rule 1.16(e)(1)).

[4] This Rule ~~3-500~~ is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the ~~member~~lawyer to provide work product to the client shall be governed by relevant statutory and decisional law. ~~Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.~~

**Proposed Rule 1.4 [3-500] Communication with Clients  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 1**  
**D = 0**  
**M = 3**  
**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-2016-43g	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	1.4	Supports adoption of proposed Rule 1.4.	No response required.
X-2016-66c	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(c), (d), cmt.	<p>1. Subsection (c) should clarify the type of harm (bodily or otherwise).</p> <p>2. The comment should address subsection (d) by stating that a lawyer shall not seek protective order or non-disclosure agreement that limits the duty to communicate unless it fulfills the objectives of representation is least restrictive on the lawyer's duty to communicate.</p>	<p>1. The Commission did not make the suggested change. The rule version circulated for public comment permits the delay of transmission to prevent imminent harm to the client or others. The Commission does not understand how modifying "harm" with the phrase "bodily or other" would provide additional protection to the client or the public.</p> <p>2. The Commission did not make the suggested change. Proposed Rule 1.3 addresses a lawyer's duty to pursue the client's interest, including the requirement that a lawyer act with commitment and dedication to the interests of the client. The Commission believes the conduct the commenter describes is addressed by Rule 1.3. It is well established that lawyers have the duty to zealously</p>

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

**Proposed Rule 1.4 [3-500] Communication with Clients**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						represent their clients within the bounds of the law (see, e.g., <i>Hawk v. Superior Court</i> , 42 Cal. App.3d 108, 126 (1974)), and Rule 1.4 doesn't need require a restatement of this concept.
X-2016-93a	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(d), cmt. 4	Paragraph (d) should carry forward the concept found in the discussion section of the current rule 3-500 that a lawyer need not provide information to the client where there is an exception permitted by decisional or statutory law	The Commission agrees and has revised paragraph (d) to include a reference to "decisional law."
X-2016-104g	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(a)(3), (c), cmt. 1	<p>1. Subsection (a)(3) excludes requiring attorney to keep client informed about employment, not just the representation.</p> <p>2. Subsection (c) will be used to excuse failures to communicate.</p>	<p>1. The Commission did not make the suggested change. The Commission has largely substituted "representation" for "employment" throughout the Rules except where the word "employment" is used to signify a situation where a lawyer is employed by an entity to provide exclusive legal services, e.g., government employment.</p> <p>2. The Commission has not made the suggested change. Proposed Rule 1.3 addresses a lawyer's duty to pursue the client's interest, including the requirement that a lawyer act with commitment and</p>

**Proposed Rule 1.4 [3-500] Communication with Clients  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					3. Comment 1 is superfluous.	<p>dedication to the interests of the client. The Commission believes the conduct the commenter describes is addressed by Rule 1.3.</p> <p>3. The Commission has not made the suggested change. The Commission believes Comment [1] provides important guidance on the application of the rule, as well as a citation to the corresponding State Bar Act provision governing lawyers' communications with clients.</p>



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.1**  
**(Current Rule 3-510)**  
**Communication of Settlement Offers**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-510 (Communication of Settlement Offer) in accordance with the Commission Charter, with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In light of the fact that the American Bar Association (“ABA”) Model Rules have no black letter rule on a lawyer’s duty to communicate settlement offers, the Commission considered approaches taken in other national jurisdictions with regard to communication of settlement offers. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 1.4.1 (Communication of Settlement Offers). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.4.1 carries forward the substance of current rule 3-510 but has been renumbered to correspond to the ABA Model Rules. The renumbering will help lawyers from other jurisdictions authorized to practice law in California to more easily find corresponding California rules to aid in their determination of whether California imposes different duties. Moreover, it will help California lawyers research case law and ethics opinions that address corresponding rules in other jurisdictions. This will assist California lawyers in complying with their duties, particularly when California does not have such authority interpreting the California rule.

Paragraph (a)(1) provides a duty to promptly inform criminal clients regarding certain enumerated settlement offers. Paragraph (a)(1) would eliminate any ambiguity from current rule 3-510 about whether dispositive offers that fall short of a “plea bargain,” e.g., offers made in a pre-charge or pre-indictment context, must also be communicated to a client.

Paragraph (a)(2) carries forward the language of current rule 3-510 and provides a duty to promptly inform a client regarding a written settlement offer in non-criminal matters.

Paragraph (b) carries forward the language of current rule 3-510 and defines to whom a lawyer must communicate settlement offers for purposes of this rule.

The comment carries forward part of the discussion in current rule 3-510 and provides a duty to communicate oral settlement offers in civil cases if the offer constitutes a “significant development” pursuant to proposed rule 1.4.

**Post-Public Comment Revisions**

None.





**Rule 1.4.1 [3-510] Communication of Settlement Offers**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall promptly communicate to the lawyer's client:
  - (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
  - (2) All amounts, terms, and conditions of any written\* offer of settlement made to the client in all other matters.
- (b) As used in this Rule, "client" includes a person\* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

**Comment**

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under Rule 1.4.



**Rule 1.4.1 [3-510] Communication of Settlement ~~Offer~~Offers**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(a)~~(A) A ~~member~~ lawyer shall promptly communicate to the ~~member's~~lawyer's client:

- (1) ~~All~~all terms and conditions of ~~any~~a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
- (2) ~~All~~all amounts, terms, and conditions of any written\* offer of settlement made to the client in all other matters.

~~(b)~~(B) As used in this ~~rule~~Rule, "client" includes a person\* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

**Comment~~Discussion~~**

~~Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.~~

~~Any~~An oral ~~offers~~offer of settlement made to the client in a civil matter ~~should~~must also be communicated if ~~they are~~it is a "significant" ~~for the purposes of rule 3-500.~~  
development" under Rule 1.4.



**Proposed Rule 1.4.1 [3-510] Communication of Settlement Offers**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43h	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.
X-2016-76d	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	(a), (b)	The rule should be amended to clarify that the lawyer can meet her duty by communicating settlement offers and pleas to any authorized representative of the client.	The Commission declines to make the suggested change. The Commission has recommended that current rule 3-510(B) be carried forward as proposed rule 1.4.1(b). The Commission is not aware that the current requirement has caused any problems. On the contrary, the suggested substitute language, "any duly authorized representative," begs the question, "authorized to do what?" That language is vague and ambiguous and could be used to justify a lawyer's failure to ensure the appropriate decision maker has been satisfied.
X-2016-82a	Polish, James (9-26-16)	N	M		Lawyers should be required to communicate all settlement offers, not just written ones.	The Commission declines to make the suggested change. Under the rule, every written offer of settlement must be communicated as well as any oral offer that constitutes a "significant development" in the representation. (See

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 1.4.1 [3-510] Communication of Settlement Offers**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						proposed Rule 1.4(a)(3).) The Commission sees no reason to require oral offers that do not satisfy that standard to be communicated.
X-2016-104h	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.2**  
**(Current Rule 3-410)**  
**Disclosure of Professional Liability Insurance**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-410 (Disclosure of Professional Liability Insurance) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the American Bar Association (“ABA”) Model Court Rule on Insurance Disclosure. The result of the Commission’s evaluation is proposed rule 1.4.2 (Disclosure of Professional Liability Insurance). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 3-410 requires a lawyer who does not have professional liability insurance to disclose that fact to the lawyer’s clients. The current rule exempts government lawyers and in-house counsel with regard to the representation of their employer. There is no counterpart to rule 3-410 in the ABA Model Rules. In addition, the ABA Model Court Rule on Insurance Disclosure employs a different approach in not requiring a lawyer to disclose the fact that he or she lacks professional liability insurance directly to his or her client but rather requires a report to the highest court (of the respective jurisdiction) whether he or she is currently covered by professional liability insurance. The reported information is then made available to the public. The Commission is not recommending a change to the approach and policy of the ABA Model Court Rule. The Commission believes that clients ought to receive direct disclosure from a lawyer.

The Commission is not recommending any substantive changes to the current rule. However, the Commission is recommending non-substantive amendments that are intended to make the rule easier to understand. These changes include combining into one paragraph all of the current provisions that identify situations where the rule is not applicable. Another clarifying change is to substitute the phrase “reasonably should know” for “should know” as the former is a term that is defined in proposed rule 1.0.1 (Terminology). Similarly, non-substantive, mostly stylistic, amendments are recommended in the Comments.

**Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.





**Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer who knows\* or reasonably should know\* that the lawyer does not have professional liability insurance shall inform a client in writing,\* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing\* within thirty days of the date the lawyer knows\* or reasonably should know\* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
  - (1) a lawyer who knows\* or reasonably should know\* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
  - (2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;
  - (3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;
  - (4) a lawyer who has previously advised the client in writing\* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

**Comment**

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written\* fee agreement with the client or in a separate writing:

*"Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I do not have professional liability insurance."*

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

*“Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I no longer have professional liability insurance.”*

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know\* whether the lawyer is or is not covered by professional liability insurance.

**Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
Redline to Public Comment Draft Version)**

- (a) A lawyer who knows\* or reasonably should know\* that the lawyer does not have professional liability insurance shall inform a client in writing,\* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing\* within thirty days of the date the lawyer knows\* or reasonably should know\* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
  - (1) a lawyer who knows\* or reasonably should know\* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
  - (2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;
  - (3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;
  - (4) a lawyer who has previously advised the client in writing\* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

**Comment**

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written\* fee agreement with the client or in a separate writing:

*"Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I do not have professional liability insurance."*

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

*“Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I no longer have professional liability insurance.”*

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know<sup>\*</sup> whether the lawyer is or is not covered by professional liability insurance.

**Rule ~~3-410~~1.4.2 Disclosure of Professional Liability Insurance**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer who knows\* or reasonably should know\* that ~~he or she~~the lawyer does not have professional liability insurance shall inform a client in writing,\* at the time of the client's engagement of the ~~member~~lawyer, that the ~~member~~lawyer does not have professional liability insurance ~~whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.~~
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing\* within thirty days of the date the lawyer knows\* or reasonably should know\* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
- (B) ~~If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.~~
- (1) a lawyer who knows\* or reasonably should know\* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
- (G2) ~~This rule does not apply to a member~~a lawyer who is employed as a government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity~~;~~.
- (D3) ~~This rule does not apply to a lawyer who is rendering~~ legal services ~~rendered~~ in an emergency to avoid foreseeable prejudice to the rights or interests of the client~~;~~.
- (E4) ~~This rule does not apply where the member~~a lawyer who has previously advised the client in writing\* under ~~Paragraph (A)~~paragraph (a) or ~~(Bb)~~ that the ~~member~~lawyer does not have professional liability insurance.

**Comment~~Discussion~~**

[1] The disclosure obligation imposed by Paragraph ~~(A) of this rule~~a) applies with respect to new clients and new engagements with returning clients.

-

[2] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Aa), and may include that language in a written\* fee agreement with the client or in a separate writing:

*"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.2, I am informing you in writing that I do not have professional liability insurance."*

[3] A ~~member~~lawyer may use the following language in making the disclosure required by ~~Rule 3-410~~paragraph (Bb):

*"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.2, I am informing you in writing that I no longer have professional liability insurance."*

[4] ~~Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are~~The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and ~~de~~does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know\* whether the lawyer is or is not covered by professional liability insurance.

**Proposed Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance  
Synopsis of Public Comments**

<b>TOTAL = XX</b>	<b>A = 1</b>
	<b>D = 0</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
X-2016-104i	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		<p>1. OCTC supports this rule.</p> <p>2. OCTC supports Comments 1 and 4.</p> <p>3. OCTC is concerned that Comments 2 and 3 do not explain or interpret the rule, but simply provide legal advice to attorneys.</p>	<p>1. No response required.</p> <p>2. No response required.</p> <p>3. The Commission has retained Comments [2] and [3]. The Supreme Court approved this rule relatively recently, operative January 1, 2010. The Commission believes the comments provide important interpretative guidance on the rule's application. The Commission is also not aware of any problems that have arisen with respect to enforcing the rule because of Comments [2] and [3].</p>

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





**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5.1**  
**(Current Rule 2-200)**  
**Fee Divisions Among Lawyers**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 2-200 (Financial Arrangements Among Lawyers) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.5(e) (concerning fee divisions among lawyers) and the Restatement of Law Governing Lawyers counterpart, Restatement § 47 (Fee Splitting Between Lawyers Not In The Same Firm). The result of the Commission’s evaluation is proposed rule 1.5.1 (Fee Divisions Among Lawyers). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

A key topic addressed by this proposed rule is the regulation of fee sharing by lawyers who are not in the same law firm, including typical referral fees. Most states follow Model Rule 1.5(e) that permits lawyers to divide a fee only to the extent that the referring lawyer is compensated for work actually done on the matter or if the referring lawyer assumes joint responsibility for the matter. The California rule is one of a minority of states that permits a “pure referral fee,” i.e., California permits lawyers to be compensated for referring a matter to another lawyer without requiring the referring lawyer’s continued involvement in the matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the California Court of Appeal held that the payment of referral fees is not contrary to public policy. The court stated, “If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields.” (Id. at 921-922.) The Commission’s study found that no case since *Moran* had questioned the policy of permitting pure referral fees. In fact, the ABA’s Ethics 2000 Commission itself had recommended that the Model Rules permit pure referral fees, but that position was rejected by the ABA House of Delegates.

That is not to say that the proposed rule remains the same as the current rule. Rather, proposed rule 1.5.1 implements two material changes intended to increase protection for clients. First, the agreement between the lawyers to divide a fee must now be in writing and second, the client must consent to the division after full disclosure at or near the time that the lawyers enter into the agreement to divide the fee. Under current rule 2-200, there is no express requirement that the agreement between the lawyers be in writing and case law has held that client consent to the fee division need not be obtained until the fee is actually divided, which might not occur until years after the lawyers have entered into their agreement. These changes were made because an underlying reason for the rule is to assure that the client’s representation is not adversely affected as a result of an agreement to divide a fee. Deferring disclosure and client consent to the time the fee is divided denies

the client a meaningful opportunity to consider the concerns the rule is intended to address. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835.)

In addition, proposed rule 1.5.1 tentatively includes the provision in current rule 2-200 permitting a gift or gratuity for a client referral (rule 2-200(B)). This is tentative because the Commission's work on the lawyer advertising and solicitation rule is pending and the provision on gifts or gratuities will be considered for inclusion in that rule.

### **Post-Public Comment Revisions**

A non-substantive change was made that was not a grammatical, stylistic, or streamlining edit.

After consideration of public comment, the Commission has added a Comment to clarify that compliance with paragraphs (a)(1) and (a)(2) may be satisfied in either a single document, or through separate documents. This is a clarifying and non-substantive change.

**Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) Lawyers who are not in the same law firm\* shall not divide a fee for legal services unless:
  - (1) the lawyers enter into a written\* agreement to divide the fee;
  - (2) the client has consented in writing,\* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms\* that are parties to the division, and (iii) the terms of the division; and
  - (3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.
- (b) This Rule does not apply to a division of fees pursuant to court order.

**Comment**

The writing\* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.\*



**Rule 1.5.1 [2-200] Fee Divisions Among Lawyers  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
Redline to Public Comment Draft Version)**

- (a) Lawyers who are not in the same law firm\* shall not divide a fee for legal services unless:
- (1) the lawyers enter into a written\* agreement to divide the fee;
  - (2) the client has consented in writing,\* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms\* that are parties to the division, and (iii) the terms of the division; and
  - (3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.
- (b) This Rule does not apply to a division of fees pursuant to court order.

**Comment**

The writing\* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.\*

**Rule 1.5.1 [2-200] ~~Financial Arrangements~~ Fee Divisions Among Lawyers**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

(Aa) ~~A member~~ Lawyers who are not in the same law firm\* shall not divide a fee for legal services ~~with a lawyer who is not a partner of, associate of, or shareholder with the member~~ unless:

(1) the lawyers enter into a written\* agreement to divide the fee;

(12) ~~The~~ the client has consented in writing ~~thereto,\*~~ either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably\* practicable, after a full written\* disclosure ~~has been made in writing to the client of:~~ (i) the fact that a division of fees will be made ~~and,~~ (ii) the identity of the lawyers or law firms\* that are parties to the division, and (iii) the terms of ~~such~~ the division; and

(23) ~~The~~ the total fee charged by all lawyers is not increased solely by reason of the ~~provision for division of fees and is not unconscionable as that term is defined in rule 4-200~~ agreement to divide fees.

(b) This Rule does not apply to a division of fees pursuant to court order.

~~(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered 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.~~

**Comment**

The writing\* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.\*

**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

<b>TOTAL = 14</b>	<b>A = 5</b>
	<b>D = 6</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-2016-11	Kreis, John (07-20-16)	No	D	1.5.1	There is no client prejudice by maintaining the current rule as is. Fees are fees; they are proper or they are not. Why should a client be asked to agree in writing to a referral fee arrangement? The stated purpose appears to be “to improve client protection.” However, clients will doubtless exploit this requirement to extract concessions from attorneys as to fees and the like.	The Rules of Professional Conduct have long required the client to consent in writing to a division of a fee. Requiring informed written consent to the division of a fee protects the public by allowing the client to decide whether a referral fee should be paid, to determine whether the client is paying a reasonable attorneys’ fee, and to insure that the lawyer working on the matter retains a sufficient economic interest in the matter to properly handle the client’s case. Nothing in the rule will allow clients to improperly exploit attorneys or force financial concessions with which the attorney does not agree.
X-2016-17	Ward, James (08-01-16)	No	D	1.5.1	Current California rule should not be changed.	The proposed rule provides greater clarity, should reduce disputes about divisions of attorneys’ fees, and will provide to clients information earlier and give them greater control over the handling of their matters.
X-2016-20	Reynolds, Pamela (08-01-16)	No	D	1.5.1	Many lawyers make referrals either because they are too busy or because the potential client is	The proposed Rule continues the existing California policy of allowing attorneys to pay a

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

**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

<b>TOTAL = 14</b>	<b>A = 5</b>
	<b>D = 6</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
					looking for services in an area that the lawyer doesn't practice in. If the current rule is changed to require a lawyer to stay involved in the matter, it will discourage referrals and, instead, clients will be required to go out on their own to find a lawyer when they could have had a really good referral.	"pure" referral fee Unlike ABA Model Rule 1.5(e), the proposed Rule does not include a requirement that the lawyer receiving the referral fee remain involved in the case. This reflects a long-standing policy decision to increase the incentive for lawyers to refer matters to other lawyers who might be better able to handle the matters. See Anthony comment (X-2016-38) and the Commission's response.
X-2016-22	Cisneros, Mariano (08-01-16)	No	D	1.5.1	The bar should not add additional regulations in the fee area because lawyers are becoming inundated with unfunded liabilities already. Commenter has been "involuntarily made into a collection agency for the state when it comes to Medi-Cal liens. In addition, there are the requirements for a Minor's Compromise of a Settlement. This is another layer of bureaucracy.	Existing Rule 2-200 requires client consent in writing to a fee division. The proposed rule continues that requirement, and also requires that the fee splitting agreement between the lawyers be in writing. This requirement protects the public by requiring a written agreement that sets forth the terms of the fee division. See also Response to Kreis. The Commission is unable to see how this Rule would create an "unfunded liability" for any lawyer.
X-2016-38	Anthony, Caleb J. (08-11-16)	No	D	1.5.1	There is great benefit to both the client and lawyers by keeping the "pure" referral fee system intact. Under our current rules, a lawyer is much more likely to refer a case	The Commission agrees. The proposed Rule continues the existing California policy that permits pure referral fees. Please see response to



**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

<b>TOTAL = 14</b>	<b>A = 5</b>
	<b>D = 6</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
					to another lawyer who is better suited for a particular arena of law if he knows he'll get a "pure" referral fee. The client gets more competent representation, the initial lawyer gets his referral fee, and the latter lawyer is happy to have a case that is suited for him - everybody wins!	Reynolds (X-2016-20).
X-2016-41	Kavcioglu, Aren (08-15-16)	No	A	1.5.1	I strongly support the proposed changes to Rule 2-200. There is not a valid reason why a client's agreement to a fee division must be in writing, but the attorneys' division itself does not need to be. In <u>Mink v. Maccabee</u> (2004) 121 Cal.App.4th 835, the court held that the division of fees between attorneys need not be in writing. That "written agreements are preferable to oral ones, and that written consents obtained early in the process are preferable to those obtained after-the-fact." The decision was based upon a strict interpretation of the statute as written, not based upon what is preferable or what makes good sense. It is time to change the language of the statute.	No response required.
X-2016-43j	COPRAC (Baldwin) (08-18-16)	Yes	M	1.5.1	We are in accord with most of the proposed revisions. There is one issue of concern, however, that we wish to highlight for the Commission's further	The proposed rule does not prohibit the creation of a single agreement signed by the attorneys and the client, so long as the single document satisfies all elements of the

**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

**TOTAL = 14**    **A = 5**  
**D = 6**  
**M = 3**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					consideration. That issue relates to the language requiring <i>lawyers</i> dividing a fee to enter into a <i>written</i> agreement regarding the fee division. Because written disclosure and consent must be made to and obtained from the <i>client</i> in order to comply with the rule, requiring a separate written agreement as between the lawyers themselves seems redundant and unnecessary to further the goal of public protection. We therefore recommend that section (a)(1) of the proposed rule be removed.	rule. However, separate agreements are permissible. Attorneys may prefer to document their fee division agreement separately, in one writing, and submit a second writing to the client satisfying the disclosure and consent requirements of the rule.
X-2016-50	Gonzalez, Timothy (08-23-16)	No	A	1.5.1	I strongly support the proposed changes to Rule 2-200. The current rule, where the client's agreement to the fee division must be in writing, but the agreement between the attorneys does not need to be in writing, makes no sense and invites abuse.	No response required.
X-2016-66e	San Diego County Bar Association (SDCBA) (Rilely) (09-21-16)	Yes	A	1.5.1	We support this proposed rule as an improvement over current Rule 2-200 in that it requires the client's written consent when the lawyers enter into the agreement or as soon afterward as reasonably practicable.	No response required.
X-2016-77	Kreiss, John (09-26-16)	No	D	1.5.1	The fee to be charged by the attorney to whom the matter would be referred must be fully disclosed. The client can try to	As the Commission noted in response to the commenter's July 20, 2016 submission, under the existing rule, the

**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

**TOTAL = 14**     **A = 5**  
**D = 6**  
**M = 3**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					negotiate the fee or seek other counsel. The proposal will insure clients will demand the benefit of the referral fee, which defeats the purpose of the referral from the referring attorney. In a highly competitive market, growing more competitive by the day, the proponents aim at wiping out a marketing tool for lawyers, especially sole practitioners	client's written consent is required before a lawyer can share a fee with another lawyer. Therefore, disclosure and client consent is already required under the existing rule. The proposed rule protects the public by allowing the client to give informed consent to the proposed fee division promptly after the lawyers agree to a division of a fee, and requires that the terms of the lawyers' agreement be in writing, which will tend to reduce disputes concerning the terms or method to be employed in dividing the fee. (See also response to Kreis, X-2016-11, above.)
X-2016-81	Melchior, Kurt (09-26-16)	No	M	1.5.1	Proposed Rule 1.6 [1.5], as well as comments 2 and 3 to Proposed Rule.1.15, draw a line between a "true retainer" and a flat fee, and an advance deposit against future fees although the latter is only implied, not spelled out. I appreciate that State Bar Court precedent supports this distinction, but I think that it does not reflect reality -- specifically, in that there are fee agreements -- I have made some myself and seen a substantial number of others --	[Although filed under Rule 1.5.1, the commenter's submission appears to be directed at proposed Rule 1.5, where a response can be found.]

**Proposed Rule 1.5.1 [2-200] Fee Divisions Among Lawyers**  
**Synopsis of Public Comments**

**TOTAL = 14**     **A = 5**  
**D = 6**  
**M = 3**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					where the client agrees to pay what is both a flat fee and a prepayment of fees for certain designated work on the lawyer's part.	
X-2016-104k	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.5.1	OCTC supports this rule.	No response required.
X-2016-120a	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.5.1	LGBT supports this rule.	No response required.
X-2016-130	Malamud, Brad (10-04-16)	No	M	1.5.1	<p>1. Section (b) should be expanded to define when it applies. Thus, "This Rule does not apply to a division of fees pursuant to court order" should include, "if the court order specifically allocates or shares fees among/between the attorneys and the attorneys provided the court notice that they would be dividing the fees based on the court's order."</p> <p>2. The case law assumes the parties will agree who is the "primary attorney" and who is the "outside lawyer" as the terms are used. Both terms are in need of a definition to clarify.</p>	<p>The Commission declines to make the suggested change. The proposed rule is a disciplinary rule governing the conduct of lawyers. It is not a procedural rule that regulates the conduct of proceedings in court. The language would infringe on a court's inherent authority to supervise the proceedings before it.</p> <p>2. The Commission declines to make the suggested change. The terms "primary" and "secondary" when used to describe a lawyer are not used in the rule and are unnecessary to its application.</p>

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.6**  
**(Current Rule 3-100)**  
**Confidential Information of a Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-100 (Confidential Information of a Client) in accordance with the Commission Charter, with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.6 (Confidentiality of Information). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.6 (Confidential Information of a Client). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.6 is nearly identical to current rule 3-100 but has been renumbered to correspond to the ABA Model Rules. California’s treatment of lawyer-client confidentiality is unique. Unlike every other jurisdiction in the country, whose statement of a lawyer’s duty of confidentiality is contained in a rule of professional conduct that has been adopted by the jurisdiction’s highest court, California’s duty of confidentiality is contained in a statutory provision passed by the California legislature and enacted in 1871. The history of current rule 3-100 provides insight into proposed rule 1.6. First, because current rule 3-100 is an outgrowth of a legislative amendment to Business and Professions Code § 6068(e), the rule was never intended to function solely as a disciplinary rule, but was instead drafted with the intent of providing guidance to California lawyers on how to proceed when confronted with circumstances addressed in the sole exception to the rule. Understanding this intent helps explain the relatively large number of lengthy comments that this proposed rule contains. Second, the history further suggests that any substantive amendment, including concepts contained in the ABA Model Rules, would require amendment of Business and Professions Code § 6068(e). This is especially true of any express exceptions to the duty of confidentiality and is one of the principal reasons why proposed rule 1.6 contains no major deviations from current rule 3-100.

Paragraph (a)(1) carries forward the language of current rule 3-100 and provides a duty to protect client confidential information to the extent mandated by Business and Professions Code § 6068(e)(1) unless the client gives informed consent or as provided by paragraph (b).

Paragraph (b) carries forward the language of current rule 3-100 and provides that a lawyer may reveal confidential information to the extent necessary to prevent a criminal act resulting in serious bodily injury or death.

Paragraph (c) carries forward the language of current rule 3-100 and provides the steps that a lawyer must take, if reasonable, before disclosing client confidential information.

Paragraph (d) carries forward the language of current rule 3-100 and provides that a lawyer may not disclose any more confidential information than is necessary to prevent a criminal act resulting in serious bodily injury or death

Paragraph (e) carries forward the language of current rule 3-100 and provides that a lawyer does not violate the rule by declining to reveal confidential information permitted by paragraph (b).

Comment [1] provides context for the rule and explains the policy underlying the duty of confidentiality. The term “detrimental subjects” has been substituted for the phrase “legally damaging subject matter” in current rule 3-100. The language is derived from California ethics opinions that have traditionally understood the term “secrets” in Business and Professions Code § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or detrimental to the client.

Comment [2] provides the scope of the information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of confidentiality is broader than the lawyer-client privilege and also includes information acquired by virtue of the representation, regardless of the source, and information protected under the work product doctrine.

Comment [3] explains that the rule provides a narrow exception to the duty of confidentiality derived from Business and Professions Code § 6068(e)(2). Moreover, by distinguishing between “past, completed” and “future or ongoing” criminal acts, the comment provides important guidance to lawyers regarding the scope of the exception.

Comment [4] is a counterpoint to paragraph (e) and provides that a lawyer is not subject to discipline if the lawyer discloses confidential information in compliance with the provisions provided in paragraph (c). The comment also provides the rationale for the provision, i.e., the balance between protecting client confidential information and the prevention of a criminal act resulting in serious bodily injury or death.

Comment [5] provides that there is no duty to disclose confidential information and that the decision to disclose rests solely with the lawyer.

Comment [6] provides critical guidance to lawyers in the form of a list of non-exclusive factors a lawyer should balance in deciding whether to disclose confidential information in order to prevent a criminal act resulting in serious bodily injury or death. The comment further clarifies that the threatened harm need not be imminent for the exception to apply.

Comment [7] provides critical guidance to a lawyer deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act resulting in serious bodily injury or death as required under paragraph (c)(1).

Comment [8] clarifies what is meant by the limiting clause in paragraph (a), “to the extent that the lawyer reasonably believes the disclosure is necessary.” Because of the numerous ways in which a lawyer may disclose confidential information, the comment provides guidance, including examples of relevant circumstances that a lawyer might consider in determining the extent of the permitted disclosure under the circumstances.

Comment [9] requires a lawyer, if reasonable under the circumstances, to inform the client of the lawyer’s ability or decision to disclose confidential information to prevent a criminal act resulting in serious bodily injury or death. The comment provides critical guidance by setting forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made.

Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing a client of the ability or decision to disclose. The comment explains that there is no specific time when the disclosure must be made and provides a range of possibilities.

Comment [11] provides that disclosure of confidential information permitted by paragraph (b) will likely result in a deterioration of the lawyer-client relationship such that withdrawal may be necessary.

Comment [12] provides that other consequences may arise from disclosure permitted by paragraph (b) and identifies other rules a lawyer should consult in determining the lawyer's course of action.

Comment [13] addresses the fact that the rule does not comprehensively address a lawyer's duty of confidentiality and puts the lawyer on notice that there may be other obligations or exceptions not addressed in the rule, none of which the rule is designed to supersede.

### **Post-Public Comment Revisions**

After consideration of public comment, the Commission has added "informed" consent in Comment [2] for consistency to paragraph (a). Also, the Commission has deleted the term "employment or" in Comment [9] as redundant to the concept of "representation."





**Rule 1.6 [3-100] Confidential Information of a Client**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(e)(1) unless the client gives informed consent,\* or the disclosure is permitted by paragraph (b) of this Rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code § 6068(e)(1) to the extent that the lawyer reasonably believes\* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes\* is likely to result in death of, or substantial\* bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable\* under the circumstances:
  - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known\* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this Rule.

**Comment**

*Duty of confidentiality.*

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code § 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful

conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,\* a lawyer must not reveal information protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

*Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.*

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent\* of the client or as authorized or required by the State Bar Act, these Rules, or other law.

*Narrow exception to duty of confidentiality under this Rule.*

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code § 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by § 6068(e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

*Lawyer not subject to discipline for revealing information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule.*

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes\* is likely to result in death or substantial\* bodily harm to an individual. A lawyer who reveals

information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule is not subject to discipline.

*No duty to reveal information protected by Business and Professions Code § 6068(e)(1).*

[5] Neither Business and Professions Code § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by § 6068(e)(1) as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this Rule.

*Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).*

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably\* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted by paragraph (b), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by § 6068(e)(1) are the following:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes\* the lawyer's efforts to persuade the client or a third person\* not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by § 6068(e)(1).

However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

*Whether to counsel client or third person\* not to commit a criminal act reasonably\* likely to result in death or substantial\* bodily harm.*

[7] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm, including persuading the client to take action to prevent a third person\* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person\* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably\* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable\* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person\* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable\* under the circumstances, efforts to persuade the client or third person\* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

*Disclosure of information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably\* necessary to prevent the criminal act.*

[8] Paragraph (d) requires that disclosure of information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons\* who the lawyer reasonably believes\* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable\* depends on the circumstances known\* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the

extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

*Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).*

[9] A lawyer is required to keep a client reasonably\* informed about significant developments regarding the representation. Rule 1.4; Business and Professions Code § 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial\* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) only if it is reasonable\* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b);
- (6) the lawyer's belief,\* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial\* bodily harm to, an individual; and
- (7) the lawyer's belief,\* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

*Avoiding a chilling effect on the lawyer-client relationship.*

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while

another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

*Informing client that disclosure has been made; termination of the lawyer-client relationship.*

[11] When a lawyer has revealed information protected by Business and Professions Code § 6068(e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent\* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person\* from the risk of death or substantial\* bodily harm, the lawyer must withdraw from the representation. (See Rule 1.16.)

*Other consequences of the lawyer's disclosure.*

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with Rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See Rules 1.7 and 1.1.)

*Other exceptions to confidentiality under California law.*

[13] This Rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code § 6068(e)(1) recognized under California law.

**Rule 1.6 [3-100] Confidential Information of a Client**  
**(Commission's Proposed Rule Adopted on October 21-22, 2016 –**  
**Redline to Public Comment Draft Version)**

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(e)(1) unless the client gives informed consent,\* or the disclosure is permitted by paragraph (b) of this Rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code § 6068(e)(1) to the extent that the lawyer reasonably believes\* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes\* is likely to result in death of, or substantial\* bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable\* under the circumstances:
  - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known\* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this Rule.

**Comment**

*Duty of confidentiality.*

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code § 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent

the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,\* a lawyer must not reveal information protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

*Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.*

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the [informed](#) consent\* of the client or as authorized or required by the State Bar Act, these Rules, or other law.

*Narrow exception to duty of confidentiality under this Rule.*

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code § 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by § 6068(e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

*Lawyer not subject to discipline for revealing information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule.*

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes\* is



likely to result in death or substantial\* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule is not subject to discipline.

*No duty to reveal information protected by Business and Professions Code § 6068(e)(1).*

[5] Neither Business and Professions Code § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by § 6068(e)(1) as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this Rule.

*Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).*

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably\* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted by paragraph (b), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by § 6068(e)(1) are the following:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes\* the lawyer's efforts to persuade the client or a third person\* not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

*Whether to counsel client or third person\* not to commit a criminal act reasonably\* likely to result in death ~~of~~or substantial\* bodily harm.*

[7] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm, including persuading the client to take action to prevent a third person\* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person\* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably\* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable\* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person\* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable\* under the circumstances, efforts to persuade the client or third person\* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

*Disclosure of information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably\* necessary to prevent the criminal act.*

[8] Paragraph (d) requires that disclosure of information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than ~~the lawyer reasonably believes\*~~is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons\* who the lawyer reasonably believes\* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable\*

depends on the circumstances known\* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

*Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).*

[9] A lawyer is required to keep a client reasonably\* informed about significant developments regarding the ~~employment or~~ representation. Rule 1.4; Business and Professions Code § 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial\* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) only if it is reasonable\* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b);
- (6) the lawyer's belief,\* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial\* bodily harm to, an individual; and
- (7) the lawyer's belief,\* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

*Avoiding a chilling effect on the lawyer-client relationship.*

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that

chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

*Informing client that disclosure has been made; termination of the lawyer-client relationship.*

[11] When a lawyer has revealed information protected by Business and Professions Code § 6068(e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation—~~(see Rule 1.16(a))~~, unless the client has given informed consent\* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person\* from the risk of death or substantial\* bodily harm, the lawyer must withdraw from the representation. (See Rule 1.16.)

*Other consequences of the lawyer's disclosure.*

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with Rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See Rules 1.7 ~~(Conflicts of Interest: Current Clients)~~ and 1.1 ~~(Competence)~~.)

~~[13]~~—*Other exceptions to confidentiality under California law.*

[13] This Rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code § 6068(e)(1) recognized under California law.

**Rule 1.6 [3-100] Confidential Information of a Client**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~ (e)(1) ~~without~~unless the client gives informed consent ~~of the client,\*~~ or ~~as provided in~~the disclosure is permitted by paragraph (Bb) of this ~~rule~~Rule.
- (Bb) A ~~member~~lawyer may, but is not required to, reveal ~~confidential~~ information ~~relating to the representation of a client to the~~protected by Business and Professions Code § 6068(e)(1) to the extent that the ~~member~~lawyer reasonably believes<sup>\*</sup> the disclosure is necessary to prevent a criminal act that the ~~member~~lawyer reasonably believes<sup>\*</sup> is likely to result in death of, or substantial<sup>\*</sup> bodily harm to, an individual, as provided in paragraph (c).
- (Cc) Before revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (Bb), a ~~member~~lawyer shall, if reasonable<sup>\*</sup> under the circumstances:
- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial<sup>\*</sup> bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the ~~member's~~lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (Bb).
- (Dd) In revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (Bb), the ~~member's~~lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known<sup>\*</sup> to the ~~member~~lawyer at the time of the disclosure.
- (Ee) A ~~member~~lawyer who does not reveal information permitted by paragraph (Bb) does not violate this ~~rule~~Rule.

**Discussion Comment**

Duty of confidentiality.

[1] ~~Duty of confidentiality.~~ Paragraph (Aa) relates to a ~~member's~~lawyer's obligations under Business and Professions Code ~~section~~§ 6068, ~~subdivision~~ (e)(1), which provides it is a duty of a ~~member~~lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” A ~~member's~~lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client-lawyer~~lawyer-client relationship. The client is thereby encouraged

to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally-damaging subject matter~~detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (Aa) thus recognizes a fundamental principle in the ~~client-lawyer~~lawyer-client relationship, that, in the absence of the ~~client's~~client's informed consent,\* a ~~member~~lawyer must not reveal information ~~relating to the representation~~protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] ~~Client-lawyer~~Lawyer-client confidentiality encompasses the ~~attorney-client~~lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.

[2] The principle of ~~client-lawyer~~lawyer-client confidentiality applies to information ~~relating to a lawyer acquires by virtue of~~ the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the ~~attorney-client~~lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The ~~attorney-client~~lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a ~~member~~lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A ~~member's~~lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the ~~client-lawyer~~lawyer-client relationship of trust and prevents a ~~member~~lawyer from revealing the ~~client's—confidential~~client's information even when not ~~confronted with~~subjected to such compulsion. Thus, a ~~member~~lawyer may not reveal such information except with the informed consent\* of the client or as authorized or required by the State Bar Act, these ~~rules~~Rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.*

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited ~~under by~~ Business ~~&and~~ Professions Code ~~section§~~ 6068, ~~subdivision—(e)(1)~~. Paragraph (B), ~~which restates b) is based on~~ Business and Professions Code ~~section§~~ 6068, ~~subdivision—(e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual~~which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code ~~section§~~ 956.5, which relates to the evidentiary ~~attorney-client~~lawyer-client privilege, sets forth a similar express exception. Although a ~~member~~lawyer is not permitted to reveal ~~confidential—~~information protected by §



6068(e)(1) concerning a ~~client's~~client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

~~[4] Member~~Lawyer not subject to discipline for revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule. ~~Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2),~~

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a ~~member~~lawyer reasonably believes\* is likely to result in death or substantial\* bodily harm to an individual. A ~~member~~lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this ~~rule~~Rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code § 6068(e)(1).

~~[5] No duty to reveal confidential information.~~ Neither Business and Professions Code ~~section~~§ 6068, ~~subdivision~~ (e)(2) nor ~~this rule~~paragraph (b) imposes an affirmative obligation on a ~~member~~lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. ~~(See rule 1-100(A).) A~~ ~~member~~ lawyer may decide not to reveal ~~confidential~~such information. Whether a ~~member~~lawyer chooses to reveal ~~confidential~~ information protected by § 6068(e)(1) as permitted under this ~~rule~~Rule is a matter for the individual ~~member~~lawyer to decide, based on all the facts and circumstances, such as those discussed in ~~paragraph~~Comment [6] of this ~~discussion~~Rule.

Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).

~~[6] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph (~~B~~b) is ordinarily a last resort, when no other available action is reasonably\* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted ~~under~~by paragraph (~~B~~b), the ~~member~~lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~ information protected by § 6068(e)(1) are the following:

- (1) the amount of time that the ~~member~~lawyer has to make a decision about disclosure;
- (2) whether the client or a ~~third-party~~third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the ~~member~~lawyer believes\* the ~~member's~~lawyer's efforts to persuade the client or a third person\* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the ~~client's~~client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 4I of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the ~~member~~lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A ~~member~~lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the ~~confidential~~ information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a ~~member~~lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

[7] ~~Counseling~~ Whether to counsel client or third person\* not to commit a criminal act reasonably\* likely to result in death ~~or~~for substantial\* bodily harm.

[7] Subparagraph (Gc)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information, ~~the member~~ protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable\* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial\* bodily harm, ~~or if~~ including persuading the client to take action to prevent a third person\* from committing or continuing a criminal act. If necessary, ~~the client may be persuaded to~~ do both. The interests protected by such counseling ~~is the client's interest~~ are the client's interests in limiting disclosure of ~~confidential~~ protected information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the ~~member's~~lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person\* from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the ~~member~~lawyer would cease ~~as because~~ the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~lawyer who contemplates making adverse disclosure of ~~confidential~~ protected information may reasonably\* conclude that the compelling interests of the ~~member~~lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the ~~member~~lawyer should, if reasonable\* under the circumstances, first advise the client of the ~~member's~~lawyer's intended course of action. If a client or another person\* has already acted but the



intended harm has not yet occurred, the ~~member~~lawyer should consider, if reasonable\* under the circumstances, efforts to persuade the client or third person\* to warn the victim or consider other appropriate action to prevent the harm. Even when the ~~member~~lawyer has concluded that paragraph (Bb) does not permit the ~~member~~lawyer to reveal ~~confidential~~ information, ~~the member~~ protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the ~~client's~~client's best interest to consent to the ~~attorney's~~attorney's disclosure of that information.

[8] *Disclosure of ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably\* necessary to prevent the criminal act.* ~~Under paragraph~~

~~(D).~~[8] Paragraph (d) requires that disclosure of ~~confidential~~ information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than ~~the member reasonably believes~~is necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential~~ information to only those persons\* who the ~~member~~lawyer reasonably believes\* can act to prevent the harm. Under some circumstances, a ~~member~~lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable\* depends on the circumstances known\* to the ~~member~~lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the ~~member's~~lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the ~~member~~lawyer.

*Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).*

[9] ~~Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).~~—A ~~member~~lawyer is required to keep a client reasonably\* informed about significant developments regarding the ~~employment or~~ representation. Rule ~~3-500.1.4~~; Business and Professions Code, ~~section~~ § 6068, ~~subdivision~~ (m). Paragraph (Cc)(2), however, recognizes that under certain circumstances, informing a client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~under~~protected by § 6068(e)(1) as permitted in paragraph (Bb) would likely increase the risk of death or substantial\* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the ~~client's~~client's family, or to the ~~member~~lawyer or the ~~member's~~lawyer's family or associates. Therefore, paragraph (Cc)(2) requires a ~~member~~lawyer to inform the client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~as provided~~protected by § 6068(e)(1) as permitted in paragraph (Bb) only if it is reasonable\* to do so under the circumstances. Paragraph (Cc)(2) further recognizes that the appropriate time for the ~~member~~lawyer to inform the client may vary depending upon the circumstances. (See ~~paragraph~~Comment [10] of this ~~discussion~~Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;

- (2) the frequency of the ~~member's~~lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the ~~member~~lawyer and client have discussed the ~~member's~~lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the ~~client's~~client's matter will involve information within paragraph (Bb);
- (6) the ~~member's~~lawyer's belief,\* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial\* bodily harm to, an individual; and
- (7) the ~~member's~~lawyer's belief,\* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

*Avoiding a chilling effect on the lawyer-client relationship.*

[10] ~~Avoiding a chilling effect on the lawyer-client relationship.~~—The foregoing flexible approach to the ~~member's~~lawyer's informing a client of his or her ability or decision to reveal ~~confidential~~—information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraphComment [1].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member's~~lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another ~~member~~lawyer may choose to inform a client only at a point when that client has imparted information that ~~may fall under~~comes within paragraph (Bb), or even choose not to inform a client until such time as the ~~member~~lawyer attempts to counsel the client as contemplated in Discussion paragraphComment [7]. In each situation, the ~~member will have discharged properly the requirement under subparagraph (C)~~lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

[14] ~~Informing client that disclosure has been made; termination of the lawyer-client relationship.~~

[11] When a ~~member~~lawyer has revealed ~~confidential~~—information underprotected by Business and Professions Code § 6068(e) as permitted in paragraph (Bb), in all but extraordinary cases the relationship between ~~member~~lawyer and client that is based on trust and confidence will have deteriorated so as to make the ~~member's~~lawyer's representation of the client impossible. Therefore, when the ~~member~~relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation—~~(see rule 3-700(B))~~, unless the ~~member is able to obtain the client's~~client has given informed consent\* to the ~~member's~~lawyer's continued representation. The ~~member~~lawyer normally must inform the client of the fact of the ~~member's~~lawyer's disclosure—unless. If the ~~member~~lawyer has a compelling interest in not informing the client, such as to protect the ~~member~~lawyer, the ~~member's~~lawyer's

family or a third person\* from the risk of death or substantial\* bodily harm-, the lawyer must withdraw from the representation. (See Rule 1.16.)

Other consequences of the lawyer's disclosure.

[12] ~~Other consequences of the member's disclosure.~~ Depending upon the circumstances of a ~~member's~~lawyer's disclosure of ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a ~~member~~lawyer must address. For example, ~~if a member will be called~~lawyer who is likely to testify as a witness in ~~the client's matter, then rule 5-210 should be considered~~a matter involving a client must comply with Rule 3.7. Similarly, the ~~member should~~lawyer must also consider his or her duties of loyalty and ~~competency (rule 3-110)~~competence. (See Rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law.

[13] ~~Other exceptions to confidentiality under California law.~~This Rule ~~3-100~~ is not intended to augment, diminish, or preclude ~~reliance upon,~~ any other exceptions to the duty to preserve ~~the confidentiality of client~~ information protected by Business and Professions Code § 6068(e)(1) recognized under California law.



**Proposed Rule 1.6 [3-100] Confidential Information of a Client**  
**Synopsis of Public Comments**

**TOTAL = 6**      **A = 0**  
**D = 0**  
**M = 6**  
**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-2016-43k	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	M	Cmt. 11	Comment [11] is unclear because it states that attorney may continue employment with client's consent despite the situation contemplated requiring mandatory withdrawal.	The Commission agrees that Comment [11] can cause confusion by designating the described situation as one requiring withdrawal when in fact the circumstances would require a more nuanced response, e.g., the lawyer remonstrating with the client on an appropriate course of conduct that would not result in a rule violation. Accordingly, the Commission has deleted the reference in the comment to Rule 1.16(a)(2). The remainder of the comment is consistent with the lawyer's duties.
X-2016-66f	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(d), cmt. 11	1. Sub. (d) should state that the lawyer's disclosure must be no more than the lawyer reasonably believes is necessary.	1. The Commission declines to make the suggested change as unnecessary. A lawyer is obligated to maintain in violate the secrets of the client "at his or her peril." There is no reason for a different standard here than there is in other situations where a lawyer is authorized or permitted to reveal confidential client information. In any event, paragraph (d) arguably has an objective standard by its reference to paragraph (b),

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

**Proposed Rule 1.6 [3-100] Confidential Information of a Client**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>2. A comment should be added discussing the limitations regarding disclosure of confidential information relating to disputes between attorney and client.</p> <p>3. Comment 11 should be clarified to reflect the fact that disclosure of confidential information creates a presumption that the relationship has deteriorated, requiring withdrawal absent client's consent.</p>	<p>which contains a reasonable belief standard.</p> <p>2. The Commission declines to make the suggested change. Rule 1.6 is limited to clarifying the single express exception in Bus. &amp; Prof. Code § 6068(e) that permits disclosure of confidential information to prevent a life-threatening criminal act. Disputes between client and lawyer, except as they might relate to a life-threatening criminal act, are beyond the scope of the rule.</p> <p>3. The Commission declines to make the suggested change. Please refer to response to COPRAC, X-2016-43k, above.</p>
X-2016-76e	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	Cmts. 5, 7, 11	Correct typographical errors in comments 5, 7, and 11.	The Commission thanks the commenter for pointing out these oversights and has made the requested changes.
X-2016-96f	Bar Association of San Francisco (BASF) (Banola) (9-27-16)	Y	M	MR 1.6(b)(5)	Requests that the rule include an attorney self-defense exception to the duty of confidentiality similar to Model Rule 1.6, but which would be applicable only to	The Commission declines to make the suggested changes. As noted in the response to SDCBA, X-2016-66c, Rule 1.6 is limited to clarifying the

**Proposed Rule 1.6 [3-100] Confidential Information of a Client**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>a former client. The provision would provide:</p> <p>A lawyer may reveal information relating to the representation of a former client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the former client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the former client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the former client.</p> <p>The foregoing provision is consistent with California law.</p>	<p>single express exception in Bus. &amp; Prof. Code § 6068(e)(2) that permits disclosure of confidential information to prevent a life-threatening criminal act. Disputes between client and lawyer, and a lawyer's ability to use confidential information to defend himself or herself, except as the disputes might relate to a life-threatening criminal act, are beyond the scope of the rule. Absent a legislative amendment to section 6068(e) that would parallel the commenter's suggested change, it cannot be made to proposed Rule 1.6 (current rule 3-100).</p> <p>In summary, changing the Rule to include exceptions under the Evidence Code, such as §958, would significantly expand the rule's scope. The intersection of the exceptions to the privilege and the duty of competence in §6068(e) has and continues to be a matter of case law.</p>
X-2016-104I	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	Cmts.1, 2, 3, 4, 5, 7, 9, and 10	Comments 1, 2, 3, 4, 5, 7, 9, and 10 are superfluous and unnecessary.	The Commission declines to make the requested change. In 2003, as part of the legislative enactment that effectuated the exception to §

**Proposed Rule 1.6 [3-100] Confidential Information of a Client  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						6068(e) to permit disclosure of confidential information to prevent a life-threatening criminal act, the State Bar, in consultation with the Supreme Court, was directed to promulgate a rule of professional conduct “regarding professional responsibility issues related to the implementation of this act.” <sup>2</sup> The bill also identified several issues that the rule drafters should consider in drafting the rule. <sup>3</sup> The Rule 1.6 comments identified by the commenter as “superfluous

<sup>2</sup> Section (3) provided of AB 1101, the bill that amended § 6068(e) provided:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney’s discretion to reveal the client’s or prospective client’s confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client’s confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client’s confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

<sup>3</sup> See note 2, section 3(b).



**Proposed Rule 1.6 [3-100] Confidential Information of a Client**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						and unnecessary” are essential to the State Bar’s reasoned and balanced response to the legislative directive to provide guidance to California lawyers regarding the application of the first express exception to the duty of California since § 6068(e) was first adopted in 1872.
	San Diego County Bar Association (SDCBA) (McIntyre) (10-3-16)	Y	M	Cmt. [2]	<p>Requests the following modification to proposed Comment [2]:</p> <p>[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, <u>including information obtained from third-parties, or which might be found in the public record, if learned during the course of the representation and the revelation of which would be detrimental or embarrassing to the client; it necessarily</u> encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege. matters protected by the work product doctrine, and matters protected under ethical standards of</p>	The Commission declines to make most of the requested changes. It does not consider the added statement to be accurate, e.g., the duty of confidentiality is not temporally defined by what a lawyer might have learned <i>during</i> the representation. Including that language would be misleading. The “public record” clarification is duplicative of Comment [3]. The Commission also disagrees with the citation to additional authority, particularly to the State Bar ethics opinion which are not cited in the Rules. However, the Commission agrees that the word “consent” in the last sentence should be modified by the word “informed” and has made that change.

**Proposed Rule 1.6 [3-100] Confidential Information of a Client**  
**Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>confidentiality, all as established in law, rule and policy. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal.Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.App.3d 614, 621 (1 20 Cal.Rptr. 253); <a href="#">Dietz v. Meisenheimer (2009) 177 Cal.App.41 771, 786 [99 Cal.Rptr.3d 614]</a>; <a href="#">Cal. State Bar Formal Opn. No. 2016-195</a>.) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality, however, is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client 's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the <a href="#">informed</a> consent of the client or as authorized or required by the State Bar Act, these Rules, or other law.</p>	

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.2**  
**(No Current Rule)**  
**Use of Current Client's Information**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-100 (prohibition on disclosure of confidential information) and Business and Professions Code § 6068(e) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterparts, a series of rules that address confidentiality issues as they might arise in a different contexts: Model Rules 1.6 (prohibition on *disclosure* of a *current* client's confidential information), 1.8(b) (prohibition against *use* of confidential information to a current client's disadvantage), and 1.9(c)(1) and (2) (prohibition against *use* of confidentiality to a *former* client's disadvantage and prohibition on *disclosure* of a *former* client's confidential information). The result of the Commission's evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules' framework of having separate rules that regulate different aspects of protecting the confidential information of a lawyer's clients: proposed rule 1.6 (prohibiting disclosure of a current client's confidential information); 1.8.2 (prohibiting use of a current client's confidential information to the client's disadvantage); and 1.9(c) (prohibiting use or disclosure of a former client's confidential information); and
- (2) proposed Rule 1.8.2 (Use of Current Client's Information), which regulates the use of a current client's confidential information. Proposed Rule 1.8.2 is derived from Model Rule 1.8(b) but incorporates language that more accurately reflects the source of confidentiality duties in California.

Proposed rule 1.8.2 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Confidentiality Framework**. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of lawyers' confidentiality duties. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific confidentiality duties. This is of particular concern in California, which traditionally has the strictest duty of confidentiality in the country. At the same time, this approach will promote a national standard for how the confidentiality duty in different contexts is organized within the Rules.<sup>1</sup>

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<sup>1</sup> Every other jurisdiction in the country has adopted the ABA confidentiality rules framework that regulates the duty through three provisions: Model Rules 1.6, 1.8(b) and 1.9(b).

**2. Recommendation to expressly address the duty owed to current clients not to use their confidential information to the client's disadvantage.** As noted, the proposed rule regulates a lawyer's use of a client's confidential information. The existing duties of confidentiality and loyalty in the Rules (rules 3-100 and 3-310(E)) and State Bar Act (Business and Professions Code § 6068(e)) do not expressly address the type of client protection advanced by proposed rule 1.8.2. These current provisions are lacking to the extent that they could be narrowly construed to prohibit improper disclosure of client information (confidentiality) or the actual representation of an adverse interest (conflicts of interest). Such an interpretation could impair disciplinary actions that would otherwise address the type of misconduct – use of confidential information – that is targeted by this proposed rule.

The Commission did consider that a new rule might be unnecessary because § 6068(e)(1) is not limited to protection of client information. Section 6068(e) is arguably broad enough to encompass the trust and confidence that a client reposes in an attorney, the policy that underlies the rule. Compare the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] to the proposed Rule. On balance, however, the Commission determined that a rule which expressly prohibits the use of a client's confidential information to the client's disadvantage is preferable to relying on implied duties parsed from the Nineteenth Century language of section 6068(e)(1). As such, the proposed rule's express prohibition will better promote compliance and facilitate enforcement.

**Text of Rule 1.8.2.** Proposed rule 1.8.2 is a single paragraph rule that largely tracks Model Rule 1.8(b). It substitutes the term “information protected by Business and Professions Code § 6068(e)(1)” for the Model Rules’ term “information relating to the representation of a client” because § 6068(e)(1) is the source of the confidentiality duty in California. It also adds “or the State Bar Act” to the exception clause because lawyers in California are uniquely regulated by the State Bar Act. The Model Rule’s phrase “or required” has been deleted because there is no provision in either the Rules or the State Bar Act that requires a lawyer to compromise the duty of confidentiality owed a client.

There is a single comment to proposed Rule 1.8.2 that clarifies that a lawyer also violates the lawyer's duty of loyalty to the client when the lawyer uses the client's information to the client's disadvantage.

### **National Background – Adoption of Model Rule 1.8.2**

Every jurisdiction except California has adopted some version of Model Rule 1.8(b). Thirty-five jurisdictions have adopted Model Rule 1.8, paragraph (b) verbatim;<sup>2</sup> 12 jurisdictions have adopted a rule provision substantially similar to 1.8(b)<sup>3</sup>; three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b).<sup>4</sup>

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<sup>2</sup> The 35 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia.

<sup>3</sup> The twelve jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Texas [the corresponding rule is Texas Rule 1.05(b)], Virginia and Wyoming.

<sup>4</sup> The three jurisdictions are: Georgia, Mississippi and North Dakota.

### **Post-Public Comment Revisions**

None.



**Rule 1.8.2 Use of Current Client's Information**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) 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) to the disadvantage of a current client.





**Rule 1.8.2 ~~Conflict Of Interest: Use of Current Clients:-~~  
Specific Rules Client's Information**  
(Redline Comparison of the Proposed Rule to ABA Model Rule)

\* \* \* \* \*

~~(b)~~ A lawyer shall not use a client's information ~~relating to representation of a client~~protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,\* except as permitted ~~or required~~ 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) to the disadvantage of a current client.

\* \* \* \* \*

~~Use of Information Related to Representation~~

~~[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.~~

\* \* \* \* \*



**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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.6**  
**(Current Rule 3-310 (F))**  
**Compensation From One Other Than Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310(F) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.8(f) (Conflict of Interest Current Clients: Specific Rules), pertaining to accepting compensation for representing a client from one other than the client. The result of the Commission’s evaluation is proposed rule 1.8.6 (Compensation From One Other Than Client). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 3-310(F) prohibits a member from accepting compensation from one other than the client unless there is no interference with the lawyer’s independent professional judgment and the duty of confidentiality owed to a client. The rule is intended to protect the client in situations where the lawyer’s independent professional judgment may become compromised based upon the lawyer’s fees being paid by one other than the client. Proposed rule 1.8.6 retains the substance of current rule 3-310(F) while expanding the public protection of the current rule. The proposed rule expands the current language of “accepting compensation” to include “enter into an agreement for or charge or accept compensation.”

In general, the proposed rule would retain the disclosure and waiver requirements found in current rule 3-310(F)(3). A substantive change that is recommended by the Commission is the addition of a new timing requirement in proposed paragraph (c) that requires a lawyer to obtain a client’s consent “at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . .” The rationale for this addition is to enhance the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. A possible concern posed by this addition is whether a lawyer’s ability to render services to the client in time sensitive matters would be compromised; however, this concern is mitigated by including the phrase “as soon thereafter as reasonably practical.”

Paragraph (a), incorporates the concept that the lawyer’s independent professional judgment shall not be compromised due to an agreement between the lawyer and a third-party payor. This is consistent with the language of 3-310(F)(1) and Model Rule 1.8 (f)(2).

Paragraph (b), the current rule uses the phrase “information relating to the representation of the client” to describe the information protected by the duty of confidentiality. The proposed rule substitutes the phrase “information protected by the Business and Professions Code § 6068 (e)(1) and Rule 1.6.” The Commission believes the proposed phrase provides enhanced guidance by citing to the specific provisions of California law that establish a lawyer’s duty of confidentiality.

Paragraph (c), of proposed rule 1.8.6 requires the lawyer to obtain a client's consent "at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . ." (See discussion above.)

Paragraph (c)(1). The current rule excepts a lawyer from the requirement to obtain consent where the lawyer's compensation is otherwise authorized by law. The proposed rule would expand the exemption to include court orders.

Paragraph (c)(2) excepts a lawyer from the requirement to obtain consent where the lawyer is rendering legal services on behalf of any public agency that provides legal services to the public or other public agencies. The proposed rule expands the concept of public agency to include non-profit organizations.

Proposed rule 1.8.6 contains four comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [1], which recognizes the existence of overlapping duties in a situation where the lawyer represents both a client and the third-party payor in the same matter. Comment [2] has been added to clarify the scope of the exemption from the disclosure and consent requirements under paragraph (c). Comment [3] further clarifies the scope of the rule as it relates to existing relationships between insurers and insureds. Comment [4] acknowledges that there might be some limited situations where a lawyer might not be able to obtain a client's consent.

#### **Post-Public Comment Revisions**

None.

**Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and
- (c) the lawyer obtains the client's informed written consent\* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably\* practicable, provided that no disclosure or consent is required if:
  - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
  - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

**Comment**

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably\* practicable.





**Rule 1.8.6 [3-310(F)] ~~Avoiding the Representation of Adverse Interests~~  
Compensation From One Other Than Client  
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(F)~~ A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1)(a)~~ ~~There~~ there is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

~~(2)(b)~~ ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code ~~section~~§ 6068, ~~subdivision (e)(1)~~ and Rule 1.6; and

~~(3)(c)~~ ~~The member~~ the lawyer obtains the client's informed written consent\* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably\* practicable, provided that no disclosure or consent is required if:

~~(a)(1)~~ ~~such~~ nondisclosure or the compensation is otherwise authorized by law or a court order; or

~~(b)(2)~~ the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

**~~Discussion~~Comment**

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] ~~Paragraph (F)~~ This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors'

committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably\* practicable.

**Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ay	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	M		COPRAC supports the proposed rule but recommends that the first sentence be rewritten. The sentence as presently drafted reads: "A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless: ...." This language seems awkward and appears to have a misplaced prepositional phrase. The statement "from one other than the client" looks like it should modify "enter into an agreement for, charge, or accept compensation from" and not "representing a client." We suggest revising the first sentence to read: "A lawyer shall not enter into an agreement for, charge, or accept compensation from one other than a client for representing that client unless: ...."	The Commission has not made the suggested change. The Commission believes the requested language is implicit in the rule. In any event, the language is verbatim from current rule 3-310(F) and the Commission is not aware that it has caused any problems.
X-2016-82b	Polish, James (09-26-16)	No	M		1. I do not believe that this rule should apply to a situation where the client has applied for insurance or has otherwise requested and is receiving payments under an indemnity agreement.	1. The Commission has not made any changes to the rule or comment. It believes that Comment [3] adequately addresses the issue.

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

**Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client  
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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					2. Also, the comment should be clarified to specify whether the rule applies where one of multiple clients in a matter pays the legal expenses of the others, a very common situation.	2. The Commission does not believe such a comment is necessary. The rule applies to any situation in which a third party is compensating the lawyer for representing a client. The situation the commenter identifies clearly falls within the rule.
X-2016-104r	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		<p>1. OCTC supports this rule and its Comments.</p> <p>2. OCTC believes, however, that a Comment should be added requiring lawyers to advise both the client and the paying non-client in writing that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client, and, even with such designation, the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to OCTC because they do not understand that the lawyer cannot communicate with them.</p>	<p>1. No response required.</p> <p>2. The Commission did not make the suggested change. The suggested addition would exceed the scope of the rule and add practice requirements that should not be in the Rules.</p>

**Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client  
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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-120g	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		LGBT Bar of LA supports the proposed revisions to 1.8.6	No response required.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.8**  
**(Current Rule 3-400)**  
**Limiting Liability to Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-400 (Limiting Liability to Client) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(h) (Conflict Of Interest: Current Clients: Specific Rules) as well as relevant California statutes, rules, and case law. This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.8.8 carries forward the substance of current rule 3-400. The main issues considered were whether to require a lawyer to advise the client to seek the advice of an independent lawyer regarding the settlement, and whether to not require a lawyer to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement. The Commission adopted both substantive changes.

Paragraph (a) restricts a lawyer from contracting prospectively with the client for the purpose of limiting liability to the client for the lawyer’s professional malpractice.

Paragraph (b) restricts a lawyer from settling a claim or potential claim for the lawyer’s professional malpractice liability to a current or former client, unless the client is either:

- (1) represented by an independent lawyer concerning the settlement;
- (2) advised by the lawyer in writing to seek the advice of an independent lawyer of the client’s choice regarding the settlement and the client is provided with a reasonable opportunity to seek that advice.

Comment [1] clarifies that Paragraph (b) of the proposed rule does not absolve the lawyer from their obligation to comply with other law, specifically California Business and Professions Code § 6090.5.<sup>1</sup>

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<sup>1</sup> Business and Professions Code § 6090.5:

- (a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:
  - (1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.
  - (2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.
  - (3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.
- (b) This section applies to all settlements, whether made before or after the commencement of a civil action.

Comment [2] is derived from the Discussion section of current rule 3-400 and adds that a lawyer may reasonably limit the scope of representation, which cross-references proposed rule 1.2 (Scope of Representation and Allocation of Authority).

**Post-Public Comment Revisions**

None.



**Rule 1.8.8 [3-400] Limiting Liability to Client**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
  - (1) represented by an independent lawyer concerning the settlement; or
  - (2) advised in writing\* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable\* opportunity to seek that advice.

**Comment**

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably\* limiting the scope of the lawyer's representation. See Rule 1.2(b).



**Rule 1.8.8 [3-400] Limiting Liability to Client**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

A ~~member~~lawyer shall not:

- (A)(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client or former client is ~~informed~~either:
- (1) represented by an independent lawyer concerning the settlement; or
- (B)(2) advised in writing ~~that~~\* by the ~~client may~~lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and ~~is~~ given a reasonable\* opportunity to seek that advice.

**Comment~~Discussion~~**

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule ~~3-400 is~~does not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is it intended to~~does it prevent a ~~member~~lawyer from reasonably\* limiting the scope of the ~~member's employment~~or lawyer's representation. See Rule 1.2(b).



**Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-14	Greene Radovsky Maloney Share & Hennigh LLP (Fotenos) (07-29-16)	Yes	M	1.8.8	Modify the proposed rule to conform to ABA Model Rule 1.8(h)(1) that permits lawyers to limit their prospective liability to a client for malpractice when a client is independently represented in making the agreement.	The Commission believes that proposed rule 1.8.8 should not be changed to conform to Mode Rule 1.8(h)(1). In considering proposed California Rule 1.8.8 vs. ABA Model Rule 1.8(h)(1), the Commission deemed California's long standing absolute prohibition of prospective limitation of malpractice liability as better policy and more client protective. The ABA Model Rule would permit a lawyer to contract with a client to prospectively limit malpractice liability where the client is independently represented in making the agreement. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm's liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed in hindsight. The Commission believes such situations are rare, but the risk that such a provision might be used with clients not

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

**Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						experienced in the use of legal services is great. Additionally, Comment 2 provides appropriate guidance noting that “This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer’s representation. See Rule 1.2(b).”
X-2016-43p	COPRAC (Baldwin) (8-12-16)	Y	A	1.8.1	Supports adoption of proposed Rule 1.8.8.	No response required.
X-2016-104t	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M		<p>1. OCTC supports this rule. OCTC would recommend, however, that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA’s Model Rule limiting liability because that rule does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA’s version of rule 3-300 (ABA rule 1.8(a)). (See Hazard &amp; Hodge, “The Law of Lawyering,” 3rd Edition, § 12.19.)</p> <p>2. OCTC supports Comment 1.</p>	<p>1. The Commission did not make the requested change. The Commission determined the protection of the client’s interest to be appropriately addressed by the inclusion in the Rule of independent counsel requirements. That is what the current rule applies and the Commission is not aware of any problems that warrant a change to the rule.</p> <p>2. No response required.</p>

**Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client**  
**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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					3. OCTC finds the first part of Comment 2 to be vague. It does not understand what the Comment means by “customary qualifications and limitations.” This needs to be either explained or the Comment should be stricken. Without an explanation or definition of what the Comment is referring to, this rule will be difficult to understand or enforce, or will end up covering something not intended to be covered. It is not necessary to have a Comment that states the rule does not prevent a lawyer from reasonably limiting the scope of the representation. This rule on its face does not address that issue and limiting the scope of representation does not limit liability.	3. The Commission did not make a change to Comment [2]. The questioned language of comment [2] comes directly from the Discussion to current rule 3-400. The Commission is not aware of any confusion or problems in enforcement caused by that language.
X-2016-120i	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		Supports adoption of proposed Rule 1.8.8.	No response required.





**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.9**  
**(Current Rule 4-300)**  
**Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 4-300 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. California has had a variation of current rule 4-300 since 1928. However, there is no counterpart to rule 4-300 in the American Bar Association (“ABA”) Model Rules. The result of the Commission’s evaluation is proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered when drafting this proposed rule was whether the proposed rule’s language should conform to the Probate Code provisions which allow an attorney to purchase a client’s property at a Probate sale under certain circumstances. Current rule 4-300 prohibits a lawyer from purchasing property at various sales under legal process<sup>1</sup> where the lawyer, or any other lawyer affiliated with the lawyer or the lawyer’s firm, is acting either as an attorney for a party or as an executor, receiver, trustee, administrator, guardian, or conservator. The rule also prohibits a lawyer from representing the seller at such a sale in which the buyer is a spouse or relative of the lawyer or another attorney in the lawyer’s firm or is an employee of the lawyer or the lawyer’s firm. However, current rule 4-300 conflicts with Probate Code sections 9880-9885, which do permit a lawyer for an estate’s personal representative to make *probate* purchases, upon court order authorizing the purchase, provided all known heirs and devisees are notified and consent.<sup>2</sup> Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

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<sup>1</sup> These sales include a probate, foreclosure, receiver’s, trustee’s, or judicial sale.

<sup>2</sup> Probate Code §§ 9881 and 9882 provide:

**9881.** Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if all of the following requirements are satisfied:

(a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.

(b) The written consents are filed with the court.

(c) The purchase is shown to be to the advantage of the estate.

**9882.** Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative’s attorney to purchase the property.

After careful consideration of whether to conform the current rule to the Probate Code, the Commission has approved retaining current rule 4-300, revised to incorporate the Commission's global changes, i.e., Model Rule numbering, format and style and substitution of the word "lawyer" for "member."

There are several reasons for the Commission's recommendation. First, when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. Second, rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct.<sup>3</sup> Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. Third, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. Lastly, the Office of the Chief Trial Counsel has on three separate occasions submitted a comment urging the prior Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.

#### **Post-Public Comment Revisions**

None.

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<sup>3</sup> See *Eschwig v. State Bar* (1969) 1 Cal. 3d 8 (attorney purchased principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client.").

**Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure  
or a Sale Subject to Judicial Review  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm\* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm\* or is an employee of the lawyer or the lawyer's law firm.\*



**Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure  
or a Sale Subject to Judicial Review  
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not directly or indirectly purchase property at a probate, foreclosure, ~~receiver's, trustee's~~receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that ~~member~~lawyer or with that ~~member's~~lawyer's law firm\* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (Bb) A ~~member~~lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer's law firm\* or is an employee of the ~~member~~lawyer or the ~~member's~~lawyer's law firm.\*



**Proposed Rule 1.8.9 [4-300] Purchasing Property at a  
Foreclosure or a Sale Subject to Judicial Review  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**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-2016-43ba	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-2016)	N	M	1.8.9	Proposed Rule 1.8.9 directly conflicts with certain Probate Code sections 9881 and 9882, which expressly permit the purchases by a lawyer that the proposed rule prohibits. Such a direct conflict between statutory law and ethical rules is confusing and a trap for the unwary, and implies that the laws passed by our legislature expressly authorized conduct that is unethical. COPRAC supports the approach proposed by the first Rules Revision Commission ("RRC1") in its proposed Rule 1.8.9, which exempted any transaction permitted by the Probate Code, as long as the transaction did not violate any other ethical rule. <sup>2</sup>	The Commission disagrees that a rule excepting sales pursuant to Probate Code §§ 9881 and 9882 should be substituted for the Commission's proposed rule. There are several reasons for the Commission's recommended rule: <i>First</i> , when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code.

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

<sup>2</sup> RRC1's proposed Rule 1.8.9 provided:

**Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a  
Foreclosure or a Sale Subject to Judicial Review  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**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
					The public is not protected by an inflexible rule that prohibits transactions that a court has determined to be to the advantage of the estate and which are fair, reasonable and subject to independent advice (as required by Rule 1.8.1).	Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. <i>Second</i> , Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct. Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. <i>Third</i> , the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that

**Comment**

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.



**Proposed Rule 1.8.9 [4-300] Purchasing Property at a  
Foreclosure or a Sale Subject to Judicial Review  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**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
						<p>under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. <i>Lastly</i>, the Office of the Chief Trial Counsel on three separate occasions submitted a comment urging the first Commission or this Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.</p> <p>The commenter's last point is that the court will confirm the lawyer's compliance with proposed Rule 1.8.1 [current rule 3-300] and its requirement to provide to the client [estate] an opportunity to seek independent advice and will result in public protection. However, Probate Code § 9881, the statute under which a lawyer would seek to have a court approve the sale, requires only "written consent" and does not require that the court determine that the transaction or acquisition is fair and reasonable to the estate</p>

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a  
Foreclosure or a Sale Subject to Judicial Review  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**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
						or beneficiaries and that the terms are fully disclosed in writing with an opportunity to seek the advice of independent counsel. RRC1's approach would not enhance public protection.
X-2016-104u	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.
X-2016-120j	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.11**  
**(No Current Rule)**  
**Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: Model 1.7 (current client conflicts) [rule 3-310(B) and (C); 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

As part of its study of conflicts of interest rules, the Commission also evaluated Model Rule 1.8, which compiles in a single rule 10 unrelated conflicts of interest concepts. In addition, where applicable the Commission has studied the current California rules that correspond to each of the conflicts concepts in Model Rule 1.8. The Model Rule 1.8 provisions and their California counterparts are:

<b>Model Rule</b>	<b>California Rule Counterpart [new number]</b>
1.8(a)	3-300 (Business Transactions With Client) [1.8.1]
1.8(b)	No California Rule Counterpart [but see proposed Rule 1.8.2]
1.8(c)	4-400 (Gifts From Clients) [1.8.3]
1.8(d)	No California Rule (none recommended)
1.8(e)	4-210 (Payment of Client’s Personal or Business Expenses) [1.8.5]
1.8(f)	3-310(F) (Third Party Payments) [1.8.6]
1.8(g)	3-310(D) (Aggregate Settlements) [1.8.7]
1.8(h)	3-400 (Limiting Liability to a Client) [1.8.8]
1.8(i)	No California Rule (none recommended) 4-300 (Purchasing Client Property at a Foreclosure) [1.8.9]
1.8(j)	3-120 (Sex with Client) [1.8.10]

The result of the Commission’s evaluation is a three-fold recommendation that the State Bar adopt, and the Supreme Court approve:

- (1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements), and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in California case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).
- (2) the rejection of the Model Rule 1.8 framework pursuant to which 10 unrelated conflicts of interest concepts are compiled in a single rule. Instead, the Commission has recommended that those concepts, most of which are already found in the current California Rules of Professional Conduct as separately numbered rules, be carried forward as separate rules with their own rule number that corresponds to the counterpart concept in Model Rule 1.8. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1 [current rule 3-300]; the rule corresponding to Model Rule 1.8(c) is numbered 1.8.3 [current rule 4-400], and so forth. Each of these rules is addressed in separate executive summaries.
- (3) proposed Rule 1.8.11 (imputation of prohibitions in the 1.8 series of rules), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest that arise from the 1.8 series of rules. Because conflicts that these rules are intended to prevent are not necessarily cured by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts.

Proposed rule 1.8.11 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts of Interest Framework.** The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.<sup>1</sup>

2. **Recommendation that the Model Rule 1.8 compilation framework approach be rejected in favor of separately numbered rules as in the current California Rules.** The Commission recommends that California not follow the Model Rules' approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the Commission recommends that the rules in the 1.8 series, which are unrelated to one another

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<sup>1</sup> Every other jurisdiction besides California has adopted the aforementioned ABA conflicts rules' framework.

except to the extent they involve potential conflict of interest situations, be given separate numbers. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the model rule counterpart should achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide. Aside from this ease of access rationale, the Commission also determined that the different concepts reflected in the rules, each of which imposes important duties critical to the maintenance of an effective lawyer-client relationship founded in trust, deserved the prominence of a separate, standalone rule.

3. **Recommendation of separate imputation rule for the 1.8 series of rules.** As noted, because the conflicts that these rules are intended to prevent cannot be cured by either the client's consent or by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts. Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the ABA Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The ABA Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

1. **Treat imputation under Rule 1.8 rather than 1.10**

The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k) [counterpart to proposed Rule 1.8.11], an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule18rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html)

The first Commission also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of Rules. Similar to the Ethics 2000 Commission, the first Commission concluded that a separate imputation rule was warranted.

**Text of Rule 1.8.11.** Proposed rule 1.8.11 carries forward the rule proposed by the first Commission. The first Commission made no substantive changes to the Model Rule. Rather, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.<sup>2</sup>

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<sup>2</sup> Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or

**Comment.** The Commission recommends including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when the rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the Commission concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

#### **National Background – Adoption of Model Rule 1.8(k)**

Aside from California, every jurisdiction except five have adopted some version of Model Rule 1.8(k). The five jurisdictions are Georgia, Michigan, Mississippi, New York and Texas. Of those five jurisdictions, four have either not completed their review of the Ethics 2000 changes to the Model Rules (Georgia and Texas) or have made only piecemeal changes to their Rules since the ABA adopted the Ethics 2000 revisions (Michigan and Mississippi).

#### **Post-Public Comment Revisions**

None.

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had a relationship with another party or witness or has or had an interest in the subject matter of the representation.”

**Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

While lawyers are associated in a law firm,\* a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

**Comment**

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm\* with the personally prohibited lawyer. For example, one lawyer in a law firm\* may not enter into a business transaction with a client of another lawyer associated in the law firm\* without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.





**Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~ 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**  
(Redline Comparison of the Proposed Rule to ABA Model Rule)

~~(k)~~ While lawyers are associated in a law firm,\* a prohibition in ~~the foregoing paragraphs (a)~~ Rules 1.8.1 through ~~(i)~~ 1.8.9 that applies to any one of them shall apply to all of them.

**Comment**

*~~Imputation of Prohibitions~~*

~~[20] Under paragraph (k), a~~ A prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~ Rules 1.8.1 through ~~(i)~~ 1.8.9 also applies to all lawyers associated in a law firm\* with the personally prohibited lawyer. For example, one lawyer in a law firm\* may not enter into a business transaction with a client of another ~~member of lawyer associated in~~ the law firm\* without complying with ~~paragraph (a)~~ Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ This Rule does not apply to Rule 1.8.10 since the prohibition ~~set forth in paragraph (j) in that Rule~~ is personal and is not applied to associated lawyers.



**Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**  
**Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
                         **D = 1**  
                         **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-2016-43bb	Committee on Professional Responsibility and Conduct (COPRAC) (09-08-16)	Y	A		COPRAC has reviewed the provisions of proposed Rule 1.8.11 – Imputation of Prohibitions. COPRAC generally supports the adoption of Rule 1.8.11. However, to avoid possible ambiguity about the impact of this Rule, COPRAC suggests that the Commission add a comment stating that no attorney will be subject to discipline for a violation of Rules 1.8.1 – 1.8.9 committed by another attorney merely because they are both members of the same law firm, that is, without participation in the misconduct that constitutes the violation.	The Commission did not make the suggested change. Neither the rule nor the comment suggests that <i>liability</i> for a violation by another lawyer in a firm will be imputed to any other lawyer simply by the other lawyer being a partner or associate in the firm. The plain language of the rule only imputes the <i>prohibition</i> on engaging in the conduct, not liability should another firm lawyer engages in the conduct.
X-2016-82g	Polish, James (09-27-16)	N	M		This rule imputes one lawyer's disqualification to all lawyers in the law firm in nearly all cases, including where one lawyer happens to have a personal interest. The corresponding ABA Model Rule (no. 1.10(a)) does not require disqualification if the personal interest of the disqualified lawyer does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. That is a prudent limitation that	The commenter is mistaken. This provision is not the counterpart to Model Rule 1.10(a), but rather is the counterpart of Model Rule 1.8(k). The proposed rule is a nearly verbatim statement of the Model Rule.

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

**Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**  
**Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
**D = 1**  
**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
					should be adopted. I may have a personal interest in the subject matter of a representation because my political, religious, environmental or other personal views are strongly opposed to the relief a client of the firm is seeking or a position it is taking in a matter. That should not have any influence on the ability of another lawyer in the firm to represent the client effectively.	
X-2016-75c	Kerins, Steve (09-25-16)	N	D		In my opinion, the proposed rule is too stringent for the realities of a modern law practice, and is particularly onerous in contexts where lawyers move from one firm or employer to another.	The rule is not onerous. It simply clarifies that certain situations that involve a conflict between a lawyer and a client cannot be resolved by the client's consent to allow another lawyer in the lawyer's firm handle the matter.
X-2016-104w	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. Supports adoption of proposed Rule 1.8.11.  2. Comment should be stricken except for the last sentence. The remainder of the comment restates the rule.	1. No response required.  2. The Commission did not make the suggested. It believes that the first and second sentences provide an important example that explains the application of the rule, which is a proper function of a comment.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.10**  
**(No Current Rule)**  
**Imputation Of Conflicts Of Interest: General Rule**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: 1.7 (current client conflicts) [rule 3-310(B) and (C)]; 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. The Model Rules also include Model Rule 1.8, which compiles in a single rule 10 separate conflicts of interest concepts,<sup>1</sup> and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

The result of the Commission’s evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).
- (2) proposed Rule 1.10 (imputation and ethical screening), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest, a concept that is currently addressed only in California case law, and also would permit the erection of an ethical screen in narrowly defined circumstances to avoid the imposition of such imputations. Proposed rule 1.10 largely adheres to the structure and substance of Model Rule 1.10 but significantly differs in the extent to which a private firm is permitted to erect an ethical screen around a lawyer who has moved laterally from another private firm. Unlike the Model Rule, which broadly permits screening, i.e., it would permit the principal lawyer in the same matter to be screened, the proposed rule would permit screening only in limited situations, i.e., if the prohibited lawyer did “not substantially participate” in the matter at issue.

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<sup>1</sup> Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed Rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules is addressed in separate executive summaries.

Proposed rule 1.10 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the Rules.<sup>2</sup>

2. **Recommendation of addressing the concepts of imputation and screening in a rule that tracks the organization of Model Rule 1.10.** There are four separate provisions in the proposed rule, two of which set forth the rules regarding imputation as it has been developed in case law in California (paragraphs (a) and (b)), one which provides that a client can waive the rule's application (paragraph (c)), and one which excludes government lawyers from the application of the rule (they are governed by Rule 1.11).

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing in paragraph (a) that imputation is the default situation that can be avoided only if the conflict is personal to the prohibited lawyer, the lawyer is screened under narrowly specified conditions, or the client waives the rule's application. *Second*, permitting the exception for screening a lawyer who "did not substantially participate" in the contested matter will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential information about the former clients is now in the opposing party's law firm. *Third*, adopting a limited screening provision will place in a rule of professional conduct an approach to screening that was sanctioned in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010). *Fourth*, including paragraph (c) regarding waiver will expressly permit what is already implied in current rule 3-310, i.e., that the client can consent to a conflicted representation.

**Informed written consent.** In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential

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<sup>2</sup> Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of a separate executive summary.

adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only “informed consent, confirmed in writing.” That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed rule 1.10 sets forth the default rule in the introductory clause: any prohibition on representation under rules 1.7 (current client conflict) or 1.9 (former client conflict) will be imputed to all lawyers in the firm unless either subparagraph (a)(1) or (2) applies.

Subparagraph (a)(1) provides that a prohibition based on a lawyer’s “personal interest” (e.g., close personal or professional relationship) is not imputed to other lawyers in the firm so long as that interest does not create a significant risk of materially limiting the representation of the firm’s client.

Subparagraph (a)(2), the screening provision, is derived from the corresponding paragraph in Model Rule 1.10 but has been modified to reflect that the rule is a disciplinary rule rather than a civil standard for disqualification (substitution of “prohibited” for “disqualified”). In addition, unlike the Model Rule, which broadly permits screening,<sup>3</sup> subparagraph (a)(2) provides for screening only in limited circumstances.<sup>4</sup> Under subparagraph (a)(2), a prohibited lawyer’s conflict will not be imputed to other lawyer’s in the firm so long as the prohibited lawyer did not substantially participate in the contested matter, is timely screened, and written notice is provided to any affected former client to enable the latter to ascertain compliance with the rule. Specifics on what constitutes an effective screen are provided in Rule 1.0.1(k) and associated comments.

The phrase “arises out of the personally prohibited lawyer’s association with a prior firm” further limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government

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<sup>3</sup> The term “**broadly permits screening**” is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client’s case, and even if the former and current clients’ cases were “substantially related.” A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who “personally and substantially participated” in the relevant matter can be screened.

Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming. Nevertheless, there are 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

<sup>4</sup> The term “**limited screen**” is used to describe a screening provision that permits screening only if a lawyer did not “substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed “not material” to the current representation, or “is not likely to be significant.”

Fourteen jurisdictions permit screening in limited situations: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

lawyers (Rule 1.11) and former judicial personnel (Rule 1.12) only when such lawyers move to new employment.

Paragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116]. The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm.

Paragraph (c) expressly states what is already implied in current rule 3-310, which provides that a client can give informed written consent to a conflicted representation. If a client can consent to such a representation, then it should follow that a client can waive the imputation of one lawyer's conflict to other lawyers in the firm.

Paragraph (d) excludes government lawyers from the application of this Rule and directs such lawyers to Rule 1.11, which incorporates its own imputation provisions for conflicts involving current and former government lawyers.

There are five comments to proposed Rule 1.10, all of which provide interpretative guidance or clarify how the proposed rule, which identifies several situations under which imputation can be avoided or does not apply, should be applied. Comment [1] notes that the rule does not apply when the prohibited person is a nonlawyer, for example, a secretary, or a person who acquired confidential information as a nonlawyer, e.g., a law student, but cautions that such a person should be screened. Comment [2] clarifies the application of paragraph (a)(2)(ii) to partnership shares. Comment [3] clarifies that Rule 1.8.11, not rule 1.10, applies to conflicts that arise under the 1.8 series of rules. Comment [4] refers lawyers to the 5 series of rules involving supervisory duties within a law firm so that such lawyers can better comprehend their duties vis-à-vis screens. Comment [5] notes that this disciplinary rule does not necessarily govern disqualification motions in the courts.

### **Post-Public Comment Revisions**

A non-substantive change was made that was not a grammatical, stylistic, or streamlining edit.

After consideration of public comment, the Commission added Comment [1] which provides guidance in determining whether a lawyer participated substantially in a matter under paragraph (a)(2)(i). The new Comment [1] lists non-exhaustive factors for evaluation and does not change a lawyer's obligations. The Commission also added a citation to *Kirk v. First American Title Ins. Co.* to the cases listed in Comment [6].



**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) While lawyers are associated in a firm,\* none of them shall knowingly\* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
  - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;\* or
  - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,\* and
    - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
    - (ii) the prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (iii) written\* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; and an agreement by the firm\* to respond promptly to any written\* inquiries or objections by the former client about the screening procedures.
- (b) When a lawyer has terminated an association with a firm,\* the firm\* is not prohibited from thereafter representing a person\* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,\* unless:
  - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm\* has information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm\* with former or current government lawyers is governed by Rule 1.11.

## Comment

[1] In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[2] Paragraph (a) does not prohibit representation by others in the law firm\* where the person\* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person\* became a lawyer, for example, work that the person\* did as a law student. Such persons,\* however, ordinarily must be screened\* from any personal participation in the matter. See Rules 1.0.1(k) and 5.3.

[3] Paragraph (a)(2)(ii) does not prohibit the screened\* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[4] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm\* with the personally prohibited lawyer.

[5] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[6] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm\* or (2) the use of a timely screen\* is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**  
**(Commission's Proposed Rule Adopted on October 21-22, 2016 –**  
**Redline to Public Comment Draft Version)**

- (a) While lawyers are associated in a firm,\* none of them shall knowingly\* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
  - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;\* or
  - (2) the prohibition is based upon Rule 1.9(a); or (b); ~~or (c)(3)~~ and arises out of the prohibited lawyer's association with a prior firm,\* and
    - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
    - (ii) the prohibited lawyer is timely screened\* ~~in accordance with Rule 1.0-1(k)~~ from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (iii) written\* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; and an agreement by the firm\* to respond promptly to any written\* inquiries or objections by the former client about the screening procedures.
- (b) When a lawyer has terminated an association with a firm,\* the firm\* is not prohibited from thereafter representing a person\* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,\* unless:
  - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm\* has information protected by ~~Rules 1.6, 1.9(c), and~~ Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm\* with former or current government lawyers is governed by Rule 1.11.

## Comment

[1] In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[2] Paragraph (a) does not prohibit representation by others in the law firm\* where the person\* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person\* became a lawyer, for example, work that the person\* did as a law student. Such persons,\* however, ordinarily must be screened\* from any personal participation in the matter. See Rules 1.0.1(k) and 5.3.

[23] Paragraph (a)(2)(ii) does not prohibit the screened\* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[34] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm\* with the personally prohibited lawyer.

[45] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[56] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm\* or (2) the use of a timely screen\* is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128(a)(5); Penal Code § 1424; *In re Charlissee C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) While lawyers are associated in a firm,\* none of them shall knowingly\* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
- (1) the prohibition is based on a personal interest of the ~~disqualified~~prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;\* or
  - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the ~~disqualified~~prohibited lawyer's association with a prior firm,\* and
    - (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;
    - (ii) the ~~disqualified~~prohibited lawyer is timely screened\* from any participation in the matter and is apportioned no part of the fee therefrom;and
    - (iii) written\* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; ~~a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal;~~ and an agreement by the firm\* to respond promptly to any written\* inquiries or objections by the former client about the screening procedures;~~and.~~
    - (iii)- ~~certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.~~
- (b) When a lawyer has terminated an association with a firm,\* the firm\* is not prohibited from thereafter representing a person\* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,\* unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm\* has information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.

- (c) A ~~disqualification prescribed by this rule~~prohibition under this Rule may be waived by ~~the~~each affected client under the conditions stated in Rule 1.7.
- (d) The ~~disqualification of~~imputation of a conflict of interest to lawyers associated in a firm\* with former or current government lawyers is governed by Rule 1.11.

## Comment

### Definition of “Firm”

[1] In determining whether a prohibited lawyer’s previously participation was substantial, a number of factors should be considered, such as the lawyer’s level of responsibility in the prior matter, the duration of the lawyer’s participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

~~[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2]–[4].~~

### Principles of Imputed Disqualification

~~[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).~~

~~[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.~~

~~[4]~~2] The rule in paragraph Paragraph (a) ~~also~~ does not prohibit representation by others in the law firm\* where the person\* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit

representation if the lawyer is prohibited from acting because of events before the person\* became a lawyer, for example, work that the person\* did as a law student. Such persons,\* however, ordinarily must be screened\* from any personal participation in the matter ~~to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect~~. See Rules 1.0~~1.0.1~~(k) and 5.3.

~~[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).~~

~~[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).~~

~~[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)–(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.~~

[8] Paragraph (a)(2)(iii) does not prohibit the screened\* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified~~prohibited~~.

~~[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.~~

~~[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.~~

~~[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.~~

[124] Where a lawyer is prohibited from engaging in certain transactions under ~~Rule 1.8, paragraph (k) of that Rule,~~[Rules 1.8.1 through 1.8.9, Rule 1.8.11,](#) and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm\* with the personally prohibited lawyer.

[\[5\] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.](#)

[\[6\] Standards for disqualification, and whether in a particular matter \(1\) a lawyer's conflict will be imputed to other lawyers in the same firm\\* or \(2\) the use of a timely screen\\* is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure § 128\(a\)\(5\); Penal Code § 1424; \*In re Charlissee C.\* \(2008\) 45 Cal.4th 145 \[84 Cal.Rptr.3d 597\]; \*Rhaburn v. Superior Court\* \(2006\) 140 Cal.App.4th 1566 \[45 Cal.Rptr.3d 464\]; \*Kirk v. First American Title Ins. Co.\* \(2010\) 183 Cal.App.4th 776 \[108 Cal.Rptr.3d 620\].](#)



**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**    **A = 6**  
**D = 0**  
**M = 3**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-32e	Law Professors (Zitrin) (07-25-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010).	No response required.
2016-52e	Law Professors (Zitrin) (08-24-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010).	No response required.
X-2016-43bc	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	A		<p>COPRAC supports this rule in general. However, COPRAC believes that the rule should provide more guidance to lawyers with respect to the meaning of the term “substantially participate.”</p> <p>1. The screening allowed under proposed Rule 1.10 is limited to “the same or substantially related” matters in which the conflicted lawyer did not “substantially participate.” COPRAC believes that it is important to provide guidance on what the term “substantially participate” means in subparagraph (a)(2)(i). This is not a term that appears elsewhere in the proposed rules and does not</p>	1. The Commission agrees and has added Comment [1] to the proposed Rule.

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

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**    **A = 6**  
                         **D = 0**  
                         **M = 3**  
                         **NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>exist in the current California rules or case law concerning ethical screens. Given that fact, COPRAC believes that the Commission should include a comment that provides guidance on the meaning and application of the term.</p> <p>Ohio has a similar limitation in its Rule 1.10, although it uses the term “substantial responsibility” and applies that limitation only to situations where that lawyer’s new firm is on the other side of the same matter for which the lawyer had substantial responsibility at his or her former firm. In such an instance, Ohio Rule 1.10 will not allow screening. Ohio’s Rule 1.10 contains a comment that explains what “substantial responsibility” means:</p> <p>“A lawyer who was the sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer’s role in representing the former client was substantial in other circumstances involves consideration of such factors as the lawyer’s level of responsibility in the matter, the duration of the</p>	

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**    **A = 6**  
                         **D = 0**  
                         **M = 3**  
                         **NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter."</p> <p>Ohio Rule 1.10, Comment [5B]</p> <p>COPRAC recommends that a similar comment be included in proposed Rule 1.10, particularly since a similar term ("participated substantially") is employed in proposed Rule 1.11, and is used there for a different purpose.</p> <p>2. COPRAC further recommends that Comment [5] include a citation to <i>Kirk v. First American Title Ins. Co.</i>, 183 Cal.App.4th 776 (2010). While the other cases cited in the comment provide useful guidance in non-civil litigation contexts, the citation to <i>Kirk</i>, which applies in the civil litigation context, would provide additional useful guidance.</p>	2. The Commission agrees and has added the reference to <i>Kirk</i> .
X-2016-66j	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We commend and support the Commission's adoption of this proposed rule that permits "screening" of lawyers who have	No response required.

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule  
Synopsis of Public Comments**

**TOTAL = 10**      **A = 6**  
**D = 0**  
**M = 3**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>moved from one firm to another, such that the whole firm—arguably including lawyers in different offices or practices—is not tainted with the conflict, while at the same time protecting the client’s interests by requiring prompt written notice to the affected former client, arguably giving that affected former client not only the opportunity to object but also to challenge the current representation.</p>	
X-2016-67e	Orange County Bar Association (Friedland) (09-16-16)	Y	M		<p>We generally agree with the approach taken by the Commission regarding imputation of conflicts, but we have a few suggestions.</p> <p>1. First, Section (a)(2)(i) of the proposed rule introduces the concept of “substantially participate,” which is not a concept used in Model Rule 1.9. We disagree that a lawyer cannot be screened if he or she substantially participated in a matter for his or her previous firm. If a screen is effective, then it is effective no matter the lawyer’s previous level of participation. At a minimum, if the Commission keeps the requirement, we believe it would be helpful to define or at least explain this term in the</p>	<p>1. The Commission has added Comment [1]. See response 1 to COPRAC, X-2016-43bc, above.</p>

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**     **A = 6**  
                              **D = 0**  
                              **M = 3**  
                              **NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>comments, as it is not obvious what level of participation in a matter would be considered substantial.</p> <p>2. Second, the proposed rule for the first time includes the possibility of screening to address a conflict of interest. We suggest adding the word “appropriately” to the phrase “timely screened” such that Section (a)(2)(ii) would read, “the prohibited lawyer is timely <u>and appropriately</u> screened. . . .”</p> <p>3. Third, Section (a)(2)(ii) and Comment [2] provide that a screened lawyer may not be apportioned any of the fees from the screened matter. We believe this concept – which has been part of the Model Rule – is not clear, and is often misunderstood by attorneys. We suggest adding an explanation, and even an example or two, in the comments as to what is meant by this phrase.</p> <p>4. Finally, we believe a reference to the <i>Kirk</i> case would be helpful in one of the comments, as that case provides a good and</p>	<p>2. The Commission did not make the suggested change. A “screen” is defined in proposed Rule 1.0.1(k). That provision requires that the screening procedures be “adequate under the circumstances.” To add a further requirement in an individual rule that the lawyer be “appropriately” screened would be redundant.</p> <p>3. The Commission has not made the suggested change. It believes that Comment [2] (renumbered [3] in the revised draft) is clear and requires no further clarification.</p> <p>4. The Commission agrees and has added the reference to <i>Kirk</i>.</p>

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**    **A = 6**  
                         **D = 0**  
                         **M = 3**  
                         **NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					thorough description of what constitutes an adequate screen.	
X-2016-68e	Law Professors (Zitrin) (09-21-16)	Y	A		Although Rule 1.10 was not addressed by the first commission or in the first ethics professors' letter, the second commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in <i>dicta</i> in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010). While we have concerns that <i>Kirk</i> itself may provide too broad a path towards screening, your proposed rule follows the thoughtful memorandum of commission member Mark Tuft on this issue, as well as the recommendation of principal letter author Richard Zitrin, made individually to the commission on June 2, 1016. As such, the commission has happily resisted the temptation, argued by some on the commission, to use a broader screening rule that do a disservice to the public and to clients.	No response required.
X-2016-104y	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a) for the same reasons expressed regarding that term in proposed Rule 1.9 and the General Comments of this	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

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**      **A = 6**  
**D = 0**  
**M = 3**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>letter.</p> <p>2. OCTC supports Comments 1 and 2. If the Commission adopts proposed rules 5.1 and 5.3 OCTC supports Comment 4. If the Commission does not, this Comment should be rewritten.</p> <p>3. The Commission may want to reconsider whether Comment 3 is necessary in light of the clear language of subsection (a) of this proposed rule.</p>	<p>can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that another lawyer in the lawyer's firm is prohibited from representing the client because of Rules 1.7 or 1.9. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule.</p> <p>2. As the Commission has not changed its view on Rules 5.1 and 5.3, no response required.</p> <p>3. The Commission did not make the suggested change. Although the Commission agrees that paragraph (a) clearly states that it applies only if the prohibition is based on Rules 1.7 and 1.9, the public comment received on 1.8.11 suggests that there remains some confusion regarding the application of this Rule. Consequently, it has retained Comment [3] (renumbered [4] in the revised Rule),</p>

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule**  
**Synopsis of Public Comments**

**TOTAL = 10**    **A = 6**  
**D = 0**  
**M = 3**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					4. Comment 5 does not address this rule for discipline purposes and, therefore, does not belong in the proposed rules.	4. The Commission has not made the suggested change. Although the Rules are intended for discipline, courts and lawyers still regularly consult the rules and cited to them in deciding disqualification motions. Comment [5] recognizes this. It clarifies that a rule of discipline does not necessarily override a court's inherent power to control the proceedings before it.
X-2016-115d	Lamport, Stanley (09-29-16)	N	M		Proposed Rule 1.10 should be revised as shown on the attached redline.  The Suggested Revision addresses two issues: (i) eliminating unconsented screening, and (ii) making clear in paragraph (b) that a firm can never be adverse to a former client when it retains the former client's confidential information that is material to the matter.	The Commission has not made the suggested changes. It continues to believe that in appropriate circumstances an timely screen can effectively provide assurance that a former client's confidential information will not be compromised.
X-2016-120I	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		Supports the adoption of proposed Rule 1.10.	No response required.
	Treat, Hon. Charles, Judge of Contra Costa Superior Court (10-06-2016).	N	NI		Concerning comments [9] and [10]: I assume this has already been debated at length, and the ship has sailed on this point. I	No response is possible. There are no comments [9] and [10] to the Rule. The commenter's submission



**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule  
Synopsis of Public Comments**

**TOTAL = 10**      **A = 6**  
**D = 0**  
**M = 3**  
**NI = 1**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					nevertheless comment that it's disappointing that the Rules will not provide a reliable source of law and guidance on disqualification issues, nor on the viability of screens.	appears to be addressed to the first Commission's proposed Rule.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4**  
**(No Current Rule)**  
**Lawyer as Third-Party Neutral**

**EXECUTIVE SUMMARY**

In connection with the consideration of current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). The evaluation was made with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of the evaluation is proposed rule 2.4 (Lawyer as Third-Party Neutral). Although the Commission's proposed rule has no direct counterpart in the current California rules, the general concept of regulating a lawyer's conduct as a neutral rather than an advocate is found in current rule 1-710. This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue presented by this Commission study is whether a new rule should be adopted. The Commission is recommending adoption of a rule primarily because a new disciplinary standard that imposes duties on lawyers when acting in a "quasi-judicial" capacity would enhance public protection in an area of conduct engaged in by lawyers that has expanded<sup>1</sup> since the last comprehensive revision of the rules in 1989. Proposed new rule 2.4 would protect the public by helping to assure that a lawyer's role is properly understood when it is intended to be distinct from the typical, and historically common, function of a lawyer as a client's advocate. Specifically, the rule would require that a lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

In considering this rule, the Commission examined the underlying public policy issue of State Bar regulation of lawyers who engage in conduct that is judicial in nature. The Commission noted the analogous precedent of current rule 1-710 (applicable when a lawyer as a court-connected temporary judicial officer) and California Supreme Court decisional law recognizing the propriety of the State Bar discipline notwithstanding that misconduct occurred in judicial, as opposed to, lawyering activity. In *In re Scott* (1991) 52 Cal.3d 968 ("Scott"), the Supreme Court addressed the inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, respondent Michael Scott pled guilty to criminal charges of possession of cocaine and resigned his judicial post as a condition of a plea bargain. Following the entry of a guilty plea, the court referred Mr. Scott's convictions to the State Bar for a report and

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<sup>1</sup> See Ethical Conundrums for the 21<sup>st</sup> Century Lawyer/Mediator – "Toto, I've Got a Feeling We're Not in Kansas Any More," by Melvin A. Rubin and Brian F. Spector, posted online at: <https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american> in which the authors observe that: "21st Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice."

recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme Court arguing, “the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment . . . .”

In rendering its decision, the California Supreme Court noted that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to “discipline him as a member of the judiciary,” and citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott’s resignation from the bench was “tantamount to a preemptive strike-precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance.” (*Scott* at p. 976.) Notwithstanding his resignation from the bench, the Court concluded that it retained jurisdiction in the attorney discipline system to determine Mr. Scott’s fitness to practice law:

“Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized.” *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law.] “[U]nder our inherent power we may discipline an attorney for conduct ‘either in or out of [his] profession’ which shows him to be unfit to practice . . . .” (Id. at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

*Scott*, at pages 976-977. Consistent with the foregoing, proposed new rule 2.4 would make clear in the rules that there can be attorney disciplinary consequences when a lawyer acts as a third-party neutral. The proposed comments also promote compliance with other related regulatory standards by including references to the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

### **National Background – Adoption of Model Rule 2.4**

As California does not presently have a direct counterpart to Model Rule 2.4, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed rule 2.4 is derived, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_2\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf)

Thirty-three jurisdictions have adopted Model Rule 2.4 verbatim (AK, AZ, AR, CO, CT, DE, DC, ID, IN, IA, KS, KY, LA, MN, MD, MI, MN, MS, MO, NE, NV, NH, NC, ND, OK, PA, RI, SD, VT, WA, WV, WI, WY); thirteen jurisdiction have adopted a rule substantially similar to Model Rule 2.4 (FL, HI, IL, MA, MT, NJ, NM, NY, OH, OR, SC, TN, UT); five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4 (AL, CA, GA, TX, VA).

### **Post-Public Comment Revisions**

None.



**Rule 2.4 Lawyer as Third-Party Neutral**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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.





**Rule 2.4 Lawyer ~~Serving As~~ Third-Party Neutral  
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (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] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third party neutrals. A third party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.~~

~~[2] The role of in serving as a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, 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 Lawyer neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Judicial Council Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution, in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.~~

~~[3] Unlike nonlawyers who serve as third party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required.~~

~~Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.~~

[42] 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.

~~[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~

[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**

<b>TOTAL = 2</b>	<b>A = 2</b>
	<b>D = 0</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
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.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4.1**  
**(Current Rule 1-710)**  
**Lawyer as Third-Party Neutral**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)<sup>1</sup> in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 2.4.1 (Lawyer as Third-Party Neutral). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 2.4.1 carries forward current rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Like the current rule, the proposed rule provides a disciplinary path for lawyers who violate applicable judicial ethics standards. Current rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court’s consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the California Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court’s request, rule 1-710 was developed, adopted by the Board and subsequently approved by the Supreme Court operative March 18, 1999.

In studying the current rule, the Commission determined that no substantive changes were warranted but some amendments are recommended as indicated below.

In the black letter text, minor stylistic revisions are recommended for clarity, including the global substitution of “lawyer” for “member.”

The current second paragraph of the Discussion section to rule 1-710 is recommended to be omitted as unnecessary. There also was concern that retaining it might cause ambiguities in construing other rules.<sup>2</sup>

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<sup>1</sup> There is no direct counterpart to this rule in the American Bar Association Model Rules; however, Model Rule 2.4 generally addresses lawyer conduct as a third-party neutral. Model Rule 2.4 is discussed in the executive summary of proposed rule 2.4.

<sup>2</sup> The current language states: “Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.” As a general proposition, this is true of every rule and the Commission believes that nothing in the instant rule suggests otherwise so as to justify its retention in proposed rule 2.4.1.

A new Comment [3] is recommended to clarify that the rule does not apply to a lawyer serving as a third-party neutral in a mediation or settlement conference or a neutral arbitrator pursuant to an arbitration agreement. This comment also provides a cross reference to proposed new rule 2.4 as that rule is intended apply to conduct not within the scope of proposed rule 2.4.1.

**Post-Public Comment Revisions**

None.

**Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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.





**Rule 2.4.1 [1-710] ~~Member~~ Lawyer as Temporary Judge, Referee,  
or Court-Appointed Arbitrator  
(Redline Comparison of the Proposed Rule to Current California Rule)**

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

**Comment~~Discussion~~**

~~Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.~~

[1] This Rule is intended to permit the State Bar to discipline ~~members~~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 <sup>1</sup>	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>

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



**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.2**  
**(No Current Rule)**  
**Delay of Litigation**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated American Bar Association (“ABA”) Model Rule 3.2 (Expediting Litigation) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of the Commission’s evaluation is proposed rule 3.2 (Delay of Litigation). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

**Proposed rule 3.2 in context within the Rules of Professional Conduct.**

Proposed rule 3.2 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

<b>Model Rule</b>	<b>California Rule</b>
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding, or to cause needless expense. The Commission recommends adoption of New York rule 3.2 (Delay of Litigation) instead of Model Rule 3.2 (Expediting Litigation),<sup>1</sup> which requires a lawyer to make reasonable efforts to “expedite” litigation, for several reasons. First, it has been widely recognized that delay tactics in litigation that greatly increase the cost for prosecuting a lawsuit threaten to limit access to the justice except for the most affluent. Second, prohibiting undue delay and needless expense are significant concerns in the litigation process that will help protect the administration of justice and the public. Such tactics are rightfully prohibited when they are used to frustrate an opposing party’s ability or attempt to obtain a rightful remedy or redress. Third, establishing such prohibitory conduct as a minimum standard of professional responsibility is consistent with the first principle of the Commission’s Charter: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public.” Finally, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, which is a rule structure more appropriate for an aspirational statement. The proposed rule prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.

There is one comment to the rule. The comment provides cross-reference to other rules addressing unnecessary delay. The reference to proposed rule 1.3 informs the reader that attorneys are required to act with reasonable diligence and the reference to proposed rule 3.1(b) is intended to address concerns that rule 3.2, standing alone, would prohibit use of delaying tactics by a lawyer who represents a criminal defendant in a capital case. The reference to Business and Professions Code section 6128(b) informs the reader that attorneys are guilty of a misdemeanor who willfully delay their client’s suit with a view to the lawyer’s own gain.

### **National Background – Adoption of Model Rule 3.2**

As California does not presently have a direct counterpart to Model Rule 3.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.<sup>2</sup>

The ABA State Adoption Chart for ABA Model Rule 3.2 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.authcheckdam.pdf)

Thirty-nine states have adopted Model Rule 3.2 verbatim.<sup>3</sup> Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.<sup>4</sup> Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.<sup>5</sup>

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<sup>1</sup> ABA Model Rule 3.2 states:

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

<sup>2</sup> The three jurisdictions are: Ohio, Oregon, and Virginia.

<sup>3</sup> The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland,

## **Post-Public Comment Revisions**

None.

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Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico (but uses a different rule number), North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The two jurisdictions are: New Jersey and Tennessee.

<sup>5</sup> The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York, and Texas.





**Rule 3.2 Delay of Litigation**  
**(Commission's Proposed Rule Adopted on October 21–22, 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).



**Rule 3.2 ~~Expediting~~Delay of Litigation**  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

~~A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.~~

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).

~~[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~



**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 <sup>1</sup>	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

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**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 <sup>1</sup>	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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.4**  
**(Current Rules 5-310, 5-220 & 5-200(E))**  
**Fairness to Opposing Party and Counsel**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rules 5-310 (Prohibited Contact With Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Asserting Personal Knowledge of Facts) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 3.4 (Fairness to Opposing Party and Counsel). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed Rule 3.4 (Fairness to Opposing Party and Counsel). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

**Proposed Rule 3.4 in context within the Rules of Professional Conduct.** Proposed Rule 3.4 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

<b>Model Rule</b>	<b>California Rule</b>
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules and, with respect to Rule 3.4, to reject the adoption of language in Model Rule that is vague or ambiguous.

**Recommendation that proposed Rule 3.4 be circulated for public comment.** Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice. Specifically, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, the Commission began its study of this rule topic with those California rules. However, in acknowledgement of its decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission largely agreed with the first Commission's approach to its proposed rule 3.4 by:

- (i) retaining rule 5-310 as paragraphs (d) and (e) largely unchanged in the structure of Model Rule 3.4, as these provisions contain specific prohibitions on lawyer conduct;
- (ii) retaining rule 5-220 as paragraph (b) as a general statement of the prohibition against suppressing evidence;
- (iii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe evidence-suppressing conduct that the rule is intended to prevent;
- (iv) retaining rule 5-200(E) in paragraph (g); and
- (v) rejecting several provisions of Model Rule 3.4 [MR 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

The principal reason for the foregoing approach is that a disciplinary rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than simply provide a generalized prohibition against suppressing evidence, (rule 5-220). There are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit. Specifically MR 3.4(a), (b) and (c) have been retained as paragraphs (a), (c) and (f). Several other Model Rule paragraphs, specifically paragraphs (d), (e) and (f), on the other hand, conflict with California law, are overbroad and likely to chill legitimate advocacy, or both.<sup>1</sup>

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<sup>1</sup> The rejected Model Rule 3.4 provisions provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.



### **Text of Rule 3.4.**

Paragraph (a) is identical to Model Rule 3.4(a) and prohibits a lawyer from destroying or altering documents, or counseling or assisting another to do so.

Paragraph (b) carries forward rule 5-220 to provide a general statement prohibiting the suppression of evidence.

Paragraph (c) is identical to Model Rule 3.4 and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

Paragraph (d) carries forward rule 5-310(B) nearly verbatim, the only change being to substitute “lawyer” for “member”.

Paragraph (e) carries forward rule 5-310(A) verbatim.

Paragraph (f) is identical to Model Rule 3.4(c) and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

Paragraph (g) carries forward the language of rule 5-200(E), but adds a provision from Model Rule 3.4(e) that prohibits a lawyer from stating an opinion about the guilt or innocence of an accused.

There are two comments to proposed Rule 3.4, both of which explain how the rule should be applied. Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence. Comment [2] clarifies an important limitation on the rule’s application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

Non-substantive aspects of the proposed rule include rule numbering to track the Commission’s general proposal to use the Model Rules’ numbering system and the substitution of the term “lawyer” for “member.”

### **National Background – Adoption of Model Rule 3.4**

Every jurisdiction except California has adopted some version of Model Rule 3.4. Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.<sup>2</sup> Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.<sup>3</sup> Seven jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.<sup>4</sup>

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<sup>2</sup> The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>3</sup> The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

<sup>4</sup> The seven jurisdictions are: Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

### **Post-Public Comment Revisions**

None.

**Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person\* to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
  - (1) expenses reasonably\* incurred by a witness in attending or testifying;
  - (2) reasonable\* compensation to a witness for loss of time in attending or testifying; or
  - (3) a reasonable\* fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person\* to secrete himself or herself or to leave the jurisdiction of a tribunal\* for the purpose of making that person\* unavailable as a witness therein;
- (f) knowingly\* disobey an obligation under the rules of a tribunal\* except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

**Comment**

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on

the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

~~Rule 5-310 Prohibited Contact With Witnesses~~ Rule 3.4 Fairness to Opposing Party and Counsel

(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person\* to do any such act;

~~Rule 5-220 Suppression of Evidence~~

- (b) ~~A member shall not~~suppress any evidence that the ~~member~~lawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce~~;~~;

- ~~(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.~~

- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

- ~~(Bd)~~ Directly~~directly~~ or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the ~~witness's~~witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) ~~Expenses~~expenses reasonably\* incurred by a witness in attending or testifying~~;~~;

- (2) ~~Reasonable~~reasonable\* compensation to a witness for loss of time in attending or testifying~~;~~ or

- (3) ~~A~~a reasonable\* fee for the professional services of an expert witness~~;~~;

- ~~(e)~~ advise or directly or indirectly cause a person\* to secrete himself or herself or to leave the jurisdiction of a tribunal\* for the purpose of making that person\* unavailable as a witness therein;

- ~~(f)~~ knowingly\* disobey an obligation under the rules of a tribunal\* except for an open refusal based on an assertion that no valid obligation exists; or

~~Rule 5-200 Trial Conduct~~

- ~~(Eg)~~ ~~Shall not~~in trial, assert personal knowledge of ~~the~~ facts ~~at~~in issue~~;~~, except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

## Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party  
and Counsel**  
**Synopsis of Public Comments**

**TOTAL = 9**      **A = 3**  
                         **D = 3**  
                         **M = 3**  
                         **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-2016-23	Baruh, Jeffrey A. (8-1-16)	N	A		Expresses concern with the lack of enforcement of Santa Clara's Code of Professionalism. Believes the State Bar and judges should enforce the rules so that they are taken seriously and complied with by lawyers.	Enforcement practices and policies are beyond the scope of the Commission's project to revise the rules. It should be noted, however, that pursuant to its Charter, the Commission is proposing new and amended rules that continue the function of the rules as disciplinary standards. The Commission has further made a deliberate effort to address ambiguities in rule language and to reconcile rules with developments in professional responsibility that have occurred since the rules were last revised. The Commission believes this approach will contribute to the effective enforcement of the rules by the State Bar.
X-2016-43bg	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	No response required.
X-2016-66p	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	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 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party  
and Counsel  
Synopsis of Public Comments**

**TOTAL = 9**      **A = 3**  
**D = 3**  
**M = 3**  
**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-2016-83f	Garrett, Christopher (9-26-16)	N	D	3.4	Rule unnecessarily burdens one's public petition or speech rights.	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.4 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1. In addition, the Commission has made some changes to Rule 3.5 that it believes removes some of the concerns the commenter has expressed with respect to this rule. See revised paragraph (a) of Rule 3.5 which adds the terms "statute" and "judicial officer" to both broaden and narrow that provision's application, respectively. See also revised paragraph (c) of Rule 3.5, which now includes in the definition of "judge" and "judicial officer" the following: "(iv) members of an administrative body acting in an adjudicative capacity;"



**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party  
and Counsel**  
**Synopsis of Public Comments**

**TOTAL = 9**      **A = 3**  
                         **D = 3**  
                         **M = 3**  
                         **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-2016-93i	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(e)	Rule lack the necessary mens rea requirement and paragraph (e) should include the term "intentionally."	The Commission has not made the suggested change. The Commission does not understand how a lawyer might "unintentionally" engage in the conduct prohibited by paragraph (e), i.e., "advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein."
X-2016-97c	Freedman, Daniel (9-27-16)	N	D	3.4	Rule would put land use attorney profession in jeopardy by chilling speech, restricting the attorney's ability to be zealous for the client, and opening attorney to discipline as retribution.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
X-2016-104al	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(f)	1. "Knowing" standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult.  An attorney is required to know or at least search for the rules of a tribunal.	1. The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyer's statements and the submission or presentation of evidence to a court.

**Proposed Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party  
and Counsel**  
**Synopsis of Public Comments**

**TOTAL = 9**      **A = 3**  
                         **D = 3**  
                         **M = 3**  
                         **NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>2. It's unclear if the "obligation" is provided by established rules or a judge's preference.</p> <p>3. Requests clarification if rule applies to when attorney advises a nonclient to not speak with opponent in matter.</p>	<p>2. The Commission does not understand what is meant by a "judge's preference." An "obligation" or "duty" would typically arise from a statute, rule or a court order, including a local court order.</p> <p>3. The Commission believes that the conduct about which the commenter inquires is subsumed in paragraph (e).</p>
X-2016-126c	Ivester, David (9-27-16)	N	D	3.4	Proposed Rule 1.0.1's broad definition of the word "tribunal" will limit and interfere with administrative law practitioners' ability to advocate for clients in administrative proceedings.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16).
X-2016-129c	California Building Industry Association (CBIA) (Cammarota) (9-27-16)	Y	M	1.0.1, 3.4	Proposes amended definition of "tribunal" under proposed rule 1.0.1 such that attorney communications are not "chilled" by proposed rule 3.4.	See the Commission's response above to Christopher Garrett (X-2016-83f). (9-26-16)

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.6**  
**(Current Rule 5-120)**  
**Trial Publicity**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-120 (Trial Publicity) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 3.6 (Trial Publicity). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 3.6 (Trial Publicity). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

**Proposed rule 3.6 in context within the Rules of Professional Conduct.**

Proposed rule 3.6 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

<b>Model Rule</b>	<b>California Rule</b>
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.6 carries forward the substance of current rule 5-120. The few significant changes to the current rule include the following. In paragraph (a), the “knows or reasonably should know standard” is moved in front of two roman numerals that were added to clarify the knowledge standard is applicable to both the means of dissemination and the likelihood of material prejudice. Paragraph (b) has been amended to place an outright condition that the subparagraphs of paragraph (b) are limited by the lawyer’s duty of confidentiality. The change was made to avoid a misinterpretation that the rule’s language provides an exception to the lawyer’s overriding duty to maintain a client’s confidential information. In paragraph (b)(6), language has been added to emphasize that the anticipated harm triggering this permissive category of information is harm to an individual or the public, and that dissemination of this information is limited to what is reasonably necessary to protect the individual or the public. This change also conforms paragraph (b)(6) to the limitation in current rule 3-100(D) [proposed rule 1.6(d)], which requires an attorney’s disclosure of information must be no more than is necessary to prevent the harm. Paragraph (b)(7)(i) has been amended by deleting “family status” and adding reference to “general area of” residence and occupation. This change was made in order to balance an accused right to privacy while also providing enough information so that the accused is not either misidentified, or confused with someone else. Finally, paragraph (d) was added to extend compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a).

There are two comments to the rule. Comment [1] adds cross references to relevant rules and adds clarifying changes to the language found in the second paragraph of the Discussion section of current rule. In comment [2], a cross reference is added to the special duties of prosecutors in proposed rule 3.8(f). Also, comment [2] retains language found in the current rule’s Discussion section which expressly states that the rule applies equally to prosecutors and criminal defense counsel.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

**Rule 3.6 [5-120] Trial Publicity**  
**(Commission's Proposed Rule Adopted on October 21–22, 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 Business and Professions Code § 6068(e) and Rule 1.6, 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 Business and Professions Code § 6068(a) and Rule 3.4(f), 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.

**Rule 3.6 [5-120] Trial Publicity**  
**(Commission's Proposed Rule Adopted on October 21-22, 2016 –**  
**Redline to Public Comment Draft 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) and Rule 1.6, 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) and Rule 3.4(f), 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.



**Rule 3.6 [5-120] Trial Publicity**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~the lawyer knows\* or reasonably should know\* will (i) be disseminated by means of public communication ~~if the member knows or reasonably should know that it will~~and (ii) have a substantial\* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (Bb) Notwithstanding paragraph (Aa), ~~a member~~but only to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6, lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons\* involved;
  - (2) ~~the~~ information contained in a public record;
  - (3) that an investigation of ~~the~~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 ~~interest~~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):
    - (a*i*) the identity, general area of residence, and occupation, ~~and family status~~ of the accused;
    - (b*ii*) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
    - (c*iii*) the fact, time, and place of arrest; and
    - (d*iv*) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (Cc) Notwithstanding paragraph (Aa), a ~~member~~lawyer may make a statement that a reasonable\* ~~member~~lawyer would believe is required to protect a client from the substantial\* undue prejudicial effect of recent publicity not initiated by the ~~member~~lawyer or the ~~member's~~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).

### **DiscussionComment**

~~Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.~~

[1] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including: (i)~~1~~ 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)~~2~~ whether the extrajudicial statement presents information the ~~member~~lawyer knows\* is false, deceptive, or the use of which would violate Business and Professions Code ~~section~~§ 6068(d) or Rule 3.3; (iii)~~3~~ 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 Business and Professions Code § 6068(a) and Rule 3.4(f), which require compliance with such obligations); and (iv)~~4~~ 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.

~~Paragraph (A) is intended to apply to statements made by or on behalf of the member.~~

~~Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member’s duty to maintain client confidence and secrets.~~

**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>
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**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.8**  
**(Current Rule 5-110)**  
**Special Responsibilities of a Prosecutor**

**EXECUTIVE SUMMARY**

Proposed new rule 3.8 (Special Responsibilities of a Prosecutor) amends current rule 5-110 (Performing the Duty of a Member in Government Service) and addresses the duties of government lawyers, including a criminal prosecutor. In particular, the proposed rule states that it is the responsibility of a criminal prosecutor to make timely disclosure to the defense of exculpatory information.

At its November 20, 2015 meeting, the Board considered and granted a Commission request to authorize proposed amendments to current rules 5-110 and 5-220 (Suppression of Evidence) for a 90-day public comment period, and that the processing of these proposed amendments be prioritized and handled separately from the Commission's comprehensive proposed amendments to the rules. After the conclusion of the 90-day public comment period, which included a public hearing on February 3, 2016, the Commission met on March 31 and April 1, 2016 to consider all of the public comments received. In response to the public comments, the Commission further revised proposed rule 5-110<sup>1</sup> and, at the Board's May 13, 2016 meeting, the Board authorized an additional 45-day public comment period to seek input on these changes.

The 45-day public comment period ended on July 1, 2016. The Commission considered the public comments received at its meeting on August 26, 2016. Following discussion, no changes were made to the proposal and the Commission voted to recommend Board adoption. The Board considered the Commission's recommendation at the Board's meeting on October 1, 2016. After a presentation by the Commission and oral comments from interested persons who attended the Board's meeting, the Board voted to adopt the Commission's proposed rules as recommended. State Bar staff also was directed to prepare a petition for submitting the proposed rules to the Supreme Court of California for approval. Board adopted amendments to the rules do not be binding and operative unless and until they are approved by the Supreme Court of California. (See Business and Professions Code sections 6076 and 6077.)

The Board's action to adopt proposed amended rules 5-110 and 5-220 on an expedited basis as rule revisions that fit the framework of the current rules does not obviate the need for the Commission to prepare versions of those rules for inclusion in the Commission's recommendation for comprehensive amendments to the entire rules because the Commission is recommending a new rule numbering system patterned on the Model Rules as well as other formatting and style changes that impact the entire rules.

In addition, the final decision to approve and implement proposed amended rules 5-110 and 5-220 rests with the Supreme Court. The Supreme Court might determine that the proposed amendments to rule 5-110 should be implemented together with the comprehensive rule revisions and not on a separate expedited basis. Accordingly, the Commission has prepared a version of proposed amended rule 5-110 formulated as a proposed rule 3.8 that could be acted on by the Supreme Court and implemented as a part of the State Bar's comprehensive revisions

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<sup>1</sup> Proposed amended rule 5-220 was not modified by the Commission following consideration of public comment. That proposal would remain simply the addition of a Discussion section sentence stating: "See rule 5-110 for special responsibilities of a prosecutor."

that are presently under consideration. Proposed rule 3.8 is substantively identical to proposed amended rule 5-110 and is summarized in the Board materials at the State Bar website link below.

<http://board.calbar.ca.gov/Agenda.aspx?id=11335&tid=0&show=100011596&s=true#10018785>

Finally, even if the Supreme Court determines to implement amendments on an expedited basis, at the subsequent time when the State Bar's comprehensive revisions are considered by the Court, a version of amended rule 5-110 renumbered as rule 3.8 (and conformed to the format and style of the new rules) would be appropriate for consideration by the Court.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

(Staff note: The dissents below were submitted on November 20, 2015 and July 1, 2016 to the Board in connection with the Commission's request to authorize on an expedited basis the proposed amendments to current rules 5-110 and 5-220.)

## **Dissent of George S. Cardona From Proposed Rule 3.8**

I agree with the Commission's decision to recommend adoption of a Rule 3.8, thereby bringing California into conformity with every other jurisdiction that already has in place some version of Rule 3.8 addressing the special responsibilities of prosecutors. I also agree with the Commission's decision to expedite consideration of Rule 3.8. There are two aspects of proposed Rule 3.8, however, that I do not believe can be justified. First, I agree with Daniel E. Eaton that proposed Rule 3.8(d) is aspirational, ambiguous, and beyond the scope of the Commission's mandate. I also believe that, as the First Rules Commission concluded, it poses an unnecessary risk of conflict with California's criminal discovery statutes. Second, I also believe that, without any empirical evidence demonstrating a sufficient need, proposed Rule 3.8(e) unduly limits the ability of prosecutors to investigate instances in which clients have used their lawyers to further criminal conduct. From these two portions of the proposed Rule I dissent.

### **a. Proposed Rule 3.8(d)**

I agree with and join in Daniel E. Eaton's dissent to proposed Rule 3.8(d). I wish to provide additional comment on three points.

First, as Mr. Eaton notes, the uniformity supposedly furthered by adoption of the language of ABA Model Rule 3.8(d) is illusory. While most states have adopted the language of the ABA Model Rule (or something very close), interpretations of that language have varied. The Drafting Team's Report and Recommendation on Rule 3.8 cites three jurisdictions (District of Columbia, North Dakota, and U.S. District Court for the District of Nevada) that have held the Rule to require disclosures beyond Brady's materiality standard; four jurisdictions (Colorado, Wisconsin, Ohio, and Oklahoma) that have held it does not; and one jurisdiction (Louisiana) whose case interpreting the Rule has been cited by different courts both for the proposition that the Rule imposes disclosure obligations beyond Brady and for the proposition that it does not.<sup>2</sup> The Commission, in proposed Comment 3, sides with those jurisdictions that have concluded that the disclosure obligations under the Rule are broader than those imposed by Brady and its progeny. This cannot be said to further any meaningful national uniformity -- California simply joins the less than overwhelming number of jurisdictions that have taken this approach. Moreover, as in these other jurisdictions, proposed Rule 3.8(d) provides insufficient guidance as to the scope of the broader obligation imposed. Far from promoting uniformity, the text of proposed Rule 3.8(d) leaves open, undetermined, and subject to potentially differing determinations by various jurisdictions' disciplinary authorities what standard should be applied by prosecutors in determining whether disclosures not required under substantive law may nevertheless be required by the Rule.

Second, the proposed language is problematic when considered against the backdrop of the discovery requirements imposed by California statutory law. Although Comment 3 reflects a wise choice not to leave the timing of disclosure required by the Rule free standing and ambiguous, the Comment does not provide the same clarity with the scope of the disclosures. Comment 3 ties the Rule's timing requirements to "statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions." The proposed alternative Rule 3.8(d) that was rejected by the Commission would have implemented a similar tie to statutory and constitutional standards, as interpreted by relevant case law, for

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<sup>2</sup> I note that the District of Columbia Rule has language markedly different from the ABA Model Rule, further undermining any claim of uniformity.

defining what constitutes information that “tends to negate the guilt of the accused or mitigates the offense. . . .” This would have provided guidance based on an existing, and evolving, body of law well known to prosecutors, defense attorneys, and courts. Instead, we are left with no guidance as to the standard that California’s disciplinary authorities will apply. Without a tie to substantive law, will prosecutors be disciplined for failing to disclose potential impeachment information even where such disclosure would not be required under Brady and its progeny? Absent a materiality limitation, must the prosecutor disclose all such impeachment information regardless of its triviality or admissibility? Is this the case even if the witness’s testimony is of minimal significance, for example, a custodian of records? The Rule itself provides no guidance, leaving ambiguities that should not be present in a Rule intended to provide a basis for discipline, not simply state an aspirational goal.

The First Rules Commission proposed a Rule 3.8(d) that contained a tie to existing law identical to that contained in the alternative rejected by this Commission, requiring prosecutors to “comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .” As explained by the First Commission, its addition of the highlighted introductory clause was to clarify “that the requirement of a prosecutor’s timely disclosure to the defense is circumscribed by the constitution and statutes, as interpreted and applied in relevant case law.” This approach was based on the Commission’s determination that ABA Model Rule 3.8(d) “was in conflict with California statutory law,” in particular, “California statutory law that had been approved with the passage of Proposition 115 in 1991.” This approach was a sound one both for this reason and because it provides prosecutors with specific guidance defining the standard to which they are accountable and emphasizes that those prosecutors who fail to adhere to the standard will be held professionally responsible.

The current Commission’s proposed Rule 3.8(d) leaves open the potential for conflict with California statutory law. California Penal Code § 1054.1(e) requires the prosecution to disclose “[a]ny exculpatory evidence.” The California Supreme Court has explained that this pretrial disclosure obligation is not limited to “just material exculpatory evidence,” and that if, prior to trial, a defendant “can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality.” Barnett v. Superior Court, 50 Cal.4<sup>th</sup> 890, 901, 114 Cal.Rptr.3d 576, 582-83 (2010).<sup>3</sup> For “exculpatory evidence,” therefore, proposed Rule 3.8(d) and the California statutes appear to align. What constitutes “exculpatory evidence” falling within the scope of this broad pretrial disclosure obligation, however, remains an open question.

For example, in People v. Lewis, 240 Cal.App.4<sup>th</sup> 257, 192 Cal.Rptr.3d 460, 468 (2015), the court recognized that “whether exculpatory evidence includes impeachment evidence may be unsettled.” (citing Kennedy v. Superior Court, 145 Cal.App. 4<sup>th</sup> 359, 378, 51 Cal.Rptr.3d 637 (2006).) If California courts ultimately conclude that impeachment evidence constitutes

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<sup>3</sup> At the same time, the Court recognized the distinction between the statutory standard for pretrial disclosure and the showing required to demonstrate, post-trial, a violation of the prosecutor’s duty to disclose exculpatory evidence: “The showing that defendants must make to establish a violation of the prosecution’s duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence.... To prevail on a claim the prosecution violated this duty, defendants challenging a conviction ... have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” Id.



“exculpatory information” within the meaning of Penal Code § 1054.1(e), then the statutory pretrial disclosure obligation would necessarily align with any interpretation of the Commission’s proposed Rule 3.8(d). But if California courts conclude otherwise, and interpret the Constitution and/or California discovery statutes as requiring pretrial disclosure of impeachment evidence only when it is material, then the Commission’s proposed Rule 3.8(d) confronts disciplinary authorities with a choice: (a) interpret proposed Rule 3.8(d) as requiring prosecutors to disclose impeachment evidence regardless of materiality; or (b) interpret proposed Rule 3.8(d) to accord with the California Courts’ interpretation of the Constitution and California discovery statutes and not require prosecutors to disclose impeachment evidence unless material by concluding that evidence that “tends to negate the guilt of the accused” does not encompass immaterial impeachment evidence. The former would pose a direct conflict with the California criminal discovery statutes, which make clear that “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” California Penal Code § 1054(e).<sup>4</sup> The latter avoids this conflict, but does so by effectively implementing the very alternative to proposed Rule 3.8(d) that the Commission has rejected. We should recognize now that the latter is the correct choice, and not leave unnecessary uncertainty and potential for conflicts with Constitutional and statutory law for later resolution by disciplinary authorities.

Finally, a primary driver to the Commission’s recommendation of proposed Rule 3.8(d) appears to have been a concern that anything less would not send a sufficiently strong message to prosecutors that they should err on the side of disclosure, and not rely on materiality as a basis for withholding exculpatory evidence. The United States Supreme Court has repeatedly emphasized this message, stating clearly its view that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” United States v. Agurs, 427 U.S. 97, 108 (1976); see also Cone v. Bell, 556 U.S. 449, 470 n. 15 (2009) (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); Kyles v. Whitley, 514 U.S. 410, 439-40 (1995) (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be.”) (quotation and citation omitted). As the Commission heard from many of the District Attorneys who spoke at the October 23 meeting in favor of the alternative rejected by the Commission, they have heard this message and adopted disclosure policies that go well beyond that required by the Constitution, and in some instances even beyond that required by California statutes. Similarly, the United States Department of Justice has adopted a policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and controlling substantive law broadly, and in particular “requires disclosure by prosecutors of information beyond that which is ‘material’ to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-91 (1999).” United States Attorneys’ Manual § 9-5.001(C).<sup>5</sup> As Mr. Eaton notes, it is simply wrong to say

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<sup>4</sup> Similarly, California Penal Code § 1054.5(a) states that “[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.”

<sup>5</sup> In footnote 16 on page 22 of the Drafting Team’s Report and Recommendation, the drafting team states, “The United States Attorney’s Manual of the Department of Justice has adopted as an internal policy for disclosure a standard comporting with the ABA’s broad interpretation of 3.8(d).” It is true that, as referenced above, the United States Attorney’s Manual has adopted an internal discovery policy that generally encourages prosecutors to view their disclosure obligations under the Constitution and

that adopting the alternative Rule 3.8(d) rejected by the Commission would do nothing to buttress this message. Adopting this alternative would still put in place a rule that singles out prosecutors with a clear statement that they may be subject to discipline for failing to comply with any of their Constitutional or statutory obligations to disclose evidence favorable to the defense. As Mr. Eaton notes, such a clear statement of the potential for discipline cannot help but focus prosecutors on the need to comply with all of their legal disclosure obligations.

**b. Proposed Rule 3.8(e)**

As recommended, proposed Rule 3.8(e) bars prosecutors from subpoenaing attorneys for information about a past or present client unless the prosecutors reasonably believes all three of the following: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is “essential” to successful completion of the prosecutor’s investigation; and (3) there is no other “feasible” alternative to obtain the information. In recommending this Rule, the Commission diverged significantly from the current rules, which have no equivalent. While the interest underlying this proposed Rule, protecting the attorney-client relationship from undue interference, supports adoption of a Rule 3.8(e), I believe the Commission’s proposal strikes an inappropriate balance with the need to investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys, a balance unjustified by any empirical evidence of overreaching by prosecutors in either California or any of the significant number of jurisdictions that, like California, have not yet adopted ABA Model Rule 3.8(e).

First, while the Commission’s proposed Rule 3.8(e) is, with a variation only in subsection (1), the same as the ABA Model Rule, a significant number of jurisdictions have not adopted the ABA Model Rule. As set forth in the report and recommendation, while 33 jurisdictions have adopted ABA Model Rule 3.8(e) verbatim or in a slightly modified form, 17 jurisdictions (including California) have not. Among the 17 jurisdictions that have not adopted the Rule are some of the largest and most significant for criminal prosecutions in the country, including the District of Columbia, Florida, Michigan, New York, Pennsylvania, and Texas. Yet, to my knowledge, the Commission has been cited no empirical evidence demonstrating any significant problem with prosecutors issuing unjustified subpoenas to attorneys in California or any of these 17 jurisdictions in the absence of Model Rule 3.8(e).

Second, despite the absence of any empirical evidence suggesting the need for such a stringent limitation on prosecutors’ use of attorney subpoenas, the Commission follows the ABA in imposing the most stringent limitation possible, one requiring that the information sought be “essential” to the investigation and that there be “no other feasible alternative” for obtaining that information. In my view, this tips too far in the opposite direction, unduly limiting prosecutors’ ability to thoroughly investigate criminal conduct furthered or concealed through the unknowing assistance of attorneys. That such criminal conduct is not unusual is demonstrated by California Evidence Code Section 956, which provides that information is not subject to protection under the attorney-client privilege where “the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.” Indeed, there have been cases in which attorneys have been used by their clients to make false representations to regulators, courts, and investors, and to assist in laundering money by moving it through attorney trust accounts. The public interest in enabling full and complete

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controlling substantive law broadly. However, the policy is independent from, and does not mention, the ABA’s interpretation of its Model Rule 3.8(d).

investigation of these crimes must be considered as a counterbalance to the public interest in protecting the attorney-client relationship.

The First Rules Revision Commission struck the appropriate balance between these two interests in proposing a Rule 3.8(e) that made two relatively minor changes to ABA Model Rule 3.8(e). The First Commission modified subsection (2) by substituting “reasonably necessary” for “essential.” As the First Commission explained, this strikes the appropriate balance while providing clearer guidance to prosecutors seeking to evaluate whether their conduct will comply with the Rule: “It is a difficult, if not impossible, task to decide *ex ante* what evidence will be ‘essential’ to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of ‘evidence reasonably necessary to the successful prosecution’ is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.” The First Commission also modified subsection (3) by substituting “reasonable” for “feasible,” explaining that this was “to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If ‘feasible’ means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If ‘feasible’ means that the alternative is reasonable, the more familiar term ‘reasonable’ should be used.” Again, the First Commission’s proposal struck the appropriate balance between competing public interests, while at the same time providing clearer guidance to prosecutors seeking to comply with the Rule.

Finally, as was raised during one of the Commission’s meetings, if there is uncertainty whether the First Commission’s or ABA’s balancing of interests is the correct one, this uncertainty should weigh in favor of taking the incremental step of moving from the current California rules (which impose no limitation on attorney subpoenas issued by prosecutors), to the less stringent limitation recommended by the First Commission. If under the First Commission’s recommended Rule there is no indication that prosecutors are abusing the issuance of subpoenas to attorneys, this would provide empirical evidence that the balance has been appropriately struck, empirical evidence that can be gathered without the potential for unduly chilling appropriate investigative steps posed by the ABA’s more stringent limitation.

For all these reasons, I dissent from the Commission’s recommendation of its proposed Rule 3.8(e).

## **DISSENT OF DANIEL E. EATON FROM RULE 3.8 AS ADOPTED**

California needs a Rule 3.8 dealing with the special duties of prosecutors to disclose exculpatory evidence to the defense, but it needs to be the right Rule 3.8. The version of the rule the Commission adopted takes a wrong turn at a critical juncture that makes the adopted rule aspirational, ambiguous, and beyond the scope of our responsibility. I dissent.

The Commission adopts Rule 3.8, Special Responsibilities of a Prosecutor, to impose a duty on a prosecutor who is subject to the jurisdiction of the California State Bar to “make timely disclosure to the defense of all evidence or information known to the prosecutor that 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, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

In adopting this version of this new California disciplinary rule of conduct, the Commission rejects alternative language (alternative two) that would subject a prosecutor within the jurisdiction of the California State Bar to discipline who does not “comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that 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, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

I believe the Commission made the wrong choice between these two alternatives.

I start by expressing the substantial areas in the adoption of this new rule with which I agree with the Commission majority. I agree that California should adopt a new disciplinary rule addressing a prosecutor’s obligation to disclose to the defense potentially exculpatory evidence. California is unique among American jurisdictions in not having such a rule. Adding a dimension of discipline to a prosecutor’s obligations in this area undoubtedly will “promote confidence in the legal profession and the administration of justice.” (Commission Charter, ¶ 1.) Adoption of such a rule will make it less likely that accused individuals will be subjected to punishment that could and should have been avoided by the timely release of information bearing on their culpability or, more precisely, their lack of culpability.

I also agree that this rule should be adopted on an expedited basis. To warrant expedited adoption, a new or revised rule must be “necessary to respond to an ongoing harm, such as harm to clients, the public, or to confidence in the administration of justice” and “where failure to promulgate the rule would result in the continuation of serious harm.” (RRC Memorandum of Working Group dated May 11, 2015.) The anecdotal and statistical reports in the Innocence Project’s several thoughtful letters to this Commission are alarming and amply justify the adoption of a new Rule 3.8 without delay.

But it should be the right rule 3.8. While my agreement with the Commission is broad, my disagreement with a critical aspect of the rule as adopted is profound. I believe that the Commission departs from most of the mandates of the Commission’s charter.

Directive two of the Charter admonishes us to “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.” Rule 3.8 as adopted is aspirational. One member of the Commission argued that the rule as adopted “is not aspirational.” That was flatly contradicted by the speaker those who

argued in favor of alternative one chose to lead off their presentation to the Commission on October 23, 2015, Dean Gerald Uelmen of the Santa Clara College of Law. In his remarks to the Commission, Dean Uelmen argued that the existing dictates of *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny are inadequate to obtaining prosecutorial compliance with the duty to disclose. Dean Uelmen said that *Brady* does not address standards of professionalism “to which all members of the profession should *aspire*.” (Emphasis added.) Dean Uelmen added that a prosecutor’s “aspirations” should go beyond doing nothing that may result in the reversal of a conviction on appeal. Dean Uelmen observed that “the primary purpose” of the rule, as the Commission ultimately adopted it, “is aspirational.” Toward the end of his remarks, Dean Uelmen framed the question of whether to adopt the alternative the Commission chose as: “Do we want a very simple *aspirational* standard?” (Emphasis added.)

Dean Uelmen is right to characterize the rule as adopted as aspirational. But that is a critical reason why the Commission was wrong to adopt the rule in that form.

Directive Three of the Commission Charter instructs us to “help promote a national standard with respect to professional responsibility issues whenever possible.” The version of the Rule adopted by the Commission offends this mandate as well.

Yes, rule 3.8 has been adopted by jurisdictions throughout the nation, but the courts have interpreted that rule differently. The uniformity we supposedly further with the adoption of the rule in the chosen form is illusory. Wisconsin, for example, has determined that this language is “consistent [and coterminous] with the requirements of *Brady* and its progeny.” (*In re Riek* (2013) 350 Wis.2d 684, 696.) Wisconsin is not alone. (See *Disciplinary Counsel v. Kellogg-Martin* (2010) 124 Ohio St.3d 415; *In re Jordan* (La. 2005) 913 So.2d 775; and *in re Attorney C.* (Colo. 2002) 47 P.3d 1167.) Other jurisdictions, by contrast, have adopted a more expansive view of what is required under what the Commission has adopted by Rule 3.8. (See e.g., *In re Kline* (D.C. 2015) 113 A.3d 202.)

The version of the rule the Commission adopted not only fails to advance uniformity, it needlessly introduced ambiguity. Directive Four of the Commission’s Charter says: “The Commission’s work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.” The Commission explicitly chooses to reject adoption of a version of the rule that would reflect the existing legal mandates on California prosecutors. The Commission’s response to this assertion is that Rule 3.8 in the form the Commission adopted it has been subject to wide body of case law.

There are two responses to the Commission’s assertion. First, this extra-jurisdictional authority is not binding on California lawyers. Unlike the alternative adopted by the Commission, alternative two would import a body of law that *is* binding on California prosecutors and that is fully formed -- evolving, to be sure, but fully formed at any given moment. The proponents of the version of Rule 3.8 repeatedly pointed out that existing California law goes beyond the bare mandates of *Brady*. (See, e.g., letter dated October 8, 2015 of the California Public Defenders Association to the Commission at pp. 3 and 7, discussing *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) That, however, is a reason for adopting alternative two, not rejecting it. Reliance on a definable body of law is preferable in a rule of *discipline* to reliance on the vicissitudes of an ever-shifting, often contradictory body of case law as it is emerging in other places with a rule with substantially the same language.

And that is the second reason why the rule as adopted by the Commission introduces new ambiguities into our rules of professional conduct rather than eliminating them. As set forth

above, jurisdictions that have adopted the very language the Commission adopted have interpreted that language very differently. Well, a prosecutor may fairly ask, which is it? Am I subject to discipline only if I violate duties less than those California imposes (*Brady*), the same as those California imposes (*Barnette*), or undefinably more than California imposes (the case law of unspecified other jurisdictions)? It will take years of litigation through our overtaxed disciplinary system to answer these and other questions, litigation that will involve questions of whether discipline under this newly adopted rules contradicts a California prosecutor's obligations under California constitutional and statutory law. (See e.g., Art. 1, § 24 of the California Constitution, rights of criminal defendants no greater under the California constitution than under the U.S. Constitution.)

Why not just acknowledge that a uniform national standard under 3.8 is unattainable and adopt a rule 3.8 that incorporates recognized underlying California law? The only possible rationale is to rewrite the law of the administration of criminal justice through the rules of discipline. One member of the Commission who supported the version of the rule adopted by the Commission said that the new rule is not designed to "regulate the criminal discovery process." But how could it not? The unknown limits of the newly adopted rule will lead conscientious prosecutors to do things existing law does not require, or even allow, them to do. (See letter of California District Attorneys Association dated October 1, 2015 to the Commission.) That kind of law-making goes well beyond the authority of this Commission.

It is simply wrong to say that adopting Rule 3.8 with alternative two would do nothing of importance. Adding a disciplinary component to a prosecutor's legal obligations in this area would concentrate the mind of a prosecutor in a way that the absence of such a disciplinary rule would not. CPDA President Michael Ogul of Santa Clara County correctly conceded as much.

In short, alternative two of rule 3.8 advances the first provision of the Commission's mandate to "promote confidence in the legal profession and the administration of justice" without offending three others. By adopting a rule that: (1) is aspirational; (2) purports to reflect a national uniformity that doesn't exist; and (3) is ambiguous, the Commission decreases the odds that the new rule will be adopted at all and increases the odds that, if adopted, enforcement of the rule will be delayed. That ironically would mean that the action of the Commission in adopting the new rule in this form on an expedited basis would not boost confidence in the legal profession or improve the administration of justice after all. What a shame. What an avoidable shame.

I respectfully dissent.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.7**  
**(Current Rule 5-210)**  
**Lawyer as Witness**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-210 (Member as Witness) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of this evaluation is proposed rule 3.7 (Lawyer as Witness). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

**Proposed rule 3.7 in context within the Rules of Professional Conduct.**

Proposed rule 3.7 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

<b>Model Rule</b>	<b>California Rule</b>
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.7 carries forward the substance of current rule 5-210 that sets the requirements when a lawyer acts as a witness in a client’s matter pending before jury. The main issue was

whether to provide broader public protection by expanding the scope of the rule beyond matters before a jury to other proceedings, such as a proceeding before a trial judge, an administrative law judge or an arbitrator. The Commission is recommending that this change be implemented in the proposed rule. The Commission believes that the intended public protection afforded by the current rule applies equally to bench trials. A client's interest is promoted by requiring lawyers to obtain the client's informed written consent where required by the rule. The nature and extent of the disclosure might vary between a bench and jury trial setting, but that does not alter the benefits of requiring client consent. In addition, the rule's application to jury trials is the standard in the majority of jurisdictions that have adopted Model Rule 3.7. This substantive change is incorporated in proposed paragraph (a).

Paragraph (b) permits a lawyer to act as an advocate when another lawyer in the same firm is likely to be called as a witness, unless precluded by a conflict of interest.

Comment [1] clarifies that paragraph (a) only applies to trials before a jury, judge, administrative law judge or arbitrator and does not encompass other adversarial proceedings or non-adversarial proceedings. One example of a situation excluded from the ambit of the rule would be a client's matter where a lawyer will testify in a hearing before a legislative body.

Comment [2] explains that a client's "informed written consent" might be documented by a recital on the record that is thereafter included in a transcript. Comment [2] also includes a reference to the definition of "written" in proposed rule 1.0.1(n).

Comment [3] reaffirms a court's discretion to take action despite a lawyer's compliance with this rule (e.g., a lawyer who complies might nevertheless be subject to a disqualification motion). See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court* (Oliver) (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.) Compare *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 [135 Cal.Rptr.3d 545] (Applying Model Rule 3.7 rather than rule 5-210 in support of court's decision to disqualify lawyer-witness).

### **Post-Public Comment Revisions**

None.



**Rule 3.7 [5-210] Lawyer as Witness**  
**(Commission's Proposed Rule Adopted on October 21–22, 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].



**Rule 3.7 ~~[5-210]~~ Member Lawyer as Witness**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A ~~member~~lawyer shall not act as an advocate ~~before a jury which will hear testimony from the member~~in a trial in which the lawyer is likely to be a witness unless:
- (A) ~~The~~(1) the lawyer's testimony relates to an uncontested issue or matter; ~~or~~
- (B) ~~The~~(2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
- (C) ~~(3) The member has~~ the lawyer has obtained informed, written consent\* ~~off from~~ the client. If the ~~member~~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 ~~member~~lawyer is employed ~~and shall be consistent with principles of recusal.~~
- (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.

**~~Discussion:~~Comment**

~~Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.~~

[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 <sup>1</sup>	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.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**Rule 3.8 [5-110] Special Responsibilities of a Prosecutor**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

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.

[4] 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.

[5] 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).

[6] 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.

[7] 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.)

[8] 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.

[9] 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.



**Rule 3.8 [5-110] Special Responsibilities of a Prosecutor**  
**(Commission's Revised Proposed Rule Adopted on October 21–22, 2016 –**  
**Redline to Public Comment Draft Version)**

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.

[3A4] 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.

[45] 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).

[56] 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.

[67] 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.)

[78] 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.

[89] 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.



**Rule 3.8 [5-110] ~~Performing the Duty of Member in Government Service~~ Special  
Responsibilities of a Prosecutor  
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.~~

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.

[4] 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.

[5] 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).

[6] 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.

[7] 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.)

[8] 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.

[9] 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 <sup>1</sup>	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.

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

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

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					"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**

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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**  
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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**  
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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**  
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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**  
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					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.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.10**  
**(Current Rule 5-100)**  
**Threatening Criminal, Administrative, or Disciplinary Charges**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)<sup>1</sup> in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 3.10 carries forward current rule 5-100. Only one substantive change is recommended in the black letter text of proposed rule 3.10. In paragraph (b), the Commission is recommending that the definition of “administrative charges” be expanded to encompass the filing of a complaint with a foreign governmental organization. Under current rule 5-100(B), “administrative charges” is limited to complaints filed with a “federal, state or local government entity.” The Commission understands that the policy of the current rule is to prohibit lawyer misconduct that is tantamount to extortion and that this policy logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule’s use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international multi-jurisdictional practice of law.

In addition to this one substantive change to the black letter of the rule, other proposed amendments include the following.

- In Comment [1], adding an explanation that the rule 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 additional clarification, this comment states that 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

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<sup>1</sup> There is no corresponding American Bar Association (“ABA”) Model Rules. The predecessor to current California rule 5-100 is former rule 7-104 and that rule was derived from DR 7-105 of the ABA Model Code of Professional Responsibility. DR 7-105 of the Model Code differs from current California rule 5-100 in that DR 7-105 was limited only to threats of criminal prosecution. The DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules to replace the Model Code. Eleven jurisdictions, however, have carried forward the DR 7-105 prohibition as part of their current rules despite the omission of a counterpart in the current Model Rules. 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. Accordingly while there is not a corresponding Model Rule, California is not alone in having a rule prohibiting this misconduct.

if the conduct continues the lawyer will report it to criminal or administrative authorities. However, that same 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. This is included by the Commission to address potential concerns that the concept of a prohibited threat is not sufficiently clear despite the fact that the rule is used for imposing discipline. (See, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company].)

- In Comment [2], clarifying that a mere statement that a lawyer will pursue “all available legal remedies” does not alone violate the rule and that finding a violation ordinarily requires consideration of the specific facts of a particular situation.
- In Comment [4], clarifying that the rule does not prohibit a government lawyer from engaging in a typical “release-dismissal” agreement in connection with related criminal, civil, or administrative matters.

#### **Post-Public Comment Revisions**

None.

**Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges  
(Commission's Proposed Rule Adopted on October 21–22, 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.

**Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges  
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (Bb) As used in paragraph (Aa) of this ~~rule~~Rule, the term “administrative charges” means the filing or lodging of a complaint with ~~a federal, state, or local~~any governmental ~~entity which~~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.
- (Cc) As used in ~~paragraph (A) of this~~ ruleRule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more ~~parties~~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.

**DiscussionComment**

~~Rule 5-100 is not intended to apply to a member’s threatening to initiate contempt proceedings against a party for a failure to comply with a court order.~~

[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) is intended to exempt~~ b) exempts the threat of filing an administrative charge ~~which~~ that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

~~For purposes of paragraph (C), the definition of “civil dispute” makes clear that the rule is applicable prior to the formal filing of a civil action.~~



**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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 4.1**  
**(No Current Rule)**  
**Truthfulness In Statements To Others**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 4.1 (Truthfulness In Statements To Others) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed rule 4.1 (Advocate in Nonadjudicative Proceedings). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 4.1 prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer’s duties under rule 1.6 and Business and Professions Code section 6068(e). The main issue considered when evaluating this proposed rule was whether this rule was necessary as a rule of professional conduct in California.<sup>1</sup> The Commission recommends adoption of ABA Model Rule 4.1 for several reasons. First, the rule provides crucial public protection. The concept embodied in proposed rule 4.1 is an important part of the entire set of rules being recommended and it is intended to supplement other rules proscribing similar conduct in other situations, such as rule 3.3 (Candor to the Tribunal) and rule 1.2.1 (Advising a Client Regarding Criminal or Fraudulent Conduct). Second, the proposed rule provides language that is more precise than either Business and Professions Code sections 6068(d) or 6128 and therefore will provide a clearer disciplinary standard than either of those statutes. Finally, every other jurisdiction has adopted some version of Model Rule 4.1. Adopting this rule helps fulfill one of the principles of the Commission’s Charter which is to eliminate unnecessary differences between California’s rules and the rules used by a preponderance of states in order to help promote a national standard with respect to professional responsibility issues.

There are four comments to the rule. Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another’s falsehood into the lawyer’s statement or a material omission in a partially true statement can violate the rule. Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply. Comment [3] alerts lawyers to the relationship of rule 4.1 with rules 1.2.1 (Advising or Assisting the Violation of Law) and 1.16 (Declining or Terminating Representation). Comment [4] directs lawyers to Comment [5] of

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<sup>1</sup> Some of the arguments made in opposition to the proposed rule included: (1) gross misconduct with respect to the subject of the proposed rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106; (2) the “knowledge” standard required by the rule may make it difficult to establish discipline under the rule; (3) the concept of a lawyer’s duty not to adopt or vouch for a client’s or witness’s falsehood is well-established in California; such a disciplinary rule is unnecessary; and (4) as to whether the proposed rule is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes an untrue statement, is well established.

proposed rule 8.4, which notes that a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to rule 4.1.

Although the concepts contained in proposed rule 4.1 are currently addressed in statutes and case law, this proposed rule is a substantive change to the current rules because these obligations are now being included as a rule of discipline.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

**Rule 4.1 Truthfulness in Statements to Others**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

In the course of representing a client a lawyer shall not knowingly:\*

- (a) make a false statement of material fact or law to a third person;\* or
- (b) fail to disclose a material fact to a third person\* when disclosure is necessary to avoid assisting a criminal or fraudulent\* act by a client, unless disclosure is prohibited by Business and Professions Code § 6068(e)(1) or Rule 1.6.

**Comment**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person\* that the lawyer knows\* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.\*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows\* is criminal or fraudulent.\* See Rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud\* by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].



**Rule 4.1 Truthfulness in Statements to Others**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 –**  
**Redline to Public Comment Draft Version)**

In the course of representing a client a lawyer shall not knowingly:\*

- (a) make a false statement of material fact or law to a third person;\* or
- (b) fail to disclose a material fact to a third person\* when disclosure is necessary to avoid assisting a criminal or fraudulent\* act by a client, unless disclosure is prohibited by ~~Rule 1.6 or~~ Business and Professions Code § 6068(e)(1) or Rule 1.6.

**Comment**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person\* that the lawyer knows\* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by ~~Rule 8.4 and~~ Business and Professions Code § 6106 and Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.\*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows\* is criminal or fraudulent.\* See Rule 1.4(a)(~~5~~4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud\* by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].





**Rule 4.1 Truthfulness ~~In~~ Statements ~~To~~ Others  
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

In the course of representing a client a lawyer shall not knowingly:\*

- (a) make a false statement of material fact or law to a third person;\* or
- (b) fail to disclose a material fact to a third person\* when disclosure is necessary to avoid assisting a criminal or fraudulent\* act by a client, unless disclosure is prohibited by [Business and Professions Code § 6068\(e\)\(1\)](#) or Rule 1.6.

**Comment**

*~~Misrepresentation~~*

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms [the truth of](#) a statement of another person\* that the lawyer knows\* is false. ~~Misrepresentations can also occur by~~ [However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph \(a\) where a lawyer makes a](#) partially true but misleading ~~statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.~~ [material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 or Rule 8.4.](#)

*~~Statements of Fact~~*

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. ~~Under generally accepted conventions~~ [For example,](#) in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.\* ~~Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~

*~~Crime or Fraud by Client~~*

[3] Under Rule ~~1.2(d)~~ [1.2.1](#), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows\* is criminal or fraudulent.\* ~~Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily~~ [See Rule 1.4\(a\)\(4\) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances,](#) a lawyer can avoid assisting

a client's crime or fraud\* by withdrawing from the representation. ~~Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by~~ in compliance with Rule 1.61.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

**Proposed Rule 4.1 Truthfulness in Statements to Others**  
**Synopsis of Public Comments**

**TOTAL = 7**      **A = 7**  
**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
X-2016-32k	Law Professors (Zitrin) (07-25-16)	Yes	A	4.1	<p>This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.”</p> <p>We commend the Commission for including this rule.</p>	No response required.
X-2016-43ac	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-22-16)	Yes	A	4.1	COPRAC supports the adoption of proposed Rule 4.1.	No response required.
X-2016-52k	Law Professors (Zitrin) (08-24-16)	Yes	A	4.1	See X-2016-32k Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32k for the Commission’s response to the Law Professors’ comments.
X-2016-66s	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	4.1	We support and approve this proposed rule. If one of the hallmarks of our profession is candor to our clients and to tribunals, lawyers should also be ethically precluded from deceiving third parties, either by false statement or material omission. This proposed rule, together with the others that mandate truthfulness in other contexts, underscores	No response required.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					that lawyers have an ethical duty not to deceive anybody they deal with in the course of their representation of a client.	
X-2016-68k	Law Professors (Zitrin) (09-22-16)	Yes	A	4.1	See X-2016-32k Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32k for the Commission's response to the Law Professors' comments.
X-2016-104as	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	4.1	1. 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. While what constitutes recklessness or gross negligence to a third party is not the same as to a client or a court, an attorney can be disciplined for gross negligence to others.  2. OCTC is concerned with the use of the term "knowingly" in Comment 1 for the same reasons expressed to the use of that word in the rule itself.  3. OCTC supports Comments 2, 3, and 4.	1. 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.  2. (See above response to no. 1.)  3. No response required.
X-2016-114	Legal Services for Prisoners with Children (Barry) (09-27-16)	Yes	D	4.1 (This letter was submitted for	Legal Services for Prisoners with Children hereby agrees with and signs onto the comment	The substance of this public comment pertains to proposed Rule 8.4.1. Please refer to the

**Proposed Rule 4.1 Truthfulness in Statements to Others  
Synopsis of Public Comments**

**TOTAL = 7**      **A = 7**  
**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
				rule 4.1 but it pertains to rule 8.4.1)	submitted by Equal Rights Advocates on proposed rule 8.4.1.	public commenter table for Rule 8.4.1.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.2**  
**(No Current Rule)**  
**Responsibilities of a Subordinate Lawyer**

**EXECUTIVE SUMMARY**

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), ABA Model Rule 5.2 (Responsibilities of a Subordinate Lawyer), and ABA Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."<sup>1</sup> The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

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<sup>1</sup> The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

The following is a summary of proposed rule 5.2 (Responsibilities of a Subordinate Lawyer).<sup>2</sup> This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.2 adopts the substance of ABA Model Rule 5.2. Paragraph (a) provides that a subordinate lawyer has an independent duty to comply with the Rules of Professional Conduct. For example, a lawyer cannot claim he or she was just following the orders of a supervisor and therefore is not subject to discipline. However, paragraph (b) provides that when the supervising lawyer reasonably resolves an “arguable question of professional duty,” the subordinate does not commit a violation by following the supervisor’s direction.

There is one comment to the rule. The comment explains how the rule should be applied when a subordinate lawyer encounters a question involving professional judgment as to the lawyers’ responsibilities under the Rules of Professional Conduct or the State Bar Act.

### **National Background – Adoption of Model Rule 5.2**

As California does not presently have a direct counterpart to Model Rule 5.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_2.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf)

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.<sup>3</sup> Five states have adopted a slightly modified version of Model Rule 5.2.<sup>4</sup> Three states have not adopted a version of Model Rule 5.2.<sup>5</sup>

### **Post-Public Comment Revisions**

None.

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<sup>2</sup> The Executive Summaries for proposed Rules 5.1 and 5.3 are provided separately.

<sup>3</sup> The forty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The five states are: Connecticut, Florida, Georgia, Ohio, and Texas.

<sup>5</sup> The three states are: California, Kentucky, and Virginia.



**Rule 5.2 Responsibilities of a Subordinate Lawyer**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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.

**Rule 5.2 Responsibilities of a Subordinate Lawyer  
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

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

**Comment**

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If 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. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate~~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. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~If the subordinate lawyer believes\* that the supervisor's proposed resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.~~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**

						<b>TOTAL = 2</b> <b>A = 1</b> <b>D = X</b> <b>M = 1</b> <b>NI = X</b>
No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	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>

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



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3**  
**(Current Rule 3-110 Disc.)**  
**Responsibilities Regarding Nonlawyer Assistants**

**EXECUTIVE SUMMARY**

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ("ABA") Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), ABA Model Rule 5.2 (Responsibilities of a Subordinate Lawyer), and ABA Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."<sup>1</sup> The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

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<sup>1</sup> The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

The following is a summary of proposed rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).<sup>2</sup> This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.3 adopts the substance of ABA Model Rule 5.3. Proposed rule 5.3 is very similar to proposed rule 5.1. The major difference is that proposed rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services, whereas proposed rule 5.1 applies to the supervision of lawyers. Proposed rule 5.3(a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that a nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Paragraph (b) requires that a lawyer who directly supervises a nonlawyer make “reasonable efforts to ensure” the nonlawyer’s conduct is compatible with the professional obligations of the lawyer, whether or not the nonlawyer is an employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for the conduct of a nonlawyer under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the nonlawyer, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There is one comment to the rule. The comment states the policy underlying the rule and explains the lawyer’s obligation in complying with the rule.

### **National Background – Adoption of Model Rule 5.3**

As California does not presently have a direct counterpart to Model Rule 5.3, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised May 5, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf)

Thirty-four states have adopted Model Rule 5.3 verbatim.<sup>3</sup> Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.<sup>4</sup> Seven states have adopted a version of the rule that is substantially different to Model Rule 5.3.<sup>5</sup> One state has not adopted a version Model Rule 5.1.<sup>6</sup>

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<sup>2</sup> The Executive Summaries for proposed Rules 5.1 and 5.2 are provided separately.

<sup>3</sup> The thirty-four states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

<sup>4</sup> The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

<sup>5</sup> The six states are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

<sup>6</sup> The one state is California.

### **Post-Public Comment Revisions**

None.





**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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.



### Rule 5.3 Responsibilities Regarding Nonlawyer Assistants (Redline Comparison of the Proposed Rule to ABA Model Rule)

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

- (a) a ~~partner, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ managerial authority in a law firm,\* shall make reasonable\* efforts to ensure that the firm\* has in effect measures giving reasonable\* assurance that the ~~person's~~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~~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 ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if engaged in by a lawyer if:
  - (1) the lawyer orders or, with ~~the~~ knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer ~~is a partner or has comparable,~~ 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

[1] Lawyers ~~generally employ assistants in their practice~~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~~lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning ~~the~~all ethical aspects of their employment, ~~particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work-product.~~ The measures employed in instructing and supervising nonlawyers should take account of the fact that they ~~demight~~demight not have legal training ~~and are not subject to professional discipline.~~

[2] Paragraph (a) ~~requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c)~~

~~specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~

**Proposed Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**  
**Synopsis of Public Comments**

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

No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
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

<sup>1</sup> 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**

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

No No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3.1**  
**(Current Rule 1-311)**  
**Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. There is no counterpart to rule 1-311 in the American Bar Association (“ABA”) Model Rules. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of the Commission’s evaluation is proposed rule 5.3.1 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 1-311 governs the employment activities of certain lawyers who are not entitled to practice law, specifically disbarred, suspended, resigned, or involuntary inactive members who work in law offices. The rule imposes duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include a requirement to give notice to both the State Bar as well as to each client on whose specific matter such person will work. The notice to the State Bar ensures that the bar can provide oversight while the notice to client ensures greater transparency by giving the client an opportunity to object to the restricted attorney working on his or her case. In proposed rule 5.3.1, the Commission made no substantive changes to current rule 1-311. The Commission reasoned that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted attorney to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status.<sup>1</sup>

The non-substantive changes proposed were intended to clarify, update and streamline the existing rule. Throughout the rule, conforming language changes include: the phrase “associate in practice” is substituted for “associate professionally with” the word “assist” is substituted for “aid” and “restricted lawyer” is defined. Other changes include the deletion of all the Discussion sections of the current rule except for language that clarifies a hiring lawyer’s obligation to give notice to a client when the client is an organization.

**National Background – Adoption of Rule Addressing Law-related Activities of Disbarred, Suspended, Resigned or Involuntarily Inactive Attorneys**

As there is currently no ABA Model Rule counterpart to the current or proposed California rules on this topic, this section reports on the adoption of a similar rule in other United States’ jurisdictions. Three states have adopted a rule of professional conduct similar to current rule

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<sup>1</sup> One member of the Commission submitted a written dissent disagreeing with the Commission’s threshold determination that the current rule should be retained. The full text of the dissent is attached to this summary.

1-311 in that they require the employing attorney to provide notice when employing a suspended or disbarred attorney: Colorado, Maryland, Minnesota, and Alaska. Alaska incorporates a bar rule that similarly requires an employing attorney to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.<sup>2</sup>

Seven states prohibit suspended or disbarred attorneys from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine states partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred attorney from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law.))<sup>3</sup>

Finally, twenty states have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

### **Post-Public Comment Revisions**

None.

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<sup>2</sup> See, Colorado Rule of Professional Conduct 5.5; Maryland Rule of Professional Conduct 5.3; and Minnesota Rule of Professional Conduct 5.8; Alaska Bar Rule 15(c): Employment of Disbarred, Suspended or Resigned Attorney. Maryland and Minnesota require notice to be served upon the state bar, while Colorado requires written notice to be provided to the client.

<sup>3</sup> Other states partially restricting the employment of suspended or disbarred members include: Florida (Rule of Discipline 3-6.1), Louisiana (Rule of Professional Conduct 5.5(e)), New Mexico (Rule of Professional Conduct 16-505(B) and (C)), North Carolina (Rule of Professional Conduct 5.5(e) and (f)), Virginia (Rule of Professional Conduct 5.5 (a) and (b)), Washington (Rule of Professional Conduct 5.8(b)), and Wyoming (Rules of Professional Conduct 8.4(g)).



**Commission Member Dissent to the Recommended Adoption  
of Proposed Rule 5.3.1, Submitted by Daniel E. Eaton**

I believe that Rule 1-311, dealing with the employment of disempowered attorneys by members of the Bar, should be dropped from the revised Rules of Professional Conduct. The one piece of the rule worth saving should be moved to Rule 1-300. Keeping the rule retains an unnecessary non-conformity with the professional rules in effect in the preponderance of the states. Lawyers who employ disempowered attorneys don't need it to know how such sidelined members of the Bar may be engaged. State Bar prosecutors don't need it to be able to pursue discipline for employing attorneys who assist disempowered practice attorneys in practicing law. And disempowered attorneys don't need a rule not even directed at them to know what they may and may not do while they are sidelined. I respectfully dissent in principle from the Commission's retention of 1-311.

"The Rules of Professional Conduct are intended not only to establish ethical standards of members of the bar, but also designed to protect the members of the public." (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917, citations omitted, rejecting disciplined attorney's contention that consent of client or the fairness of an attorney-client transaction rendered professional conduct rule regulating such a transaction in operative.) The first principle of this Commission's Charter from the State Bar Board of Trustees captures that declaration: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public." (Commission Charter, Principle 1.)

Principle 3 of the Commission's Charter directs the analysis of whether a particular existing Rule should be revised and, if so, how: "The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, **unnecessary** differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to promote a national standard with respect to professional responsibility issues **whenever possible**." (Emphasis added.)

Rule of Professional Conduct 1-311 is entitled "Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member." It was adopted by the California Supreme Court in 1996 over the dissent of Justice Joyce Kennard. The Rule has six subparts. Paragraph (A) defines the terms "employ," "involuntarily inactive member," and "resigned member." Paragraph (B), the core of the Rule, sets out six tasks the employing member of the Bar may not employ a disempowered attorney to do on behalf of the employing member's clients. Subparagraph 6 of this paragraph has the catchall prohibition on employing such an attorney to "[e]ngage in activities which constitute the practice of law." Paragraph (C) identifies three non-exhaustive types of "research, drafting or clerical activities" the employing attorney may employ a disempowered lawyer to do. Paragraph (D) requires the employing attorney to serve a written notice of the employment of the disbarred attorney on the State Bar, listing the prohibited activities in paragraph (B) and confirming that the disempowered attorney is not being employed to perform any of those activities. Paragraph (D) also requires the employing attorney to serve a similar written notice on each client on whose matter the disempowered attorney will work before or at the time the disempowered attorney begins to work on the client's matter and further requires the employing attorney to retain that notice for two years with proof that it was served. Paragraph (E) expressly allows the employing attorney, without notifying clients or the Bar, to hire the disempowered attorney exclusively to do such support services as typing,

catering, reception, and maintenance. Paragraph (F) requires the employing member to notify the Bar when the services of the disempowered attorney are terminated.

The substance of Rule 1-311 is not found in the ABA Model Rules and is not found in the professional rules of 46 other states. The continued presence of Rule 1-311 in the California Rules of Professional Conduct is an unnecessary non-conformity with the rules used by the preponderance of the states. The essence of the Rule would remain in Business and Professions Code § 6133: “Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline.” This provision was enacted in 1988. It captures all of paragraph (B) of the existing rule. Indeed, by requiring the employing attorney to supervise the disempowered attorney in the latter’s assigned duties, § 6133 appropriately goes beyond what is required by Rule 1-311. It is not clear that the continued presence of this Rule, with a limited exception addressed below, adds anything to the ability of the State Bar to prosecute those who would employ a disempowered attorney to practice law. And yet there it is.

Paragraph (B) is not necessary to tell the disempowered attorney and an attorney who would employ him what he may do. It is useful to repeat that Rule 1-311 is not directed at the disempowered attorney at all, only to the attorney who would employ him or her. Even without this Rule, the law is clear for both employer and employee that a disempowered attorney may not in any way, shape, or form practice law or be employed to do so. Period. Subparagraphs 1-5 of Paragraph (B) add nothing to subparagraph 6, which in turn adds nothing to Rule 1-300. Subparts 1-5 may confuse the practitioner seeking guidance, who may understandably assume that the activities listed in those subparts comprise some special category of activities that are not quite the practice of law prohibited by subpart 6. What it means to “practice law” has been ably handled by the courts, including the State Bar Review Department. (See e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 (collecting cases); *Farnham v. State Bar* (1976) 17 Cal.3d 605; *Estate of Condon v. McHenry* (1998) 65 Cal.App.4th 1138, 1142-1143.) That is where those looking for guidance on this question, both the disempowered attorney and the one who would employ him or her, should turn, not the Rules of Professional Conduct.

It may be argued that Paragraphs (C) and (E) are still important because they guide the employing attorney in assigning the disempowered attorney appropriate tasks and thereby encourage the rehabilitation of the disempowered attorney. There are at least two responses to that argument.

First, it should be self-evident that not all roads to vocational redemption for the disempowered lawyer lead through a law office. For one thing, seven states prohibit suspended or disbarred lawyers from engaging in any law-related activities, a bar that presumably does not preclude those lawyers’ rehabilitation through other means. There are other ways for a disempowered lawyer to carry the heavy burden of demonstrating the “exemplary” behavior “over a meaningful period of time” required for reinstatement. (*In re Gossage* (2000) 23 Cal.4th 1080, 1097.) That is why any defense of this Rule on the ground that its elimination would make the disempowered lawyer altogether unemployable makes no sense. The omission of these provisions would not even make the disempowered lawyer less employable since anyone at all may perform the tasks that are listed in Paragraphs (C) and (E), and there is nothing in the Rules that says that a disempowered lawyer may not be employed by an active lawyer at all.

Second, a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney. In any event are the Rules of Professional Conduct, given their purpose, really the place to advance even such a noble end?

All of that said, I would not discard Rule 1-311 in its entirety. The requirement that the employing attorney provide contemporaneous written notice to clients on whose matters the disempowered is being engaged to work serves the purpose of these Rules to protect the public, especially the public consisting of clients. The same could be said I suppose of a rule requiring written notice to a client of anyone convicted of criminal fraud to work on their matters. I would transfer this part of the Rule to Rule 1-300 (A), addressing the unauthorized practice of law.

Rule 1-300 (A) reads: "A member shall not aid any person or entity in the unauthorized practice of law." One of three other states that have such a rule, Colorado, places the substance of the current Rule 1-311 under its rule prohibiting an attorney to assist others in the unauthorized practice of law. (See, Colorado Rule 5.5.) Rule 5.5 also is the ABA Rule addressing the unauthorized practice of law. Annotations under Rule 5.5, as it has been adopted in other states deal with the same kind of conduct as addressed in Rule 1-311. See e.g., *Ky. Bar Ass'n v. Unnamed Attorney* (Ky. 2006) 191 S.W.3d 640 (Lawyer disciplined for employing suspended lawyer and telling clients that employee was not practicing law for "health" and other reasons.) I would make the client notification provision of Rule 1-311 new Paragraph (B) of Rule 1-300 and make what is now Paragraph 1-300(B) a new Paragraph 1-300(C).

But that is the only part of Rule 1-311 that I would keep. The Commission learned from the Office of Chief Trial Counsel that lawyers who have employed disempowered attorneys have filed over 1,000 written notices of having done so with the State Bar under this Rule. Impressive, but what ethical purpose does that really serve? Violation of the written notice provision gives the Bar an additional ground to punish a lawyer who has assisted a disempowered attorney in the practice of law. But the employing attorney is subject to discipline for that under Rule 1-300 anyway. And what of the lawyer who employs a disempowered attorney to perform non-legal tasks without serving the written notice with the Bar? In that case, violation of the notice furnishes a unique ground to seek discipline of the unwary employing lawyer. In my view, the provision requiring written notice to the Bar gives rise to what is essentially either redundant discipline or it is a trap for the unwary. Either way, it should go.

Yes, we start with the Rules as they exist, but our mandate goes beyond that. I regret that we have missed a rare opportunity to eliminate an unnecessary non-conformity with the rules prevailing in the vast majority of the states. I respectfully dissent.



**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive Lawyer  
(Commission's Proposed Rule Adopted on October 21–22, 2016– Clean Version)**

- (a) For purposes of this Rule:
- (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
  - (2) "Member" means a member of the State Bar of California.
  - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).
  - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
  - (5) "Restricted lawyer" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person\* the lawyer knows\* or reasonably should know\* is a restricted lawyer to perform the following on behalf of the lawyer's client:
- (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client's funds; or
  - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist a restricted lawyer to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person\* the lawyer knows\* or reasonably should know\* is a restricted lawyer, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (b) and state that the restricted lawyer will not perform such activities. The lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist a restricted lawyer whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) When the lawyer no longer employs, associates in practice with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Comment**

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 1.13.)

**Rule 5.3.1 [1-311] Employment of Disbarred,  
Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer  
(Redline Comparison of the Proposed Rule to Current California Rule)**

(Aa) For purposes of this ~~rule~~Rule:

(1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) “Member” means a member of the State Bar of California.

(~~23~~) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code ~~sections~~§§ 6007, 6203(~~ed~~)(1), or California Rule of Court 9.31;~~and~~(d).

(~~34~~) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.

(5) “Restricted lawyer” means a member whose current status with the State Bar of California is ~~disbarred, suspended, resigned, or involuntarily inactive.~~

(Bb) A ~~member~~lawyer shall not employ, associate ~~professionally~~in practice with, or ~~aid~~assist a person\* the ~~member~~lawyer knows\* or reasonably should know\* is a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer to perform the following on behalf of the ~~member's~~lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities ~~which~~that constitute the practice of law.

(Cc) A ~~member~~lawyer may employ, associate ~~professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member~~in practice with, or assist a

restricted lawyer to perform research, drafting or clerical activities, including but not limited to:

- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active ~~member~~lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active ~~member~~lawyer who will appear as the representative of the client.
- (~~Dd~~) Prior to or at the time of employing, associating in practice with, or assisting a person\* the ~~member~~lawyer knows\* or reasonably should know\* is a ~~disbarred, suspended, resigned, or involuntarily inactive member, the member~~restricted lawyer, the lawyer shall serve upon the State Bar written\* notice of the employment, including a full description of such person's current bar status. The written\* notice shall also list the activities prohibited in paragraph (~~bB~~) and state that the ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer will not perform such activities. The ~~member~~lawyer shall serve similar written\* notice upon each client on whose specific matter such person\* will work, prior to or at the time of employing, associating with, or assisting such person\* to work on the client's specific matter. The ~~member~~lawyer shall obtain proof of service of the client's written\* notice and shall retain such proof and a true and correct copy of the client's written\* notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.
- (~~Ee~~) A ~~member~~lawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned, or involuntarily inactive member, associate in practice with, or assist a restricted lawyer~~ whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (~~Ff~~) ~~Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member~~When the lawyer no longer employs, associates in practice with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written\* notice of the termination.

### **Discussion**Comment

~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants*~~



~~*Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)~~

~~Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client~~  
~~the client~~ is an organization, ~~then the written~~lawyer shall serve the notice required by paragraph ~~(D) shall be served upon the~~d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See ~~rule~~Rule 3-6001.13.)

~~Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.~~



**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
**D = 1**  
**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
2016-25a	McCue, Martin (08-02-16)	No	M	5.3.1	Some parts of this rule should also apply to employment of lawyers who have voluntarily elected inactive status. Using only the concept of “involuntary inactivity” creates a gap in the rule that does not make sense. A person who elects inactive status should not practice while inactive. They need not be “restricted” by an outside authority.	Proposed rule 5.3.1 is intended to regulate lawyers who are under some form of regulatory or disciplinary sanction not to practice law, i.e., those lawyers who are <i>involuntarily</i> inactive. Proposed rule 5.5 (b), on the other hand, regulates activities by those lawyers who are not admitted to practice law in California for other reasons, including those who <i>voluntarily</i> go on inactive status. The strict regimen of 5.3.1 is inappropriate for this latter group of lawyers, who can voluntarily elect to go back on active status.
X-2016-43ah	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 5.3.1.	No response required.
X-2016-76p	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	D		PREC urges the deletion of Proposed Rule 5.3.1 in its entirety. It has long been established that a lawyer who is suspended from practice and holds herself out as entitled to practice is engaged in the unauthorized practice of	The Commission disagrees with the commenter’s assessment of current rule 5.3.1.

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

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
Synopsis of Public Comments**

**TOTAL = 4**      **A = 2**  
**D = 1**  
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					<p>law and is subject to sanctions. Current Rule 1-311, impacts the employment of restricted California lawyers by imposing certain duties upon the active lawyer/employers; its revised version, Proposed Rule 5.3.1, has similar features. There is no current rule that describes a lawyer's responsibilities with respect to the employment or retention of nonlawyers in general. Proposed Rule 5.3 would bridge that gap. It is substantially similar to ABA Model Rule 5.3.</p> <p>If adopted, Proposed Rule 5.3 would both obviate the need for, and highlight the substantial defects of, current Rule 1-311 and its proposed revision, 5.3.1. Those defects include the following:</p> <p>1. Proposed Rule 5.3.1 is punitive. The purpose of disciplinary proceedings is not to punish but to protect the courts and the public. The rule limits the activities of restricted California lawyers in ways that greatly exceed the boundaries set by <i>Birbrower, Montalbano, Condon &amp; Frank v. Superior</i></p>	<p>1. The commenter does not explain why rule 5.3.1 is "punitive." The purpose of the proposed Rule, which largely carries forward current rule 1-311, is to <i>restrict</i> the unauthorized practice of law by a disbarred, suspended or involuntarily inactive lawyer, but not prohibit that person</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
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	<b>M = 1</b>
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p><i>Court</i> for other lawyers not admitted in California without demonstrating an enhanced risk of harm. Where the restricted lawyer is involuntarily inactive for reasons other than discipline, the punitive effect is even more pronounced.</p> <p>2. Proposed Rule 5.3.1 imposes undue burdens on current practice. Strict compliance with the rule precludes the otherwise necessary and appropriate use of remote and online law-related services where the status of individual service providers cannot be ascertained. In addition, the reporting requirements are both onerous to potential employers and an unsustainable burden on the regulatory resources of the State Bar without demonstrating a commensurate risk to the public or the courts.</p>	<p>from working in a legal environment under lawyer supervision. The rule sets forth in precise terms what is expected of the employing lawyer who supervises a person who has been disbarred, suspended or placed on involuntarily inactive service. The Commission believes this provides a degree of public protection that would not be available with the rule's repeal.</p> <p>2. The commenter also criticizes the rule as imposing "undue burdens on current practice" because, theoretically, a lawyer might utilize "remote and online law-related services" where the status of service providers cannot be ascertained. The Commission believes this is a strained reading of the scope, purpose and intent of the rule. However, to the extent a lawyer is employing someone to engage in tasks covered by the rule, the lawyer is obligated to comply with the rule. There is no indication that the concerns raised by LACBA have caused problems</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
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					<p>3. Proposed Rule 5.3.1 frustrates rehabilitation. Disciplinary proceedings are designed to rehabilitate lawyers. The rule imposes significant disincentives for potential lawyer-employers to hire restricted lawyers as opposed to other nonlawyers. In so doing, the rule effectively deprives restricted lawyers of potential employment, which, in turn, impairs their ability to attain the present learning and ability in law required for rehabilitation. Proposed new rule 5.3 would provide valuable guidance for the use of nonlawyer assistants that is not available under the current rules and, and it would be appropriate for contemporary practice. In contrast, the proposed rule 5.3.1, would be rendered moot by 5.3 and is otherwise unduly burdensome to both practitioners and regulators. Proposed rule 5.3 should be adopted, and proposed rule 5.3.1 should be deleted in its entirety.</p> <p>In the event Proposed Rule 5.3.1</p>	<p>under the existing rule, and therefore the Commission does not believe the issue needs to be addressed further.</p> <p>3. The Commission also believes that the rule does not frustrate rehabilitation. The rule does not impose unreasonable disincentives, and the client and public's right to know that a person who is disbarred, suspended or involuntarily inactive is working on their case is a matter of public protection and outweighs the disincentives that exist by virtue of requiring disclosure of the employment status to the client.</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
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Synopsis of Public Comments**

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					<p>is not deleted, we have the following remaining comments on its current form:</p> <p>4. Proposed Rule 5.3.1(a) (3) and (4) each use the term “member,” despite the fact that that term has generally been eliminated in the proposed new rules, with the term “lawyer” being used in its place. Under these circumstances, the use of the term “member” in these subparagraphs, without reference to the term “lawyer,” may lead to confusion. It is also internally inconsistent with language of subparagraph (a)(5), as well as the title of the rule, which do use the term “lawyer.” To avoid this, we recommend that in subparagraphs (a)(3) and (4), the first use of the term “member” be replaced with the term “lawyer.” Under this approach, subparagraph (a)(3) would read, “(3) ‘Involuntarily inactive lawyer’ means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).” Likewise, subparagraph (a)(4) would read, “(4) ‘Resigned lawyer’ means a</p>	<p>4. The Commission thanks the commenter but has not made the suggested changes to the rule. The term “member” is used because the rule as drafted applies only to the employment of <i>members</i> of the State Bar of California who have been disbarred, suspended or placed on involuntary inactive status.</p>

**Proposed Rule 5.3.1 [1-311] Employment of Disbarred, Suspended,  
Resigned, or Involuntarily Inactive Lawyer  
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					member who has resigned from the State Bar while disciplinary charges are pending.” Finally, we read this proposed rule to prohibit a lawyer from assisting a restricted lawyer from negotiating any matter on behalf of a client. However, there are contexts (e.g., in transactional work) where attorneys appropriately work with investment bankers and business brokers in negotiating transactions. If a restricted lawyer is functioning in such a role (and not as an attorney), the transactional attorney should not be in violation of the rule. As a result, we recommend deleting the reference to “assisting”.	
X02016-104az	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 5.3.1.	No response required.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.4**  
**(Current Rules 1-310; 1-320; 1-600)**  
**Financial and Similar Arrangements with Nonlawyers**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated current rules 1-310 (Forming a Partnership With a Non-lawyer), 1-320 (Financial Arrangements With Non-Lawyers), and 1-600 (Legal Service Programs) in accordance with the Commission Charter, with a focus on the function of these rules as disciplinary standards, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart which contains many of the concepts included in these three California rules in a single rule, Model Rule 5.4 (Professional Independence Of A Lawyer). The Commission also reviewed relevant California statutes, rules, and case law relating to issues addressed by the proposed rule. The result of the Commission's evaluation is proposed rule 5.4 (Financial and Similar Arrangements with Nonlawyers). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered when evaluating these rules was whether to retain the existing rules separately, or to recommend adoption of a rule derived from ABA Model Rule 5.4. The recommendation is for a rule derived from ABA Model Rule 5.4 because the proposed rule gathers together in a single rule concepts that are intended to promote the independence of a lawyer's professional judgment, as opposed to retaining these concepts in three separate rules. The proposed rule will improve public protection by providing broader prohibitions on a lawyer's conduct and on relationships into which a lawyer might enter that could pose a threat to the lawyer's exercise of independent professional judgment. In addition, the proposed rule provides greater public protection by expanding upon current rule 1-310<sup>1</sup> through not only prohibiting a lawyer from forming a partnership with a nonlawyer, but also any other organization with a nonlawyer if any of the activities of the organization consist of the practice of law. Finally, the proposed rule ensures California's existing laws permitting lawyers to participate with governmental entities, legal services programs and certain other organizations continue to be honored.

Paragraph (a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer or with an organization that is not authorized to practice law. Paragraph (a) contains five subparagraphs providing guidance on the exceptions to the prohibition permitted under the rule. Paragraph (a) contains the substance of current rule 1-320(A).

Paragraph (b) prohibits a lawyer from forming a partnership or other organization with a nonlawyer if any of the activities of the partnership or organization consist of the practice of law. Paragraph (b) contains the substance of current rule 1-310 but, as stated above, expands upon the current rule by prohibiting a lawyer from forming any other organization, in addition to a partnership, with a nonlawyer to conduct the practice of law.

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<sup>1</sup> Current Rule 1-310 (Forming a Partnership With a Non-Lawyer) provides:

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Paragraph (c) prohibits a lawyer from allowing a person who recommends, employs, or pays the lawyer to provide legal services for another to interfere with either the lawyer's independent professional judgment or with the lawyer-client relationship in rendering legal services.

Paragraph (d) prohibits a lawyer from practicing law with or in the form of a professional corporation or other organization authorized to practice law for a profit if: (1) a nonlawyer owns any interest in it;<sup>2</sup> (2) a nonlawyer is a director or officer of the corporation or holds a similar position of responsibility in any other form of organization; or (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

Paragraph (e) requires the Board of Trustees of the State Bar of California to formulate and adopt Minimum Standards for Lawyer Referral Services which are binding on lawyers in California. This paragraph also prohibits a lawyer from accepting a referral from, or otherwise participating in, a lawyer referral service unless it complies with the Minimum Standards for Lawyer Referral Services as adopted by the Board. Paragraph (e) contains the substance of current rule 1-600(B).

Paragraph (f) prohibits a lawyer from practicing law with or in the form of a nonprofit legal aid, mutual benefit, or advocacy group if such organization allows any third person or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or helps any person or organization to practice law in violation of the Rules of Professional Conduct or the State Bar Act. Paragraph (f) contains the substance of current rule 1-600(A).

There are four comments to the rule. Comment [1] states that paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to a nonlawyer employee so long as the arrangement does not interfere with the lawyer's independent professional judgment; however, the nonlawyer's compensation may not be based on a percentage or share of fees in specific cases or legal matters. Comment [2] states that paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to the lawyer so long as the compensation is not determined as a percentage or share of the lawyer's overall revenues, or tied to fees in specific cases or legal matters. Comment [3] clarifies that paragraph (a)(5)

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<sup>2</sup> Proposed paragraph (d)(1) contains a limited exception which states: "except for allowing a fiduciary representative of a lawyer's estate to hold the lawyer's stock or interest for a reasonable time during administration." This is consistent with State Bar Rule 3.157(C) and Business and Professions Code section 6171(a).

State Bar Rule 3.157(C): "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death."

Bus. & Prof. Code § 6171(a):

With the approval of the Supreme Court, the State Bar may formulate and enforce rules and regulations to carry out the purposes and objectives of this article, including rules and regulations requiring all of the following:

- (a) That the articles of incorporation or bylaws of a law corporation shall include a provision whereby the capital stock of the corporation owned by a disqualified person (as defined in the Professional Corporation Act) or a deceased person shall be sold to the corporation or to the remaining shareholders of the corporation within such time as the rules and regulations may provide.

permits sharing with or paying court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. Comment [4] states that the rule is not intended to affect case law regarding the relationship between insurers and lawyer providing legal services to insureds.

**Post-Public Comment Revisions**

None.



**Rules 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements with Nonlawyers  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
  - (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
  - (5) a lawyer or law firm\* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
  - (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;
  - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

- (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,\* organization or group to practice law in violation of these Rules or the State Bar Act.

### **Comment**

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

**Rule 5.4 [1-320] Financial and Similar Arrangements**  
**~~With Non-Lawyers~~with Nonlawyers**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(a)(A) Neither a member nor a~~A lawyer or law firm\* shall ~~directly or indirectly~~not share legal fees ~~with a person who is not a lawyer~~directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

- (1) ~~An~~An agreement ~~between a member and a law~~by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the ~~member's~~lawyer's death, to the ~~member's~~lawyer's estate or to one or more specified persons ~~over a reasonable period of time~~; or
- (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17, to the lawyer's estate or other representative;
- ~~(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~
- (3) ~~A member~~a lawyer or law firm\* may include ~~non-member~~nonlawyer employees in a compensation, ~~profit sharing~~, or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~provided the plan does not ~~circumvent these rules or Business and Professions Code section 6000 et seq.; or otherwise violate these Rules or the State Bar Act;~~
- (4) ~~A member~~a lawyer or law firm\* may pay a prescribed registration, referral, or ~~participation~~other fee to 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~~. Services; or
- (5) a lawyer or law firm\* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm\* in the matter.

~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, 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) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

### **~~Rule 1-310 Forming a Partnership With a Non-Lawyer~~**

- ~~(b) A member~~lawyer shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization consist of the practice of law.
- ~~(c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.~~
- ~~(d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~
- ~~(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;~~
  - ~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~
  - ~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~
- ~~(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.~~

### **~~Rule 1-600 Legal Service Programs~~**

- ~~(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.~~



- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- ~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,\* organization or group to practice law in violation of these Rules or the State Bar Act.

### **Discussion** COMMENT

~~[Discussion paragraph for Rule 1-320]~~

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these Rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

~~[Discussion paragraph for Rule 1-310]~~

~~Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.~~

~~[Discussion paragraph for Rule 1-600]~~

~~The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.~~

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[4] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements  
with Nonlawyers  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 1</b>
	<b>M = 2</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 26, 2016. See pages 43-46 of the public hearing transcript.)	Yes	D	5.4	<p>Nonlawyers should be permitted to invest in law firms as long as lawyer's professional judgment isn't compromised.</p> <p>Recounts examples under current rules where attorneys place their financial interests above those of their clients.</p> <p>Outside ownership will increase access to justice. Cites H&amp;R Block as an example of a large company that has made tax work more available to the public.</p> <p>Outside ownership will allow lawyers to focus on what they are trained to do as opposed to the business of the law firm.</p> <p>Recent law grads can get training at these types of firms which is less likely at smaller firms.</p> <p>That the rule should just contain the language in paragraph (c) to protect the public while allowing outside ownership.</p>	<p>No change to the report is recommended. It is outside of the scope of the Commission to draft Rules that conflict with established California law. Ownership interests by non-lawyers in California law firms are prohibited. California Business and Professions Code Section 6125 states, "No person shall practice law in California unless the person is an active member of the State Bar." California law has long limited the practice of law to Lawyers. "(I)ndividuals may not, either singly or in association, engage in the practice of the law without having a special license so to do, and hence the individuals forming this corporation could not, under the section of the code relied upon, gain any other or further right by the act of incorporation than that lawfully possessed by them, either singly or in the aggregate, without incorporation." <i>People v. Merchants Protective Corp.</i>, 189 Cal. 531 (1922). The</p>

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

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements  
with Nonlawyers  
Synopsis of Public Comments**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 1</b>
	<b>M = 2</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
						Business and Professions Code Section specifically allows the establishment of law corporations. Law corporations are limited by California Business and Professions Code § 6165 which provides that "...each director, shareholder, and each officer of a law corporation shall be a licensed person as defined in the Professional Corporation Act, or a person licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices."
X-2016-76q	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M		PREC finds the reference to "other organization" in paragraph (b) of Proposed Rule 5.4 to be overbroad and recommends that the language in this paragraph be clarified by adding "for a profit" to the end of the paragraph. Such a change would parallel the language used in the beginning portion of paragraph (d) of this Rule.	The Commission has not made the requested change. The provisions of paragraph (d) referred to by the commenter were discussed during drafting and were designed for lawyers practicing in for profit law firm organizations as differentiated from existing and legally permitted not for profit organizations that provide legal service. The provisions of paragraph (b) deal with all lawyers regarding the startup formation by lawyers of law

**Proposed Rule 5.4 [1-320, 1-310, 1-600] Financial and Similar Arrangements  
with Nonlawyers  
Synopsis of Public Comments**

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						partnerships and other law firm organizations and restates the long held prohibition against nonlawyers practicing law in California.
X-2016-104ba	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		OCTC supports this rule and its Comments.	No response required.
X-2016-115g	Lamport, Stanley (09-29-16)	N	M		<p>Current Rules 1-320 and 2-200 use different terms to describe the same concept, the division/sharing of fees. Proposed Rules 1.5.1 and 5.4 continue the use of the different terminology. Proposed Rule 1.5.1 refers to a division of fees for legal services. Proposed Rule 5.4 refers to sharing legal fees. In my view, the terminology in both rules should be the same.</p> <p>Accordingly, I recommend that proposed Rule 5.4 should be revised so that both proposed Rules 1.5.1 and proposed Rule 5.4 state that a lawyer or a firm shall not divide a fee for legal services. I have prepared redlined revision to proposed Rule 5.4 showing the requested changes.</p>	The Commission did not make the requested change. The current California rules, as well as those in all other jurisdictions, intentionally use different words for fee split arrangements among lawyers as opposed to fee arrangements between lawyers and nonlawyers. The former are permitted under certain circumstances, (proposed Rule 1.5.1 [2-200], while the latter are prohibited. The Commission is concerned about the problems a deviation in language could create. Consistent with the Commission's charter, the Commission does not believe a sufficiently good reason exists to deviate from this distinction in terminology established in the current rules.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.5**  
**(Current Rule 1-300)**  
**Unauthorized Practice of Law; Multijurisdictional Practice of Law**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-300 (Unauthorized Practice of Law) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.5 amends current rule 1-300. In substance, it continues the prohibitions in rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the Commission is recommending that the rule also include the Model Rule 5.5 prohibitions against a lawyer who is not admitted to practice in California from maintaining an office or systematic presence in California and falsely holding out that he or she is admitted to practice law in California.

The main issue considered by the Commission in studying this rule was whether to propose paragraph (b) that implements the Model Rule prohibitions against a lawyer who is not admitted to practice in California from: (i) maintaining an office or systematic presence in California; and (ii) from holding out that he or she is admitted to practice law in California. Although the Commission recognized that such conduct presently is governed by well-established State Bar Act prohibitions against the unlawful practice of law (see Business and Professions Code §6125 et seq.), the Commission nevertheless recommends this amendment to the current rule. Three of the Commission’s reasons for this change are set forth below.

First, proposed rule 5.5 would serve as an entry point for out-of-state lawyers considering whether to practice in California and proposed paragraph (b) alerts such lawyers to limitations on their potential authorization to practice in California even if they believe that they would qualify to do so under one of the multijurisdictional practice of law (“MJP”) provisions in the California Rules of Court (i.e., MJP Rule of Court 9.46 authorizing a registered in-house counsel to engage in a limited practice exclusively for that lawyer’s employer).

Second, proposed paragraph (b) would prohibit all non-admitted lawyers, including those persons authorized to practice in California under the Rules of Court (i.e., under the MJP rules, the pro hac vice rule, and other rules) from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California as a member of the State Bar. For example, a non-admitted lawyer who is given narrow permission by a trial judge to appear as counsel pro hac vice in a single case should not thereafter hold himself or herself out as being admitted in California as that would be a misleading representation that the lawyer enjoys the same unlimited privilege of practicing law as an active member.

Third, proposed paragraph (b) would be a necessary predicate in the black letter of the rule for the important information provided in the proposed comment to the rule concerning California's regulatory structure for MJP which differs substantially from that in other jurisdictions where regulation of MJP is found in the Rules of Professional Conduct. In California, MJP is "codified" in the Rules of Court. The comment identifies the categories of authorized practice of law available to qualified lawyers who are not admitted in California and includes citations to the applicable Rules of Court.

**Post-Public Comment Revisions**

None.



**Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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).

**Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(A) A member shall not aid any person or entity in the unauthorized practice of law.~~

(a) A lawyer admitted to practice law in California shall not:

(1) ~~(B) A member shall not~~ 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-2016-43al	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>

**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.6**  
**(Current Rule 1-500)**  
**Restrictions on a Lawyer's Right to Practice**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 1-500 (Agreements Restricting a Member's Practice) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.6 (Restrictions on a Lawyer's Right to Practice). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered was whether to add an express exception that would permit a restrictive partnership, or similar, agreement which is "authorized by law" in order to address the wide range of restrictive arrangements that a law firm might employ which do not constitute a violation of the current rule (see *Howard v. Babcock* (1993) 6 Cal.4th 409, 425). The Commission voted to recommend adoption of this exception. Furthermore, the Commission recommends adoption of the rule structure of Model Rule 5.6 to eliminate unnecessary differences with the national standard of Model Rule 5.6 and to facilitate compliance in the case of partnership agreements among multijurisdictional law firms.

Paragraph (a) restricts a lawyer from participating in offering or making: (1) a restrictive law firm partnership, or similar, agreement; and (2) a restrictive agreement as part of a settlement of a client's case or matter. Paragraph (a) continues the concept of the existing exception for agreements that concern benefits upon retirement (current rule 1-500(A)(1)). Paragraph also adds the exception described above that permits agreements authorized by law.

Paragraph (b) continues the existing prohibition against a lawyer participating in, offering or making an agreement which precludes the reporting of a violation of the rules. Although this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection.

Paragraph (c) provides that the rule does not prohibit agreements that impose restrictions on practice as part of disciplinary proceedings. This continues paragraph (A)(3) of current rule 1-500.

Comment [1] cites to Business and Professions Code § 16602 and *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80] concerning the application of the wide range of restrictive arrangements that law firms might employ.

Comment [2] explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement cannot require that a lawyer refrain from representing other clients. This continues the guidance in the first Discussion paragraph in rule 1-500.

Comment [3] clarifies that the rule does not prohibit restrictions of the sale of a law practice, where agreements to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold.

### **Post-Public Comment Revisions**

None.

**Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not participate in offering or making:
  - (1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or
  - (2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.
- [(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.]
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Comment**

- [1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].
- [2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.
- [3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.





**Rule 1-500 ~~Agreements Restricting a Member's~~**  
**[5.6] Restrictions on a Lawyer's Right to Practice**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A lawyer shall not participate in offering or making:
- (A1) ~~Aa member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement~~partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a ~~member~~lawyer to practice ~~law~~after termination of the relationship, except ~~that this rule shall not prohibit such an agreement which:~~that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or
- (1) ~~Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~
- (2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.
- (3) ~~Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~
- (Bb) A ~~member~~lawyer shall not ~~be a party to or~~ participate in offering or making an agreement which precludes the reporting of a violation of these rules.
- (c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

**Discussion**~~**Comment**~~

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~

[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons\* in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**Proposed Rule 5.6 [1-500] Restrictions on Lawyer's Right to Practice  
Synopsis of Public Comments**

<b>TOTAL = 2</b>	<b>A = 2</b>
	<b>D = 0</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
X-2016-43ai	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	5.6	COPRAC supports the adoption of proposed Rule 5.6.	No response required.
X-2016-104bc	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	5.6	<p>OCTC supports this rule and Comments 1 and 3</p> <p>OCTC is concerned that Comment 2 is unnecessary and merely repeats the rule.</p>	<p>No response required.</p> <p>The Commission did not delete Comment [2] because it explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement may not require that a lawyer refrain from representing other clients. This explanation is being carried forward from the first Discussion paragraph found in current rule 1-500 and deleting it might cause confusion as to whether this explanation remains true for the proposed rule.</p>

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**PROPOSED RULE OF PROFESSIONAL CONDUCT 6.3**  
**(No Current Rule)**  
**Membership in Legal Services Organization**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 6.3 (Membership in Legal Services Organization) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed rule 6.3 (Membership in Legal Services Organization). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 6.3 is derived from ABA Model Rule 6.3. The proposed rule addresses a lawyer serving as an officer or member in a legal services organization while continuing to practice law in another capacity. The proposed rule’s aim is to provide assurance to lawyers that they will not disqualify themselves or their firm from participating as officers or members of a legal services organization. Such service is important and should be encouraged as long as it does not interfere with the lawyer’s duties to his or her clients.

Proposed rule 6.3 provides that a lawyer may serve as an officer or member of a legal services organization even where the organization serves persons whose interests are adverse to the lawyer’s clients. However, the lawyer is barred from participating in a decision or action of the legal services organization in the following situations.

First, paragraph (a) prohibits such participation if it would be incompatible with certain enumerated duties owed to the lawyer’s clients, including the duty of confidentiality. While ABA Model Rule 6.3 does not include a reference to confidentiality, California has a tradition of heightened client protection in this area.

Second, paragraph (b) prohibits a lawyer from participating in a decision or action of a legal services organization where it would have an adverse effect on the organization’s client whose interests are adverse to those of the lawyer’s client.

The comment provides that a lawyer participating as an officer or member of a legal services organization does not have a lawyer-client relationship with the persons served by the organization. The comment explains the policy underlying the proposed rule, namely, that without such a rule, the profession’s involvement in legal services organizations would be severely curtailed.

**National Background – Adoption of Model Rule 6.3**

As California does not presently have a direct counterpart to Model Rule 6.3, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart,

entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations,” revised May 4, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_6\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.pdf)

Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.<sup>1</sup> Seven states have adopted a slightly modified version of Model Rule 6.3.<sup>2</sup> Two states have adopted a version of the rule that is substantially different from Model Rule 6.3.<sup>3</sup> Four states have not adopted any version of Model Rule 6.3.<sup>4</sup>

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

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<sup>1</sup> The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>2</sup> The seven states are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

<sup>3</sup> The two states are: Michigan and New Jersey.

<sup>4</sup> The four states are: California, Kentucky, Ohio, and Texas.

**Rule 6.3 Membership In Legal Services Organization**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm\* in which the lawyer practices, notwithstanding that the organization serves persons\* having interests adverse to a client of the lawyer. The lawyer shall not knowingly\* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code § 6068(e)(1) or Rules 1.7 or 1.9; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

**Comment**

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons\* served by the organization. However, there is potential conflict between the interests of such persons\* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.





**Rule 6.3 Membership In Legal Services Organization**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 –**  
**Redline to Public Comment Draft Version)**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm\* in which the lawyer practices, notwithstanding that the organization serves persons\* having interests adverse to a client of the lawyer. The lawyer shall not knowingly\* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~Rules 1.7 or 1.9, or~~ Business and Professions Code § 6068(e)(1) or Rules 1.7 or 1.9; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

**Comment**

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons\* served by the organization. However, there is potential conflict between the interests of such persons\* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.



**Rule 6.3 Membership In Legal Services Organization  
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm<sup>\*</sup> in which the lawyer practices, notwithstanding that the organization serves persons<sup>\*</sup> having interests adverse to a client of the lawyer. The lawyer shall not knowingly<sup>\*</sup> participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~Rule~~[Business and Professions Code § 6068\(e\)\(1\) or Rules 1.7 or 1.9](#); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

**~~COMMENT~~ [Comment](#)**

~~[1]~~ Lawyers should ~~be encouraged to~~ support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons<sup>\*</sup> served by the organization. However, there is potential conflict between the interests of such persons<sup>\*</sup> and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

~~[2]~~ ~~It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.~~



**Proposed Rule 6.3 Membership in Legal Services Organization  
Synopsis of Public Comments**

**TOTAL = 5**      **A = 4**  
**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-2016-43aj	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	6.3	Supports adoption of proposed Rule 6.3.	No response required.
X-2016-76s	Los Angeles County Bar Association (LACBA) (Schmid) (9-24-16)	Y	M	6.3, cmt.	<p>1. The term “legal services organization” should be defined or the language revised.</p> <p>2. Comment language not consistent with rule language.</p>	<p>1. The Commission disagrees that the term needs to be defined. It continues to believe there should be no confusion as to the term’s meaning. It is a well understood term in the legal profession. Further, the fact that the term “legal services organization” is included in the definition of “firm” or “law firm” in proposed Rule 1.0.1(c) should remove any confusion that the term is so broad as to encompass any organization that provides legal services, including for-profit law partnerships and corporations. Finally, no other jurisdiction has found it necessary to define the term.</p> <p>2. The Commission agrees and has made changes to conform the text and Comment language.</p>
X-2016-94c	Disability Rights California (Mudryk) (9-27-16)	Y	A		Supports rule because clarifies the lack of conflict of interest for those who serve on boards	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 6.3 Membership in Legal Services Organization  
Synopsis of Public Comments**

**TOTAL = 5**      **A = 4**  
**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
					except in certain circumstances.  Legal services organizations rely on volunteers and would see a great decline in volunteers without the guidance in the rule.	
X-2016-104bd	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	A	Cmt.	Comment is unnecessary.	The Commission disagrees. The comment explains the policy underlying the rule that permits withdrawal from decision-making but does not require resignation in the event a conflict arises involving a client of a lawyer serving on the organization's board.
X-2016-121h	California Commission on Access to Justice (CCAJ) (Harston) (9-23-16)	Y	A		Supports rule because it clarifies that there is no conflict of interest for attorneys serving on legal service organization board unless they knowingly participate in decisions where they have an adverse interest. There would be a great decline in volunteers without this rule.	No response required.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 6.5**  
**(Current Rule 1-650)**  
**Limited Legal Services Programs**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-650 (Limited Legal Services Programs) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 6.5 (Nonprofit And Court-Annexed Limited Legal Services Programs). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 6.5 (Limited Legal Services Programs). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 6.5 carries forward the substance of current rule 1-650, which was originally derived from Model Rule 6.5. The rule promotes legal services activities by lawyers and aids in addressing the current access to the justice crisis in California.

Paragraph (a) states that if a lawyer provides short-term limited legal services to a client through a program sponsored by a court, government agency, bar association, law school or nonprofit organization the lawyer is:

- (1) subject to rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients] if the lawyer knows that the representation of the client involves a conflict of interest;
- (2) subject to rule 1.10 [Imputation of Conflicts of Interest: General Rule] if the lawyer knows that an associated lawyer in a law firm is prohibited from representation by rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients].

Paragraph (b) clarifies that rule 1.10 [Imputation of Conflicts of Interest] is inapplicable to proposed rule 6.5 outside of the specific language of 6.5(a)(2).

Paragraph (c) states that personal disqualification of a lawyer in a legal services program will not be imputed to lawyers participating in the same program.

Comment [1] explains that there is no expectation that the lawyer’s representation of a client will continue beyond the limited consultation through legal services programs, in which it is unfeasible for a lawyer to systematically screen for conflicts of interest.

Comment [2] requires the client’s informed consent to the limited scope representation when a lawyer provides short-term limited legal services. Furthermore, a lawyer’s duty of confidentiality to the client are applicable to the limited representation.

Comment [3] reaffirms that the lawyer must have actual knowledge that the representation presents a conflict of interest for the lawyer.

Comment [4] reaffirms that imputation of conflicts of interest is applicable only when the lawyer has actual knowledge that another lawyer in the lawyer’s law firm would be disqualified. In

addition, imputation will not preclude the disqualified lawyer's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the legal service program's auspices.

Comment [5] clarifies that 1.7 [Conflict of Interest: Current Clients], 1.9 [Duties To Former Clients] and 1.10 [Imputation of Conflicts of Interest] are applicable when the lawyer undertakes to represent the client in the matter on an ongoing basis.

### **Post-Public Comment Revisions**

Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.



**Rule 6.5 [1-650] Limited Legal Services Programs**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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) and Rules 1.6 and 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.

**Rule 6.5 [1-650] Limited Legal Services Programs  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
Redline to Public Comment Draft 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~~ Rules 1.6 and 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.

**Rule 6.5 [1-650] Limited Legal Services Programs  
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~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 ~~member~~lawyer or the client that the ~~member~~lawyer will provide continuing representation in the matter:
- (1) is subject to ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) ~~has an imputed conflict of interest~~is subject to Rule 1.10 only if the ~~member~~lawyer knows\* that another lawyer associated with the ~~member~~lawyer in a law firm\* ~~would have a conflict of interest under rule 3-310~~is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (Bb) Except as provided in paragraph (Aa)(2), ~~a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm~~Rule 1.10 is inapplicable to a representation governed by this Rule.
- (Cc) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

**DiscussionComment**

[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~~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 ~~member~~lawyer who provides short-term limited legal services pursuant to ~~rule 4-650~~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 ~~member~~lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~ Except as provided in this ~~rule 1-650, the~~Rule, these Rules of Professional Conduct and the State Bar Act, including the ~~member's~~lawyer's duty of confidentiality

under Business and Professions Code § 6068(e)(1), and Rules 1.6 and 1.9, are applicable to the limited representation.

[3] A ~~member~~lawyer who is representing a client in the circumstances addressed by ~~rule 1-650~~this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (Aa)(1) requires compliance with ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows\* that the representation presents a conflict of interest for the ~~member~~lawyer. In addition, paragraph (Aa)(2) imputes conflicts of interest to the ~~member~~lawyer only if the ~~member~~lawyer knows\* that another lawyer in the ~~member's~~lawyer's law firm\* would be disqualified under ~~rule 3-310~~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 ~~member's~~lawyer's law firm\*, paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) imputes conflicts of interest to the participating ~~member~~lawyer when the ~~member~~lawyer knows\* that any lawyer in the ~~member's~~lawyer's firm\* would be disqualified under ~~rule 3-310~~Rules 1.7 or 1.9(a). By virtue of paragraph (Bb), moreover, a ~~member's~~lawyer's participation in a short-term limited legal services program will not be imputed to the ~~member's~~lawyer's law firm\* or preclude the ~~member's~~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~~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 ~~rule 1-650, a member~~this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other rules~~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 <sup>1</sup>	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

<sup>1</sup> 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 <sup>1</sup>	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.



**PROPOSED RULES OF PROFESSIONAL CONDUCT 7.2, 7.3, 7.4 & 7.5**  
**(Current Rule 1-400)**  
**Advertising and Solicitation**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-400 (Advertising and Solicitation) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts to rule 1-400, which comprise a series of rules that are intended to regulate the commercial speech of lawyers: Model Rules 7.1 (Communication Concerning A Lawyer’s Services), 7.2 (Advertising), 7.3 (Solicitation of Clients), 7.4 (Communication of Fields of Practice and Specialization), and 7.5 (Firm Names and Letterheads).

The result of the Commission’s evaluation is a three-fold recommendation for implementing:

- (1) The Model Rules’ framework of having separate rules that regulate different aspects of lawyers’ commercial speech:  
  
Proposed Rule **7.1** sets out the general prohibition against a lawyer making false and misleading communications concerning the availability of legal services.  
  
Proposed Rule **7.2** will specifically address advertising, a subset of communication.  
  
Proposed Rule **7.3** will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services.  
  
Proposed Rule **7.4** will regulate the communication of a lawyer's fields of practice and claims to specialization.  
  
Proposed Rule **7.5** will regulate the use of firm names and trade names.
- (2) The retention of the Board’s authority to adopt advertising standards provided for in current rule 1-400(E). Amendments to the Board’s standards, including the repeal of a standard, require only Board action; however, many of the Commission’s changes to the advertising rules themselves are integral to what is being recommended for the Board adopted standards. Although the Commission is recommending the repeal of all of the existing standards, many of the concepts addressed in the standards are retained and relocated to either the black letter or the comments of the proposed rules.
- (3) The elimination of the requirement that a lawyer retain for two years a copy of any advertisement or other communication regarding legal services.

The five proposed rules were adopted by the Commission during its March 31-April 1, 2016 meeting for submission to the Board of Trustees for public comment authorization. Following consideration of public comment, there were no substantive changes made to proposed Rules 7.2, 7.3, 7.4, and 7.5. A change was made to proposed Rule 7.1 and is not part of this request

for adoption, as we are requesting circulation for a second public comment period. See the Executive Summary for proposed Rule 7.1 provided with the Commission's request for an additional public comment authorization.

**1. Recommendation of the ABA Model Rule Advertising & Solicitation Framework.**

The partitioning of current rule 1-400 into several rules corresponding to Model Rule counterparts is recommended because advertising of legal services and the solicitation of potential clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts. The current widespread use of the Internet by lawyers and law firms to market their services and the trend in most jurisdictions, including California, toward permitting some form of multijurisdictional practice, warrants such national uniformity. In addition, a degree of uniformity should follow from the fact that all jurisdictions are bound by the constitutional commercial speech doctrine when seeking to regulate lawyer advertising and solicitation.

**2. Recommendation to repeal or relocate the current Standards into the black letter or comments of the relevant proposed rule but to retain current rule 1-400(E), which authorizes the Board to promulgate Standards.**

The standards are not necessary to regulate inherently false and deceptive advertising. The Commission reviewed each of the standards and determined that most fell into that category. Further, as presently framed, the presumptions force lawyers to prove a negative. They thus create a lack of predictability with respect to how a particular bar regulator might view a given advertisement. The standards also create a risk of inconsistent enforcement and an unchecked opportunity to improperly regulate "taste" and "professionalism" in the name of "misleading" advertisements. In the absence of deception or illegal activities, regulations concerning the content of advertisements are constitutionally permitted only if they are narrowly drawn to advance a substantial governmental interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques" that are no more than potentially misleading are unconstitutionally broad).

Nevertheless, although the Commission's review led it to conclude that none of the current standards should be retained as standards, it determined that proposed rule 7.1 should carry forward current rule 1-400(E), the standard enabling provision, in the event future developments in communications or law practice might warrant the promulgation of standard to regulate lawyer conduct.

**3. Recommendation to eliminate the record-keeping requirement.** Following the lead of most jurisdictions in the country and the ABA itself, the Commission recommends eliminating the two-year record-keeping requirement in current rule 1-400(F). The ABA Ethics 2000 Commission explained the rationale:

"The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years." (See ABA Reporter's Explanation of Changes, Rule 7.2(b).)

The Commission also notes that because a "web page" is an electronic communication, (see State Bar Formal Ethics Op. 2001-155), it would be extraordinarily burdensome to require a lawyer to retain copies of each web page given how often the information on web pages are

changed, and how often web pages are deleted. Nevertheless, the Commission also notes that even with the deletion of the requirement in rule 1-400(F), a one-year retention requirement would remain in Business and Professions Code section 6159.1. To address this discrepancy, the rule submission to the Supreme Court should include a note to this effect and recommend that, with the Supreme Court's approval, the State Bar approach the legislature with a recommendation to delete that requirement.

A description of each of the proposed rules follows.

### **Rule 7.2 (Advertising)**

As noted, proposed Rule 7.2 will specifically address advertising, a subset of communication.

Paragraph (a), derived from MR 7.2(a) as modified, permits lawyers to advertise to the general public their services through any written, recorded or electronic media, provided the advertisement does not violate proposed Rule 7.1 (prohibition on false or misleading communications) or 7.3 (prohibition on in-person, live telephone or real-time electronic communications). The addition to MR 7.2(a) language of the terms "any" and "means of" are intended to signal that the different modes of communication listed (written, recorded and electronic) are expansive and not limited to currently existing technologies.

Paragraph (b) prohibits a lawyer from paying a person for recommending the lawyer's services except in the enumerated circumstances set forth in subparagraphs (b)(1) through (b)(5). Subparagraph (b)(1) carries forward current rule 1-320's Discussion paragraph, which does not "preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment." The term "reasonable" was added to modify "costs" to ensure such advertising costs do not amount to impermissible fee sharing with a nonlawyer. Subparagraph (b)(2) clarifies that payment of "usual charges" to a qualified lawyer referral service is not the impermissible sharing of fees with a nonlawyer. Subparagraph (b)(3) carries forward the exception in current rule 2-200(B). Subparagraph (b)(4) has no counterpart in the California Rules. However, permitting reciprocal referral arrangements recognizes a common mechanism by which clients are paired with lawyers or nonlawyer professionals. Because these arrangements are permitted only so long as they are not exclusive and the client is made aware of them, public protection is preserved. Subparagraph (b)(5) carries forward the substance of the second sentence of current rules 2-200(B) and 3-120(B), which permit such gifts to lawyers and nonlawyers, respectively.

Paragraph (c), derived from Model Rule 7.2(c), as modified, requires the name and address of at least one lawyer responsible for the advertisement's content. It carries forward the concept in current Standard No. 12.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] provides interpretive guidance on the kinds of information that would generally not be false or misleading by providing a non-exhaustive list of permissible information. The comment's last sentence carries forward the substance of rule 1-400, Standard No. 16 regarding misleading fee information. Comment [2] clarifies that neither Rule 7.2 nor 7.3 [Solicitation of Clients] prohibits court-approved class action notices, a common form of communication with respect to the provision of legal services. Comment [3] provides interpretive guidance by clarifying that a lawyer may not only compensate media outlets that publish or air the lawyer's advertisements, but also may retain and compensate employees or outside contractors to assist in the marketing the lawyer's services, subject to proposed Rule 5.3

(Responsibilities Regarding Nonlawyer Assistants). Comment [4] clarifies how the rule should be applied to reciprocal referral arrangements, as permitted under subparagraph (b)(4), specifically focusing on the concept that such arrangements must not compromise a lawyer's independent professional judgment.

### **Rule 7.3 (Solicitation of Clients)**

As noted, proposed Rule 7.3 will regulate marketing of legal services through direct contact with a potential client either by real-time communication such as delivered in-person or by telephone, or by directly targeting a person known to be in need of specific legal services through other means, e.g., letter, email, text, etc. It carries forward concepts that are found in current rule 1-400(B), (C), (D)(5) and Standard Nos. 3, 4 and 5.

Paragraph (a), derived from MR 7.3(a), carries forward the concept of current rule 1-400(C), which contains the basic prohibition against what is traditionally understood to constitute improper "solicitation" of legal business by a lawyer engaging in real-time communication with potential clients. The concern is the ability of lawyers to employ their "skills in the persuasive arts" to overreach and convince a person in need of legal services to retain the lawyer without the person having had time to reflect on this important decision. The provision thus eliminates the opportunity for a lawyer to engage in real-time (i.e., contemporaneous and interactive) communication with a potential client. The term "real-time electronic contact" has been added from Model Rule 7.3 because the same concerns regarding in-person or live telephone communications applies to real-time electronic contact such as communications in a chat room or by instant messaging. The two exceptions to such solicitations are included because there is significantly less concern of overreaching when the solicitation target is another lawyer or has an existing relationship with the soliciting lawyer.

Paragraph (b), derived from MR 7.3(b), is a codification of *Shapero v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, in which the Supreme Court held that a state could not absolutely prohibit direct targeted mailings. The provision, however, recognizes that there are instances in which even any kind of communication with a client, including those permitted under Rule 7.2, are prohibited. Such circumstances include when the person being solicited has made known to the lawyer a desire not to be contacted or when the solicitation by the lawyer "is transmitted in any manner which involves intrusion, coercion, duress or harassment." The latter situation largely carries forward the prohibition in current rule 1-400(D)(5). The Commission, however, determined that additional language in the latter provision, i.e., "compulsion," "intimidation," "threats" and "vexatious conduct," are subsumed in the four recommended terms: "intrusion, coercion, duress and harassment."

Paragraph (c), derived from MR 7.3(c), largely carries forward current rule 1-400, Standard No. 5, and requires that every written, recorded or electronic communication from a lawyer seeking professional employment from a person known to be in need of legal services in a particular matter, i.e., direct targeted communications, must include the words "Advertising Material" or words of similar import. The provision is intended to avoid members of the public being misled into believing that a lawyer's solicitation is an official document that requires their response.

Paragraph (d), derived from MR 7.3(d), would permit a lawyer to participate in a pre-paid or group legal service plan even if the plan engages in real-time solicitation to recruit members. Such plans hold promise for improving access to justice. Further, unlike a lawyer's solicitation of a potential client for a particular matter where there exists a substantial concern for

overreaching by the lawyer, there is little if any concern if the plan itself engages in in-person, live telephone or real-time electronic contact to solicit members in the organization.

Paragraph (e), derived in part from MR 7.3, cmt. [1], has been added to the black letter to clarify that a solicitation covered by this Rule: (i) can be oral, (paragraph (a)) or written (paragraph (b)); and (ii) is a communication initiated by or on behalf of the lawyer. The first point is important because the traditional concept of a “solicitation” is of a “live” oral communication in-person or by phone. The second point is an important reminder that a lawyer cannot avoid the application of the rule by acting through a surrogate, e.g., runner or capper.

There are four comments that provide interpretative guidance or clarify how the rule should be applied. Comment [1] clarifies that a communication to the general public or in response to an inquiry is not a solicitation. Comment [2] provides an important clarification that a lawyer acting pro bono on behalf of a bona fide public or charitable legal services organization is not precluded under paragraph (a) from real-time solicitation of a potential plaintiff with standing to challenge an unfair law, e.g., school desegregation laws. This clarification can contribute to access to justice by alerting lawyers that real-time solicitations under conditions present in the cited Supreme Court opinion, *In re Primus*, are not prohibited. Comment [3] clarifies the application of paragraph (d). Comment [4] clarifies that regardless of whether the lawyer is providing services under the auspices of a permitted legal services plan, the lawyer must comply with the cited rules.

**Savings Clause.** In addition to the foregoing recommended adoptions, the Commission recommends the deletion of the savings clause in current rule 1-400(C) (“unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California.”) The clause was added to the original California advertising rule in 1978 following the Supreme Court’s decision in *Bates v. State Bar of Arizona*, when it was uncertain the extent to which limitations placed on lawyer commercial speech could survive Constitutional challenge. The clause’s continued vitality is questionable at best. Through its decisions in the decades since *Bates*, the Supreme Court has repeatedly held that a state’s regulation of a lawyer’s initiation of in-person or telephonic contact with a member of the public does not violate the First Amendment. The Commission concluded that the clause is no longer necessary.

**Current Rule 1-400(B)(2)(b).** The Commission also recommends the deletion of current rule 1-400(B)(2)(b), which includes in that rule’s definition of “solicitation” a communication delivered in person or by telephone that is “(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.” In recommending its deletion, the Commission reasoned that although the conduct described in 1-400(B)(2)(b) might give rise to a civil remedy for tortious interference with a contractual relationship, the provision does not belong in a disciplinary rule. Moreover, there are potential First Amendment issues with retaining this prohibition.

#### **Rule 7.4 (Communication of Fields of Practice and Specialization)**

As noted, proposed Rule 7.4 will regulate the communication of a lawyer's fields of practice and claims to specialization. It carries forward concepts that are found in current rule 1-400(D)(6).

Paragraph (a), derived from MR 7.4(d), as modified, states the general prohibition against a lawyer claiming to be a “certified specialist” unless the lawyer has been so certified by the Board of Legal Specialization or any accrediting entity designated by the Board. Placing this provision first is a departure from the Model Rule paragraph order. However, in conformance with the

general style format for disciplinary rules, the Commission concluded that this prohibitory provision should come first, followed by paragraph (b), which identifies statements a lawyer is permitted to make regarding limitations on the lawyer's practice.

Paragraph (b), derived from MR 7.4(a), permits a lawyer to communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability by communicating that the lawyer's practice specializes in, is limited to, or is concentrated in a particular field of law.

The Commission does not believe any comments are necessary to clarify the black letter of the proposed rule.

**Recommended rejections of Model Rule provisions.** The Commission does not recommend adoption of MR 7.4(b) or (c), both of which are statements regarding practice limitations or specializations that have been traditionally recognized (patent law in MR 7.4(b) and admiralty law in MR 7.4(c)), but which come within the more general permissive language of proposed paragraph (b).

#### **Rule 7.5 (Firm Names and Trade Names)**

As noted, proposed Rule 7.5 will regulate the use of firm names and trade names. It carries forward concepts in current rule 1-400(A), which identifies the kinds of communications the rule is intended to regulate, and Standard Nos. 6 through 9.

Paragraph (a) sets forth the general prohibition by clarifying that any use of a firm name, trade name or other professional designation is a "communication" within the meaning of proposed Rule 7.1(a) and, therefore must not be false or misleading. The Commission, however, recommends departing from both current rule 1-400 and MR 7.5 by eliminating the term "letterhead," which is merely a subset of "professional designation" and has largely been supplanted by email signature blocks. (See also discussion re the single comment to this Rule.

Paragraph (b), derived from the second sentence of MR 7.5(a), as modified to be prohibitory rather than permissive, carries forward the concept in Standard No. 6 regarding communications that state or imply a relationship between a lawyer and a government agency.<sup>1</sup>

Paragraph (c), derived from MR 7.5(d), as modified to be prohibitory rather than permissive, carries forward the concepts in Standard Nos. 7 and 8 that prohibit communications that state or imply a relationship between a lawyer and a law firm or other organization unless such a relationship exists.<sup>2</sup>

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<sup>1</sup> Standard No. 6 provides the following is a presumed violation of rule 1-400:

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

<sup>2</sup> Standard Nos. 7 and 8 provide the following are presumed violations of rule 1-400:

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other

There is a single comment that provides an explanation of the scope of the term, “other professional designation,” which includes not only letterheads but also more recent law marketing innovations such as logos, URLs and signature blocks.

### **Post-Public Comment Revisions**

Proposed Rule 7.2 - Only grammatical, stylistic, or streamlining edits have been implemented. See redline draft.

Proposed Rules 7.3, 7.4, and 7.5- None.

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lawyer or law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.





**Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising  
(Commission's Proposed Rule Adopted on October 21–22, 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 Rules 2.1 and 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.

**Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising  
(Commission's Proposed Rule Adopted on October 21-22, 2016 –  
Redline to Public Comment Draft 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~~<sup>1</sup>~~s~~Rules 2.1 and <sup>1</sup>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.

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<sup>1</sup>~~—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.~~

**Rule 7.2 [1-400, 1-320(B), (C), & (A)(4), 2-200(B)] Advertising  
(Redline Comparison of the Proposed Rule to Current California Rules)**

**Proposed Rule 7.2(b) compared to current rule 1-320 (B), (C), (A)(4):**

- (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.
- (Bb) A ~~member~~lawyer shall not compensate, promise or give, ~~or promise~~ anything of value to any person\* or entity for the purpose of recommending or securing ~~employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, 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.~~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;
- (G) ~~A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~
- (A) ~~Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:~~
- (42) ~~A member may pay a prescribed registration,~~the usual charges of a legal services plan or a qualified lawyer referral,~~or participation fee to service. A qualified lawyer referral service is~~ a lawyer referral service established, sponsored, and operated in accordance with the State Bar of ~~California's~~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

**Proposed Rule 7.2(b) compared to the 2nd sentence of current rule 2-200(B):**

- (i) the reciprocal referral arrangement is not exclusive, and
- (ii) the client is informed of the existence and nature of the arrangement;
- ~~(B5)~~ ~~Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving~~offer or give ~~a gift or gratuity to any lawyer who has~~a person\* or entity having ~~made a recommendation resulting in the employment of the member~~lawyer ~~or the member's~~lawyer's ~~law firm\* shall not of itself violate this rule,~~ 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.

**Proposed Rule 7.2(c) compared to current Rule 1-400, Standard (12):**

- (c) ~~(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. 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 Rules 2.1 and 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.





**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 <sup>1</sup>	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&amp;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&amp;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>

<sup>1</sup> 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 <sup>1</sup>	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 <sup>1</sup>	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 October 21–22, 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).

**Rule 7.3 [1-400] ~~Advertising~~ Solicitation of Clients**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (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:
- (B) ~~For purposes of this rule, a "solicitation" means any communication:~~
- (1) ~~Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~
- (2) ~~Which is:~~ a lawyer; or
- (a2) ~~delivered in person or by telephone, or~~ has a family, close personal, or prior professional relationship with the lawyer.
- (b) ~~directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~
- (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
- (C) ~~A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.~~
- (D) ~~A communication or a solicitation (as defined herein) shall not:~~
- ~~\* \* \* \* \*~~
- (52) ~~Be~~ the solicitation is transmitted in any manner which involves intrusion, coercion, duress, ~~compulsion, intimidation, threats, or vexatious or harassing conduct~~ or harassment.
- ~~\* \* \* \* \*~~
- (c) (5) ~~A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication,~~

~~including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.~~ 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.

### **Standards:Comment**

~~Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:~~

~~(3)[1] A "lawyer's communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.~~ 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.

~~(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.~~

[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**

<b>TOTAL = 6</b>	<b>A = 3</b>
	<b>D = 1</b>
	<b>M = 2</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-2016-43as	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>

<sup>1</sup> 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 <sup>1</sup>	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>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**

<b>TOTAL = 6</b>	<b>A = 3</b>
	<b>D = 1</b>
	<b>M = 2</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
					<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 <sup>1</sup>	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 October 21–22, 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.

Rule 7.4 [1-400(D)(6)] Communication of Fields of Practice  
and Specialization ~~Provision~~  
(Redline Comparison of the Proposed Rule to Current California Rule)

\* \* \* \* \*

- (~~D~~a) A ~~communication or solicitation (as defined herein) shall not~~ lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

\* \* \* \* \*

- (~~6~~1) ~~State that a member is a~~ “the lawyer is currently certified ~~specialist” unless the member holds a current—certificate~~ as a specialist ~~issued~~ 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 ~~states the complete name of the entity which granted certification.—~~
- (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**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</b>
	<b>NI = 1</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-43at	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

<sup>1</sup> 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**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</b>
	<b>NI = 1</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	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**

<b>TOTAL = 4</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</b>
	<b>NI = 1</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	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 October 21–22, 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.

**Rule 7.5 [1-400] Firm\* Names and ~~Letterheads~~Trade Names**  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (a) A lawyer shall not use a firm\* name, ~~letterhead~~trade name or other professional designation that violates Rule 7.1.
- (b) A ~~trade name may be used by a~~ lawyer in private practice ~~if it does not imply a connection~~ 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 ~~and is not, or~~ otherwise ~~in violation of~~violates Rule 7.1.
- ~~(b)~~ A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- ~~(c)~~ The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (dc) ~~Lawyers may~~A lawyer shall not state or imply that ~~they practice in a partnership~~the lawyer practices in or has a professional relationship with a law firm\* or other organization ~~only when~~unless that is the fact.

**Comment**

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

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.~~

**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 <sup>1</sup>	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.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED





**PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1.1**  
**(Current Rule 1-110)**  
**Compliance with Conditions of Discipline and Agreements in Lieu of Discipline**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-110 (Disciplinary Authority of the State Bar) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. There is no corresponding American Bar Association (“ABA”) Model Rule to current rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules for Lawyer Disciplinary Enforcement. The result of the Commission’s evaluation is proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 1-110 states: “A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19 California Rules of Court.” Rule 10(B) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that “[w]ritten conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.”

The Commission is recommending two clarifying revisions to the current rule. First, the Commission is recommending the addition of a reference to “an agreement in lieu of discipline.” An agreement in lieu of discipline is a disposition of a disciplinary matter that might include “conditions” with which a lawyer should be required to comply. Second, the Commission is recommending substituting the phrase “the terms and conditions” for “conditions” as the former is a more inclusive reference than the later. The Commission believes that both changes further the function of the rule as a charging vehicle that helps assure that lawyers can be held accountable if terms or conditions of a disciplinary disposition are violated.

The single comment recommended in proposed rule 8.1.1, recognizes that there are other provisions which also require a lawyer to comply with conditions of discipline. See e.g., Business and Professions Code § 6068 subdivisions (k) and (l).

**Post-Public Comment Revisions**

None.



**Rule 8.1.1 [1-110] Compliance with Conditions of Discipline  
and Agreements in Lieu of Discipline**

**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reproof, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

**Rule 8.1 [1-110] ~~Disciplinary Authority of the State Bar~~ Compliance with  
Conditions of Discipline and Agreements in Lieu of Discipline  
(Redline Comparison of the Proposed Rule to Current California Rule)**

A ~~member~~lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private ~~reprovals or~~reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code ~~sections~~§§ 6077 and 6078 and ~~rule 9.19,~~ California Rules of Court, rule 9.19.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

**Proposed Rule 8.1.1 [1-110] Compliance with Conditions of Discipline  
and Agreements in Lieu of Discipline  
Synopsis of Public Comments**

**TOTAL = 3**      **A = 2**  
**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 NI = 0
X-2016-43an	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Yes	A		Supports adoption of proposed Rule 8.1.1.	No response required.
X-2016-76v	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	M		PREC recommends that reference in Proposed Rule 8.1.1 [Compliance with Conditions of Discipline and Agreements in Lieu of Discipline (current Rule 1-110)] to “any agreement in lieu of discipline” be deleted as it is unnecessary. Violations of agreements in lieu of discipline already constitute a violation of Business and Professions Code section 6068, subdivision (I). There is no need for a rule that also addresses violations of agreements in lieu of discipline.	The Commission has not made the suggested change. The Commission continues to believe that including the term “agreement in lieu of discipline” removes ambiguity concerning a member’s duties under disciplinary orders and such agreements and emphasizes the importance of strict compliance with such orders and agreements.
X-2016-104bl	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		Supports adoption of proposed Rule 8.1.1 and its comments.	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 OF PROFESSIONAL CONDUCT 8.2**  
**(Current Rule 1-700)**  
**Judicial Officials**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-700 (Member as Candidate for Judicial Office) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.2 (Judicial And Legal Officials). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.2 (Judicial Officials). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 1-700 requires that a member who is a candidate for judicial office comply with Canon 5 of the Code of Judicial Ethics. The current rule, includes a provision defining “candidate for judicial office” describing when such candidacy starts and ends (the Model rule does not). Both Model Rule 8.2 and current rule 1-700 require compliance with the applicable provision of the Code of Judicial Ethics. Model Rule 8.2 also prohibits lawyers from making false statements of fact concerning the qualifications or integrity of a judge, legal officer or candidate for election or appointment to judicial or legal office. Proposed rule 8.2 tracks this aspect of Model Rule 8.2 by including a revision to paragraph (a) prohibiting lawyers from making false or reckless statements concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

Paragraph (a) of proposed rule 8.2 prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. The rationale for adding this provision is to enhance public confidence in the legal profession. This concept has precedent generally in a lawyer’s duty of respect to the courts and judicial officers (Bus. & Prof. Code § 6068 (b)) and specifically in disciplinary case law (*In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370 [during a lawyer’s campaign for judicial election, the lawyer made false statements regarding his opponent’s involvement in fraudulent activities]).

Paragraph (b) of proposed rule 8.2 makes clear that a lawyer who is a candidate for judicial office shall comply with Canon 5 of the California Code of Judicial Ethics. Like current rule 1-700(B), proposed rule 8.2 defines “candidate for judicial office” and addresses the determination of when a member is a candidate for judicial office as well as sets forth the criteria for determination of when the lawyer’s judicial candidacy ends.

Paragraph (c) is a new paragraph that governs the conduct of a lawyer who seeks appointment to judicial office and requires the candidate’s compliance with Canon 5B(1) of the California Code of Judicial Ethics. Similar to the policy and intended function of the current rule, new paragraph (c) could result in State Bar disciplinary charges for violations of the applicable provisions of the Code of Judicial Ethics.

There are two new comments to proposed rule 8.2. Both new comments promote lawyer compliance with obligations imposed by the rule and are revisions to the corresponding ABA Model Rule 8.2. Comment [1] recognizes the duties of lawyers to maintain respect due to the courts and judges (Bus. & Prof. Code § 6068(b)) and encourages lawyers to defend judges and courts unjustly criticized. Comment [2] in part explains that false statements by lawyers about candidates for judicial office harm confidence in the legal profession.

### **Post Public Comment Revisions**

A non-substantive change was made that was not a grammatical, stylistic, or streamlining edit.

After consideration of public comments, the Commission deleted Comment [2] because it was deemed aspirational and unnecessary.



**Rule 8.2 [1-700] Judicial Officials**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not make a statement of fact that the lawyer knows\* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- (b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics. For purposes of this Rule, “candidate for judicial office” means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer’s duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer’s candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer’s duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer’s application.

**Comment**

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).



**Rule 8.2 [1-700] Judicial Officials**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 –**  
**Redline to Public Comment Draft Version)**

- (a) A lawyer shall not make a statement of fact that the lawyer knows\* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- (b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics. For purposes of this Rule, “candidate for judicial office” means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer’s duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer’s candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer’s duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer’s application.

**Comment**

~~[1] —~~To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

~~[2] — Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons\* being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.~~

**Rule 8.2 [1-700-~~Member as Candidate for~~] Judicial ~~Office~~Officials**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (a) A lawyer shall not make a statement of fact that the lawyer knows\* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- (Ab) A ~~member~~lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.
- (B) For purposes of this ~~rule~~Rule, “candidate for judicial office” means a ~~member~~lawyer seeking judicial office by election. The determination of when a ~~member~~lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A ~~member's~~lawyer's duty to comply with ~~paragraph (A)~~this Rule shall end when the ~~member~~lawyer announces withdrawal of the ~~member's~~lawyer's candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

**Comment-~~Discussion~~**

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

~~Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.~~

**Proposed Rule 8.2 [1-700] Judicial Officials  
Synopsis of Public Comments**

<b>TOTAL = 3</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</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-2016-43ao	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8/12/16)	Yes	A	8.2	COPRAC supports the adoption of proposed Rule 8.2	No response required.
X-2016-76w	Los Angeles County Bar Association (LACBA) (Schmid) (9/21/16)	Yes	M	8.2	<p>1. Paragraph (a) of Proposed Rule 8.2 [Judicial Officials (current Rule 1-700)] precludes a lawyer from making a statement of fact the lawyer knows to be false or with reckless disregard as to its truth concerning the qualifications or integrity of a judge. This restriction (which is not contained in current Rule 1-700) is overbroad, too subjective, and raises serious First Amendment issues. In addition, the conduct proscribed here is already subject to B&amp;P Code Section 6106, and therefore not necessary.</p> <p>2. Also, the first sentence of Comment [1] is aspirational, unnecessary and should be deleted. Similarly, Comment [2] adds nothing and should be deleted.</p>	<p>1. The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).</p> <p>2. The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.</p>

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

**Proposed Rule 8.2 [1-700] Judicial Officials  
Synopsis of Public Comments**

<b>TOTAL = 3</b>	<b>A = 1</b>
	<b>D = 0</b>
	<b>M = 2</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
						The Commission agrees that the second comment can be deleted and has done so.
X-2016-104bm	Office of Chief Trial Counsel (OCTC) (Dresser) (9/27/16)	Yes	M	8.2	<p>1. OCTC is concerned that this proposed rule would only prohibit a false statement of fact, not other misleading statements. California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. No distinction is made among concealment, half-truths, and false statements of fact. Further, express and implied representations, as well as material omissions, support finding a statement misleading.</p> <p>2. Comments 1 and 2 are unnecessary and merely a philosophical discussion of the reasons for the rule, which are evident.</p>	<p>1. Please see response to LACBA, X-2016-76w, above.</p> <p>2. Please see response to LACBA, X-2016-76w, above.</p>

**PROPOSED RULE OF PROFESSIONAL CONDUCT 8.5**  
**(Current Rule 1-100(D))**  
**Disciplinary Authority; Choice of Law**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-100(D) (Rules of Professional Conduct, in General – Geographic Scope of the Rules) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.5 (Disciplinary Authority; Choice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.5 (Disciplinary Authority; Choice of Law). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

This proposal responds to multijurisdictional practice considerations that have expanded in recent years. Proposed rule 8.5 departs from the standard in current rule 1-100(D).<sup>1</sup> The Commission is recommending a new rule derived from Model Rule 8.5 in order to eliminate unnecessary differences with the national standard. The Commission believes this is particularly significant for the topics of choice of law and the extraterritorial application of the rules. Twenty-four states have adopted Model Rule 8.5 verbatim.<sup>2</sup> Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.<sup>3</sup> Nine states have adopted a version of

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<sup>1</sup> Current rule 1-100(D) (Geographic Scope of Rules) provides that:

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow Rules of Professional Conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

<sup>2</sup> The twenty-four states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

<sup>3</sup> The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

the rule that is substantially different to Model Rule 8.5.”<sup>4</sup> One state has not adopted a version of Model Rule 8.5.<sup>5</sup>

Paragraph (a) clarifies that a lawyer who is admitted to practice in California is subject to discipline regardless of where their conduct occurs, while a lawyer who is not admitted in California is subject to California disciplinary authority if the lawyer provides or offers legal services in California. A lawyer may be subject to discipline in California and another jurisdiction for the same conduct.

Paragraph (b) clarifies the choice of law to be applied by the disciplinary authority of California. The rules of professional conduct to be applied shall be as follows:

- (1) matters pending before a tribunal shall use rules of the jurisdiction in which the tribunal sits, unless the tribunal provides otherwise;
- (2) for any other conduct, rules of the jurisdiction in which the lawyer’s conduct occurred or where the predominant effect of the conduct occurred.

The one recommended Comment to proposed rule 8.5 is derived from Comment [1] to Model Rule 8.5, but cites to relevant California statutory law. Comment [1] reaffirms that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Furthermore, a lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct.

### **Post-Public Comment Revisions**

None.

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<sup>4</sup> The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

<sup>5</sup> The one states is: Alabama.



**Rule 8.5 Disciplinary Authority; Choice of Law**  
**(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) **Disciplinary Authority.** A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
  - (1) for conduct in connection with a matter pending before a tribunal,\* the rules of the jurisdiction in which the tribunal\* sits, unless the rules of the tribunal\* provide otherwise; and
  - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes\* the predominant effect of the lawyer's conduct will occur.

**Comment**

*Disciplinary Authority*

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.



**Rule 8.5 Disciplinary Authority; Choice of Law**  
**(Redline Comparison of the Proposed Rule to Current ABA Model Rule)**

- (a) **Disciplinary Authority.** A lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in ~~this jurisdiction~~California is also subject to the disciplinary authority of ~~this jurisdiction~~California if the lawyer provides or offers to provide any legal services in ~~this jurisdiction~~California. A lawyer may be subject to the disciplinary authority of both ~~this jurisdiction~~California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of ~~this jurisdiction~~California, the rules of professional conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal,\* the rules of the jurisdiction in which the tribunal\* sits, unless the rules of the tribunal\* provide otherwise; and
  - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes\* the predominant effect of the lawyer's conduct will occur.

**Comment**

*Disciplinary Authority*

~~[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.~~

*Choice of Law*

~~[2] The conduct of a lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions~~

~~in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.~~ in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

~~[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.~~

~~[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.~~

~~[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.~~

~~[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

~~[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.~~



**Proposed Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law  
Synopsis of Public Comments**

**TOTAL = 3**  
**A = 1**  
**D = 1**  
**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 A = 12
X-2016-43ap	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-18-16)	Yes	A	8.5	COPRAC supports the adoption of proposed Rule 3.1.	No response required.
X-2016-104bp	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	8.5	OCTC agrees with the policy behind this rule, but still has concerns that the rule, as written, is in conflict with section 6049.1. Section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California, unless, as a matter of law, the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can OCTC enforce a rule that permits discipline based on another jurisdiction's rules, if those rules are in conflict with California's rules? Is rule 8.5 intended to change section 6049.1? This needs to be discussed and addressed in this rule and its Comments.	The Commission has not made any change to the proposed Rule. The Commission disagrees that OCTC will be unable to enforce the proposed Rule. As explained in its Report and Recommendation, the Commission believes that the citation to section 6049.1 in the Comment to the Rule appropriately recognizes that section's possible effect on the bar's disciplinary authority while at the same time allowing California to move toward the national standard of Model Rule 8.5 ("A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.")

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

**Proposed Rule 8.5 [1-100(D)] Disciplinary Authority; Choice of Law  
Synopsis of Public Comments**

**TOTAL = 3**  
**A = 1**  
**D = 1**  
**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 A = 12
X-2016-116c	Hamilton, Thomas (10-03-16)	No	D	8.5	No explanation provided.	As the commenter did not provide an explanation for his disagreement with the proposed rule, no response is possible or necessary. However, the Commission reaffirms its belief that including Rule 8.5 in the Rules is both necessary and appropriate to explain under what circumstances and to whom the Rules will apply.