

# **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.0 [1-100]**

## **Commission Drafting Team Information**

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**Co-Drafters:** Danny Chou, Howard Kornberg, Hon. Dean Stout

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## **I. CURRENT CALIFORNIA RULE**

### **Rule 1-100 Rules of Professional Conduct, in General**

#### **(A) Purpose and Function.**

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

#### **(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
- (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

- (d) a publicly funded entity which employs more than one lawyer to perform legal services.
- (2) “Member” means a member of the State Bar of California.
- (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.
- (4) “Associate” means an employee or fellow employee who is employed as a lawyer.
- (5) “Shareholder” means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(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.

(E) These rules may be cited and referred to as “Rules of Professional Conduct of the State Bar of California.”

## **Discussion:**

The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)

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.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.0 [1-100]

Vote: 13 (yes) – 1 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.0 [1-100]

Vote: X (yes) – X (no) – X (abstain)

## **III. COMMISSION'S PROPOSED RULE 1.0 [1-100] (CLEAN)**

### **Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct**

#### **(a) Purpose.**

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code §§ 6076 and 6077 to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These Rules together with any standards

adopted by the Board of Trustees pursuant to these Rules shall be binding upon all lawyers.

(b) Function.

- (1) A willful violation of any of these rules is a basis for discipline.
- (2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.
- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

(d) These Rules may be cited and referred to as the “California Rules of Professional Conduct.”

**Comment**

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Ibid.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of a rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons\* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial\* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Also, lawyers may fulfill this pro bono responsibility by providing financial support to organizations providing free legal services. See Business and Professions Code § 6073.

#### IV. COMMISSION'S PROPOSED RULE 1.0 [1-100] (REDLINE TO CURRENT CALIFORNIA RULE 1-100)

##### Rule 1.0 [1-100] Purpose And Function Of The Rules Of Professional Conduct, ~~In General~~

###### (a) ~~(A)~~ Purpose ~~and Function~~.

The following rules are intended to regulate professional conduct of ~~members of the State Bar~~ lawyers through discipline. They have been adopted by the Board of ~~Governors~~ Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code ~~sections~~ §§ 6076 and 6077 to protect the public ~~and to, the courts, and the legal profession; protect the integrity of the legal system; and~~ promote ~~respect~~ the administration of justice and confidence in the legal profession. These ~~rules~~ Rules together with any standards adopted by the Board of ~~Governors~~ Trustees pursuant to these ~~rules~~ Rules shall be binding upon all ~~members of the State Bar~~ lawyers.

###### (b) Function.

(1) ~~For a~~ willful breach violation of any of these rules, ~~the Board of Governors has the power to~~ is a basis for discipline ~~members as provided by law~~.

(2) The prohibition of certain conduct in these rules is not exclusive. ~~Members~~ Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California

~~courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~

~~(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~~
- ~~(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~~
- ~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

- ~~(2) "Member" means a member of the State Bar of California.~~

- ~~(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.~~

- ~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~

- ~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

(c) (G) Purpose of ~~Discussions~~Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~

~~(D) — Geographic Scope of Rules.~~

~~(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.~~

~~(d) (E)~~ These ~~rules~~Rules may be cited and referred to as the “California Rules of Professional Conduct ~~of the State Bar of California.”~~

**Discussion:Comment**

[1] The Rules of Professional Conduct are intended to establish the standards for ~~members~~lawyers for purposes of discipline. ~~(See Ames v. State Bar (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See Noble v. Sears, Roebuck & Co. (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal.App.3d 1324 [109 Cal.Rptr. 269].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. Ibid.; Mirabito v. Liccardo (1992) 4 Cal.App.3d 1324 [109 Cal.Rptr. 269]. A violation of a rule may have other non-disciplinary contextsconsequences. (See, e.g., KlemmFletcher v. Superior Court (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); Chronometrics, Inc. v.~~

~~Sysgen, Inc. (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party);~~ Davis (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); Chambers v. Kay (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

~~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.~~

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. Phillips v. State Bar (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons\* who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial\* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Also, lawyers may fulfill this pro bono responsibility by providing financial support to organizations providing free legal services. See Business and Professions Code § 6073.

## **V. RULE HISTORY**

### **A. 1928 Rules**

The original expression of the purpose and function of the rules was in former rule 1, part of this Court's original promulgation of the rules in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) In relevant part, former rule 1 of the 1928 rules provided that:



. . . [T]hese rules shall be binding upon all members of the State Bar, and the willful breach of any of these rules shall be punishable by suspension from the practice of law . . . . The specification in these rules of certain conduct as unprofessional is not to be interpreted as approval of conduct not specifically mentioned. In that connection, the Canons of Ethics of the American Bar Association are commended to the members of the State Bar. Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California.

Rule 1 embraced the following concepts: (1) the rules are binding; (2) disciplinary consequences of a rule violation; (3) the rules are not the sole basis for determining unprofessional conduct; (4) recognition of other authorities (in 1928, the ABA Canons of Ethics; in 1970, the ABA Code of Professional Responsibility); (5) the rules do not limit or supersede other law that imposes duties on lawyers; and (6) the proper title for citing the rules. Each concept has been carried forward in proposed rule 1.0.

## **B. 1975 Rule Amendments**

Rule 1 was not materially revised and adopted until 1975 as part of the first comprehensive rules revision since 1928. Rule 1 was renumbered 1-100 and the reference to ABA Code of Professional Responsibility deleted. The special committee charged with revising the rules in 1970 summarized rule 1-100 in its 1972 Final Report:

Comment: This provision retains the substance of present Rule 1, Rules of Professional Conduct. This provision, like present Rule 1, is intended to serve as an introductory provision to the Rules of Professional Conduct enacted pursuant to Business and Professions Code Section 6077. The reference in present Rule 1 to members noting the ABA Code of Professional Responsibility has been deleted.

(Final Report of the State Bar of California Special Committee to Study the ABA Code of Professional Responsibility, dated November 8, 1972, at page 1, copy on file with the State Bar.) While no direct explanation was given for deleting the reference to the ABA Code, it appears from the entirety of the 1972 Report that the Special Committee believed its proposed revisions to the 1928 rules struck an appropriate balance between conforming to the ABA Code and conforming to applicable California statutes and case law, rendering a reference to the ABA Code unnecessary and potentially misleading.<sup>1</sup>

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<sup>1</sup> The Special Committee stated: "It was obvious to your Committee from the outset that the proper job could not be done here simply by 'rubber stamping' the ABA Code and recommending the repeal of our statutes and rules which might be in conflict therewith. . . .¶Thus the detailed recommendations which follow [in this report] . . . basically conform to the ABA numbering system, even though in particular instances, as will be noted, a California Rule is recommended over the ABA rule on the same subject." (1972 Final Report, at p. iii.)

### **C. 1989 Rule Amendments**

The 1975 rule 1-100 was next amended with the comprehensive rules revision made operative in 1989. Rule 1-100 was expanded to include: definitions of terms used throughout the rules; an explanation of the Discussion component to the rules; and provisions on the geographic scope of the rules, i.e., the rules' application to State Bar member conduct outside California and conduct by lawyers from other jurisdictions practicing law in California.

Proposed rule 1.0 does not include provisions on the geographic scope of the rules or definitions as those topics are relocated to proposed rules 8.5 and 1.0.1, respectively, to conform to the organization of the Model Rules. As "Comments" in the proposed rules substitute for the "Discussion," proposed rule 1.0(c) describes the role of Comments.

The 1989 version of rule 1-100 also included amendments to the description of the purpose and function of the rules. A reference to Business and Professions Code sections 6076 and 6077 (the statutory provisions providing for Board adoption of rule amendments and the range of disciplinary remedies for a violation) was added. Also added was a statement that the rules serve to "protect the public and to promote respect and confidence in the legal profession." Proposed rule 1.0 carries forward both the statutory references (Comment [1]) and the concept of public protection and confidence in the legal profession (proposed rule 1.0(a)(1) and (a)(4)).

The 1989 version of rule 1-100 also added new language on the non-exclusivity of the rules, including an explicit commendation of other authorities for guidance, i.e., opinions of ethics committees and rules promulgated by other jurisdictions and bar associations, which presumably encompass the ABA Model Rules. Proposed rule 1.0 carries forward these concepts (Comment [3]).

The 1989 revisions also deleted the following language on the non-disciplinary impact of the rules: "Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof." This sentence was replaced with two new sentences stating:

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

The new language, and a related new Discussion paragraph, was developed in part from discussions with Robert Fellmeth, State Bar Disciplinary Monitor, in 1988, who had expressed interest in this aspect of rule 1-100. (Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, September 1988, at pp. 13 – 15 ("1988 Supplemental Memorandum").) The new language was explained as follows:

The amendments are intended to clarify that the Rules of Professional Conduct do not create new civil causes of action, but rather are for purposes of assessing

the duties of an attorney in the context of attorney discipline. The amendments also make clear that the new rules are not intended to disrupt the already existing body of law relating to the duties of attorneys in non-disciplinary contexts.

(1988 Supplemental Memorandum at p. 15.)

Proposed rule 1.0 includes this concept but uses new language (proposed rule 1.0(b)(3) and Comment [2]) to account for new case law in this area of attorney professional responsibility.

#### **D. 1992 Rule Amendments**

The most recent rule 1-100 amendments became operative in 1992. The only revisions were to the definition of “lawyer” and a non-substantive clarification of the geographic scope of the rules, neither of which is carried forward in proposed rule 1.0, having been moved to other rules.

#### **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC supports this rule.
2. OCTC supports Comments 2, 3, and 4.
3. Comment 1 is duplicative of subsections (a) and (b) and, thus, unnecessary and inconsistent with the Supreme Court’s directive that Comments should be used sparingly and only to elucidate and not to expand upon the rules themselves.
4. Comment 5 is aspirational only, encouraging attorneys to do pro bono activities. The Comment, therefore, is contrary to the Supreme Court’s directive that the Commission should avoid incorporating purely aspiration or ethical considerations that are present in the Model Rules and Comments.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
**(In response to 45-day public comment circulation):**

OCTC re-submitted the same comments for the 45-day public comment version of the rule as for the 90-day public comment version of the rule and the Commission’s responses to OCTC remained the same. See 90-Day and 45-Day Public Comment Synopsis Tables, Attachments \_\_\_\_\_ and \_\_\_\_\_.

- **State Bar Court:** No comments were received from State Bar Court.

## VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

One comment was received, from OCTC, which agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Proposed rule 1.0 addresses the purpose and scope of the rules. The closest analog to rule 1.0 nationally is found in two introductory sections, modeled on the introductory sections of the ABA Model Rules designated as the "Preamble and Scope," some version of which have been adopted by nearly every other jurisdiction.

Only two states have adopted a numbered rule that is somewhat similar to the content of rule 1-100, Michigan and Nevada. For example, Nevada Rule 1.0A provides:

**Rule 1.0A. Guidelines for Interpreting the Nevada Rules of Professional Conduct.** The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments. The following guidelines for interpreting and applying the Nevada Rules of Professional Conduct are hereby adopted:

(a) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

(b) For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as the duty of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

(c) Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that

disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

(d) Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

See also Michigan Rule 1.0, which provides:

### **Rule 1.0 Scope and Applicability of Rules and Commentary<sup>2</sup>**

(a) These are the Michigan Rules of Professional Conduct. The form of citation for this rule is MRPC 1.0.

(b) Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

(c) The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule.

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<sup>2</sup> Michigan includes sections titled "Preamble" and "Scope" as part of the comment to Rule 1.0.

## ABA Model Rule Adoptions

The ABA has two charts that report separately on the implementation of the “Preamble” and the “Scope.” Each chart reports on implementation in fifty-one United States jurisdictions (including California and the District of Columbia). One chart is captioned: “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities” and was last updated October 21, 2010.

- <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/preamble.authcheckdam.pdf>. (Last accessed on May 6, 2015.)

The second chart is captioned: “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules of Professional Conduct, Scope” and was last updated May 4, 2015.

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_scope.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_scope.authcheckdam.pdf). (Last accessed on May 6, 2015.)

Regarding the “Preamble” provisions, twenty-seven jurisdictions have adopted text that is either the same<sup>3</sup> or substantially similar<sup>4</sup> to the Model Rule “Preamble.” Seven jurisdictions do not have any preamble text.<sup>5</sup> Seventeen jurisdictions take a different approach by implementing unique language or a significantly revised version of the Model Rule “Preamble.”<sup>6</sup>

Regarding the “Scope” provisions, twenty-six jurisdictions have adopted text that is either the same<sup>7</sup> or substantially similar<sup>8</sup> to the Model Rule “Scope.” Six jurisdictions do not have any scope text.<sup>9</sup> Nineteen jurisdictions take a different approach by

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<sup>3</sup> These jurisdictions are: Delaware; Iowa; Maryland; Minnesota; Missouri; Nebraska; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Vermont; and Wisconsin.

<sup>4</sup> These jurisdictions are: Alaska; Arizona; Arkansas; Colorado; Connecticut; Idaho; Indiana; Kansas; Kentucky; Mississippi; New Mexico; North Dakota; Tennessee; Washington; and Wyoming.

<sup>5</sup> These jurisdictions are: District of Columbia; Louisiana; Nevada; New Hampshire; New Jersey; North Dakota; and Tennessee.

<sup>6</sup> These jurisdictions are: Alabama; California; Florida; Georgia; Hawaii; Illinois; Maine; Massachusetts; Michigan; Montana; New York; North Carolina; Ohio; Texas; Utah; Virginia; and West Virginia.

<sup>7</sup> These jurisdictions are: Colorado; Idaho; Iowa; Rhode Island; and Utah.

<sup>8</sup> These jurisdictions are: Alaska; Arizona; Arkansas; Delaware; Illinois; Indiana; Kansas; Kentucky; Maine; Maryland; Minnesota; Missouri; Nebraska; New Mexico; New York; North Carolina; Ohio; South Carolina; Vermont; Wisconsin; and Wyoming.

<sup>9</sup> These jurisdictions are: Louisiana; Nevada; New Hampshire; New Jersey; Oregon; and South Dakota.

implementing unique language or a significantly revised version of the Model Rule “Preamble.”<sup>10</sup>

Based on these two charts, a majority of states implement “Preamble and Scope” provisions that are either identical or substantially similar to the Model Rules.

In addition, similar to proposed rule 1.0, proposed Comment [1], one jurisdiction, Maryland, refers to specific case law authority on the use of the rules in a non-disciplinary proceeding. Paragraph [20] of the Maryland “Scope” section cites to *Post v. Bregman* (1998) 349 Md. 142 (holding that enforcement of the Rule of Professional Conduct dealing with splitting of fees among lawyers who are not part of the same firm is not limited to disciplinary proceedings). Comment [1] to proposed rule 1.0 cites to this Court’s decision in *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] that likewise involves application of a rule of professional conduct to decide a question of the civil enforceability of a fee division agreement between lawyers who are not in the same law firm.

Proposed rule 1.0 also includes an updated discussion of the use of the rules in non-disciplinary proceedings. That issue is also addressed in paragraph [7] of the Minnesota Rule, above (the corresponding paragraph is [20] of the Model Rule “Preamble and Scope.”) The last sentence in paragraph [7] provides, in part, that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” Based on the ABA chart concerning implementation of paragraph [20] of the Model Rule “Scope,” thirty states<sup>11</sup> have adopted language that is either the same or substantially similar to the last sentence of paragraph [7] of the Minnesota Rule “Scope.” Twenty-one states<sup>12</sup> either do not have any scope text or, if they do, they have deleted or significantly changed the last sentence in paragraph [7]. Thus, addressing the use of the rules in non-disciplinary proceedings is the approach taken in a majority of jurisdictions and proposed rule 1.0 promotes this national standard.

A final aspect of national uniformity is the approach taken in every jurisdiction, all of which either have a separate terminology section or a separate rule containing the definitions of common terms used throughout their respective rules, and also have a separate rule, patterned after Model Rule 8.5, which addresses geographic scope and choice of law. The recommendation to relocate the provisions currently in paragraphs

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<sup>10</sup> These jurisdictions are: Alabama; California; Connecticut; District of Columbia; Florida; Georgia; Hawaii; Massachusetts; Michigan; Mississippi; Montana; North Dakota; Oklahoma; Pennsylvania; Tennessee; Texas; Virginia; Washington; and West Virginia.

<sup>11</sup> These jurisdictions are: Alaska; Arizona; Arkansas; Colorado; Connecticut; District of Columbia; Florida; Idaho; Illinois; Indiana; Iowa; Kentucky; Maine; Maryland; Minnesota; Mississippi; Nebraska; New Hampshire; New Mexico; New York; North Carolina; North Dakota; Ohio; Rhode Island; South Carolina; Tennessee; Utah; Virginia; Wisconsin and Wyoming.

<sup>12</sup> These jurisdictions are: Alabama; California; Delaware; Georgia; Hawaii; Kansas; Louisiana; Massachusetts; Michigan; Missouri; Montana; Nevada; New Jersey; Oklahoma; Oregon; Pennsylvania; South Dakota; Texas; Vermont; Washington; and West Virginia.

(B) and (D) of current rule 1-100, (See Sections IX.A.11 & 14, below), would conform the California Rules to that national approach. Current rule 1-100(B) provides definitions of terms used throughout the current rules and rule 1-100(D) addresses geographic scope principles. The Commission has proposed Rule 1.0.1 as the terminology rule and proposed Rule 8.5 as the rule delimiting the disciplinary authority for enforcing the rules and the geographic scope of the Rules.

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

1. Changing the title of the current rule.
  - Pros: The change in title more accurately describes the content of the rule as amended, i.e., the amended rule only sets out the purpose and function of the rule and no longer contains other general concepts, i.e., global definitions and the geographic scope of the rule. It should facilitate the ability of a lawyer who is trying to find a rule topic by scanning the table of contents.
  - Cons: None identified because current paragraphs (B) [definitions] and (D) [geographic scope of the rules] have been relocated to Rules 1.0.1 and 8.5, respectively.
2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
  - Pros: It would facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It would also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system. Further, for this rule, which numbering system is used is irrelevant, because the analogous "rule" in most jurisdictions is not a rule but instead two unnumbered sections called the "Preamble" and "Scope."



3. Substituting the term “lawyer” for the term “member”.
  - Pros: The Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
4. Proposed paragraph (A) of current rule 1-100 (Purpose and Function [of the rules]) is divided into (i) paragraph (a) [Purpose], which retains the concept of current (A), subparagraph 1, and (ii) paragraph (b) [Function], which retains the concepts of current (A), subparagraphs (2)-(4).
  - Pros: Clarifies which aspects of current paragraph (A) are intended to describe the purposes of the rules and which aspects clarify the function of the Rules, each of which is relevant in interpreting them.
  - Cons: The concepts described in one paragraph might also be susceptible to being viewed as a concept in the other and thus the division of the concepts might cause confusion. For example, it could be argued that the purpose of the rules “to regulate conduct of members through discipline” might also be viewed as a “function” of the rules. On balance, however, the Commission concluded the division of current paragraph (A) into two paragraphs provided better guidance for lawyers in interpreting their duties under the Rules.
5. In proposed paragraph (a), substitute the concepts in Principle 1 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 to the public.”) for the language in current paragraph (A), subparagraph 1 (“to protect the public and to promote respect and confidence in the legal profession.”)
  - Pros: Retains the same concepts found in the current rule and adds the concept of promoting the administration of justice, which highlights a lawyer’s role as an officer of the court.
  - Cons: There is no evidence that the current language is lacking. But see “Concepts Rejected,” section IX.B.2, below, concerning OCTC’s request that rule 1-100 include a purpose of the rules “to promote and enforce the highest professional standards among attorneys.”
6. In proposed paragraph (b)(1), amend current rule 1-100(A), subparagraph 2, to provide: “A willful violation of any of these rules is a basis for discipline.” In particular, note the substitution of the term “violation” for “breach.”

- Pros: The revised language is a more succinct and accurate statement of the consequences of violating a rule than is the current statement (“For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.”) *First*, use of the amended language avoids the problem of distinguishing exactly what the Board of Trustees has authority to do, i.e., the Board can impose reprovls but only the Supreme Court can impose suspensions and disbarments. The change reduces the language that would otherwise be required to more accurately describe the relative allocation of authority, i.e., only the Supreme Court has authority to suspend or disbar. *Second*, regarding the substitution of “violation” for “breach,” “breach” is suggestive of a breach of duty, a concept in malpractice. Use of “violation” more accurately describes the basis for discipline, a rule violation.
  - Cons: The Commission is unaware of evidence suggesting that the current language has caused problems. Further, the word “breach” is used in the State Bar Act, e.g., Bus. & Prof. Code § 6077.
7. In proposed paragraph (b)(2), retain the first two sentences of current rule 1-100(A), subparagraph 3, which provide: “The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.”
- Pros: The first two sentences provide important information about how lawyers are regulated in California, i.e., lawyers are subject not only to the Rules of Professional Conduct, as is true in other jurisdictions, but also subject to the provisions of the State Bar Act.
  - Cons: None identified.
8. In proposed paragraph (b)(2), delete the last two sentences, of current rule 1-100(A), subparagraph 3, which provide: “Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.” Further, place the sentences in a comment to the rule.
- Pros: The use of the word “should” with respect to California ethics opinions (aspirational) and “may” with respect to opinions from other jurisdictions (permissive) indicates that the sentences should be relegated to a comment. The sentences are not a disciplinary standard but guidance. Such aspirational guidance should be included in a comment if it is to appear in the rules at all. A lawyer’s failure to consult such ethics opinions should not by itself be a basis for discipline. (Compare Commission Charter, Principle 2, which states that the Commission should “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as

opposed to purely aspirational objectives.”) See also discussion re Comment [4], below, in paragraph 21.

- Cons: Ethics opinions provide such important guidance on proper conduct that the clause should remain in the black letter because lawyers often limit their reading to the black letter and would miss the guidance in a comment. New lawyers or lawyers from other jurisdictions are more likely to pay attention to this guidance if it is in the rule. Further, the sentences have been in the current rule for over 25 years without any problems having been identified; there would appear to be no reason to make a change.
9. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substitute the following language for the first sentence: “A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule.”
- Pros: The replacement statement is derived from *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097, which is well-settled California law. The current statement is misleading because courts since the rule was promulgated in 1989 have held that a violation of a rule can be used as evidence of a breach of duty in a malpractice cause of action. The rule should more accurately reflect the case law.
  - Cons: The Rules are *intended* as disciplinary rules, and should not be a basis for creating a new cause of action.
10. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4, substitute the following language for the second sentence: “Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.”
- Pros: The proposed amended sentence is a clearer and more succinct statement about the intended effect of the rules on the law related to lawyer liability.
  - Cons: The phrase “law regarding the liability of lawyers” might be an underinclusive concept. It suggests malpractice liability or other similar damages actions brought against a lawyer. In contrast, the issue of civil disqualification is not ordinarily referred to as a liability issue yet one goal of the proposed new sentence is to clarify that the rules, such as the rules governing conflicts of interest, are not intended to govern a disqualification proceeding.
11. Delete current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules (e.g., member, lawyer, law firm) and instead include as part of the Rules a global terminology rule, proposed Rule 1.0.1.
- Pros: This is the approach that is taken in the California Code of Judicial Ethics, the Model Rules, and the rules in every other jurisdiction. A global

terminology rule would provide convenient and ready access in one place to common definitions for State Bar members and other lawyers practicing in California as permitted by the various rules of court that regulate multijurisdictional practice. See, e.g., California Rules of Court, rule 9.40 (Counsel pro hac vice); 9.41 (Appearances by military counsel); 9.43 (Out-of-state attorney arbitration counsel); 9.44 (Registered foreign legal consultant); 9.45 (Registered legal services attorneys); 9.46 (Registered in-house counsel); 9.47 (Attorneys practicing law temporarily in California as part of litigation); and 9.48 (Nonlitigating attorneys temporarily in California to provide legal services).

- Cons: None identified.

12. Change the name of the “Discussion” section to “Comment”.

- Pros: The Code of Judicial Ethics refers to its explanatory sections as “*Commentary* of the Advisory Committee.” (Emphasis added). The ABA Model Rules and every other jurisdiction that has adopted the Model Rule approach of including comments to their rules, refers to the explanatory comment sections of each rule as “Comment.”
- Cons: None identified.

13. In proposed paragraph (c), delete the first clause in current rule 1-100, paragraph (C), which provides: “Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules ...”

- Pros: The clause is surplus exposition and does not belong in the black letter of rules that are intended to “set forth a clear and enforceable articulation of disciplinary standards.”
- Cons: This language has not proven to be problematic.

14. Delete current rule 1-100, paragraph (D) [Geographic scope of the rules] and instead include in the Rules a standalone rule, similar to Model Rule 8.5, which addresses the geographic scope of the Rules and choice of law. See materials in support of adoption of proposed Rule 8.5.

- Pros: Including the topic in a separate rule would be similar to the approach taken in the Model Rules and every other jurisdiction. Placing the geographic scope in a separate rule would help lawyers from other jurisdictions who are authorized to practice in California to determine the extent to which the California rules would apply to them.
- Cons: That the rules apply to non-California lawyers could reasonably be perceived as a purpose or function of the rules and retaining the topic of the geographic scope of the rules in rule 1-100 would be consistent with that concept. Simply changing “member” to “lawyer” in this rule might not be enough

to convey the true scope of the rules.

15. In proposed paragraph (d) [current rule 1-100(E)], change the preferred citation of the rules to the “California Rules of Professional Conduct.”

- Pros: The proposed language is more succinct than the current term in 1-100(E), “Rules of Professional Conduct of the State Bar of California.”
- Cons: The current statement more accurately describes the rules as those “of the State Bar of California.”

16. Number the comment sections.

- Pros: This is done in two current rules, rule 1-650 and rule 3-100, both of which were promulgated after 2003. Numbering the comments facilitates references in opinions and briefs, as well as cross-references within the rules.
- Cons: None identified.

17. In Comment [1], replace the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (b)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts.

- Pros: See discussion of proposed paragraph (b)(3) in paragraphs 9 and 10, above.
- Cons: See discussion of proposed paragraph (b)(3) in paragraphs 9 and 10, above.

18. In Comment [1], include pin cites in the case citations in the comment.

- Pros: Pin cites will provide a precise reference point for a lawyer who wants to review a more in-depth analysis of the proposition for which the case is cited.
- Cons: None identified.

19. Add Comment [2], which clarifies that the Rules apply to a lawyer’s conduct even when the lawyer is not practicing law or acting in a professional capacity.

- Pros: This comment clarifies the scope of conduct regulated under the Rules and thus provides important guidance to lawyers in complying with the rules.
- Cons: None identified.

20. Add Comment [3], which explains that a willful violation of a rule does not require that a lawyer intend to violate the rule. Comment [3] is derived from the first Commission’s proposed Rule 1.0, Cmt. [2].

- Pros: This comment provides important clarification regarding the requisite

intent contemplated in paragraph (b)(1), which provides that a willful violation of any rule is a basis for discipline.

- Cons: This comment might be confusing in those instances where a lawyer is interpreting a rule that, by its terms, includes a specific intent element. (See, for example, current rule 5-320(D) which requires an intent to harass or embarrass a juror.)

21. Add Comment [4], which is a verbatim restatement of current rule 1-100(A), subparagraph 3.

- Pros: See discussion re proposed paragraph (b)(2) in paragraph 8, above.
- Cons: See discussion re proposed paragraph (b)(2) in paragraph 8, above.

22. Add Comment [5], which recognizes voluntary pro bono provision of legal services as an important professional obligation of lawyers.

- Pros: Having concluded that an aspirational rule patterned after Model Rule 6.1 and the Board of Trustees Resolution on Pro Bono Publico Legal Services was inappropriate in a set of disciplinary rules, the Commission nevertheless determined that a comment regarding pro bono was appropriate in proposed Rule 1.0. Rule 1.0 delimits the purpose and function of the rules, including “to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession.” By including this Comment, it is emphasized that the disciplinary standards promulgated in the rules are not intended to address all aspects of a lawyer's professional responsibilities and that the rules do not state the entirety of a lawyer's obligations as an officer of the legal system with special duties for assuring access to justice. Including this comment in the Rules should also enhance the ability of legal services organizations to recruit lawyers to provide pro bono service.
- Cons: The proposed comment is purely aspirational and offends paragraph 2 of the Commission's Charter, which provides:

“2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as *opposed to purely aspirational objectives*.” (Emphasis added).

Further, the proposed comment deviates from paragraph 5 of the Commission's Charter. Unlike the other proposed comments to proposed Rule 1.0, proposed Comment 5 provides no “guidance for interpreting and practicing in compliance with the Rules,” which is the purpose of the Comments as set forth in paragraph (c) of Rule 1.0.

## B. Concepts Rejected (Pros and Cons):

1. In proposed paragraph (a), delete the adjective “professional” as a modifier of “conduct”.
  - Pros: Deleting “professional” more accurately describes the scope of conduct for which lawyers can be disciplined. The rules are not limited to regulating a lawyer’s conduct in his or her professional capacity. See, e.g., rules 3-100 (Confidential Information of a Client); 3-120 (Sexual relations with clients); 3-320 (Relationship with other party’s lawyer); 4-300 (Purchasing property at a foreclosure of a sale subject to judicial review); and 4-400 (Gifts from client). See also *In re Scott* (1991) 52 Cal.3d 968 [inherent power of the Supreme Court to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession].
  - Cons: The principal purpose of the Rules is to address a lawyer’s conduct when he or she is acting in a professional capacity, although certain rules do reach a lawyer’s conduct when not acting in a professional capacity. Regardless of the context, the lawyer’s conduct is subject to the rules. See proposed comment [2] and related discussion in paragraph IX.A.19, above. Therefore, the qualifying word “professional” accurately describes the central aspects of the rules.
2. Include in proposed paragraph (a) [current rule 1-100(A), subparagraph 1] that a purpose of the rules is “to promote and enforce the highest professional standards among attorneys.” (See 4/20/2015 OCTC [Kim] Memo to Chair & Commission), Rule 1-100, ¶.1.)
  - Pros: The California Supreme Court has stated that the primary purposes of imposing discipline include maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514.)
  - Cons: Including such a goal or purpose would take away from the more grounded goals identified in proposed paragraph (a), i.e., “to promote confidence in the legal profession and the administration of justice, and ensure adequate protection for the public.” Employing the term “highest standards” would also appear inappropriate in light of the Commission’s charge to “ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.” See Charter, Principle 3. The concept of maintaining the highest professional standards would appear to be purely aspirational in a set of disciplinary standards that are intended to set out the base level of conduct that will be tolerated before discipline is imposed.

3. In proposed paragraph (b)(2), delete the phrase “and opinions of California courts.”

- Pros: The notion that lawyers can be disciplined for not acting in consonance with a California appellate court opinion (which may be wrong) is worrisome. Lawyers can debate all day long what a court of appeal opinion means. Further, this rule language is not a black letter standard but a vague incorporation-by-reference of a universe of appellate opinions which may or may not be grounded on the Rules of Professional Conduct. In addition, the legal effect of an opinion is established under principles *stare decisis*, law of the case, *res judicata*, etc. The concept is used to define the precedential effect of an opinion on other courts. But opinions in the abstract do not “bind”. Finally, the phrase might even be construed to apply to trial court opinions, which themselves do not even have precedential effect.
- Cons: *First*, the language has been in the current rule for over 25 years. There is no evidence that the language has caused overreaching by the State Bar in discipline cases. There is no compelling reason to delete it. *Second*, current 1-100’s language also encompasses discipline common law from the Supreme Court. If the language is deleted, the rule’s “legislative history” must clarify that the State Bar does not recommend any change to a lawyer’s duty to comply with attorney conduct standards that have evolved as discipline common law in Supreme Court and State Bar Court decisions (see, e.g., *In the Matter of Respondent C*, 1 Cal. State Bar Ct. Rptr. 439, 450-451, 1991 WL 63249 (Rev. Dept. 1991), which describes the common law duty to communicate that predates both rule 3-500 and B&P sec. 6068(m)).<sup>13</sup> This tradition of common law discipline is a part of the minimum standards of discipline that the rules should continue to recognize. *Third*, the phrase would also apply to opinions of the Review Department of the State Bar, which provide important insight into the application of the rules in a disciplinary context and other court opinions provide important guidance concerning the application of the rules in non-disciplinary contexts. (See also discussion of proposed Comment [1] in paragraphs IX.A.17 & 18, above.)

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<sup>13</sup> The Court observed:

Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)" (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor v. State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in *Aronin v. State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068(m), as falling within the parameters of an attorney's oath and \*\*451 duties, under the general provisions of sections 6068(a) (duty to support the laws). (See e.g., *Taylor v. State Bar*, *supra*; *Aronin v. State Bar*, *supra*.)



4. In proposed paragraph (b)(3), add the clause “for enforcement of a rule or” so that the first sentence would read “A violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule.”
  - Pros: Adding the clause would make paragraph (b)(3) more accurate. For example, in a fee splitting dispute, the cause of action brought by the lawyer who did not receive any of the fee typically is a claim for breach of the fee agreement between the fee splitting lawyers. The lawyer who refuses to share the fee in accordance with the agreement, typically asserts a rule 2-200 violation as a defense, i.e., asks the court to enforce the rule. Similarly in disqualifying a lawyer, California courts typically cite to a violation of a specific rule, e.g., rule 3-310(E) or rule 2-100, as the basis for granting the motion.
  - Cons: The additional language is unnecessary. Fee splitting disputes often assert causes of action for violation of Rule 2-200. Conflict rules are often enforced by a separate cause of action (e.g., for injunctive relief) to disqualify lawyers (as opposed to by a motion).
5. In paragraph (c), delete the clause that states the discussion sections in the rule are intended to provide guidance for “practicing in compliance with the rules.”
  - Pros: Deleting the clause would strictly comply with the Commission Charter directs that the comments “should be used sparingly to elucidate, and not to expand upon, the rules themselves,” see Charter, Principle 5.
  - Cons: The comments can and should also provide guidance for complying with the rules so long as the comment does not expand the scope of the rule itself. See also Commission Charter, Principle 4 (“The Commission’s work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”)
6. OCTC’s request that the Commission make certain changes or additions to the definitions in current rule 1-100, paragraph (B), as identified by OCTC. (See Section V.**Error! Reference source not found.**, above.) The Commission recommends that paragraph (B) be deleted and its definitions be part of a global terminology rule or section.
  - Pros: See discussion re deletion of paragraph (B) in paragraph IX.A.11, above.
  - Cons: See discussion re deletion of paragraph (B) in paragraph IX.A.11, above.
7. OCTC’s request that the Commission consider the concepts captured in Model Rule 8.5. (See 4/20/2015 OCTC Memo, ¶.2.) The Commission recommends that paragraph (D) be deleted and that a separate standalone rule similar to Model Rule 8.5 be included in the Rules.

- Pros: See discussion re deletion of paragraph (D) in paragraph IX.A.14, above.
  - Cons: See discussion re deletion of paragraph (D) in paragraph IX.A.14, above.
8. Including the term “willful” in the terminology rule/section.
- Pros: Such a definition would provide lawyers with a better understanding of what is required for a willful violation of a rule.
  - Cons: The word “willful” is not a term that is used throughout the rules. It is used only in rule 1-100. The Commission, however, recommends including comment [3] because it clarifies the requisite intent contemplated in paragraph (b)(1), which provides that a willful violation of any rule is a basis for discipline. Paragraph (b)(1) carries forward the same concept that is currently found in rule 1-100(A), subparagraph 2.
9. In Comment [4], add as a qualifier to the statement that a lawyer may consider ethics opinions and rules and standards in other jurisdictions the clause, “to the extent they are consistent with these rules and the State Bar Act.”
- Pros: Such a qualifying clause would place an important limitation on the relevance of opinions and rule approaches in other jurisdictions.
  - Cons: There is no evidence that the language in current rule 1-100(A), paragraph 3 regarding consideration of ethics opinions from outside of California has caused any problems. Absent such evidence, the language should not be qualified or otherwise modified.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. In proposed paragraph (a), substituting the concepts in Principle 1 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 to the public.”) for the language in current paragraph (A), subparagraph 1 (“to protect the public and to promote respect and confidence in the legal profession”) is not intended as a substantive change except to the extent that the phrase “administration of justice” arguably reflects a lawyer’s role as an officer of the legal system, a concept that has not been expressed in rule 1-100 previously.

2. In proposed paragraph (b)(1), amending current rule 1-100(A), subparagraph 2, to provide: “A willful violation of any of these rules is a basis for discipline” is not intended as a substantive change. However, the substitution of the term “violation” for “breach” might be viewed as such. (See paragraph IX.A.6, above.)
3. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substituting the new language for the first sentence (“A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule”) is a substantive change because it updates the law concerning the effect of the rules in civil cases. (See paragraph IX.A.9, above.)
4. In Comment [1], replacing the language in current rule 1-100, Discussion ¶.1, with updated language that explains proposed paragraph (b)(3) [current rule 1-100, subparagraph 4], i.e., how the rules might be applied in non-disciplinary contexts, is a substantive change for the reasons set forth in paragraphs IX.A.9, 17 and 18, above.

#### **D. Non-Substantive Changes to the Current Rule:**

1. Changing the rule title is not a substantive change. It is intended simply to provide a better description of the rule’s content, especially in light of the recommended deletion of current rule 1-100, paragraphs (B) and (D).
2. Dividing current rule 1-100(A) [Purpose and Scope] into paragraph (a) [Purpose], and paragraph (b) [Function] and numbering the subparagraphs of proposed paragraph (B) is not a substantive change. It is a formatting change to intended to make the rule more user-friendly.
3. In proposed paragraph (a), substituting “lawyer” for “member” is intended as a non-substantive change that more accurately reflects the current scope of the Rules, i.e., their application is not limited to members of the State Bar. See discussion at paragraph IX.A.3, above.
4. In proposed paragraph (b)(1), amending current rule 1-100(A), subparagraph 2, to provide: “A willful violation of any of these rules is a basis for discipline” is not intended as a substantive change. Although the substitution of the term “violation” for “breach” might be viewed as a substantive change, it is merely a clarifying change for the reasons set out in paragraph IX.A.6, above.
5. In proposed paragraph (b)(2), the deletion of the last two sentences from the current rule paragraph arguably is a substantive change because it moves black letter in the current rule into a comment. However, as discussed in paragraph IX.A.8, above, the change is non-substantive because the relocated black letter was either aspirational (“should”) or permissive (“may”).
6. In proposed paragraph (b)(3) [current rule 1-100(A), subparagraph 4], substituting language for the second sentence (“Nothing in these rules or the Comment to the rules is intended to enlarge or to restrict the law regarding the

liability of lawyers to others”) is non-substantive change intended as a clearer and more succinct statement of the current rule’s sentence. See paragraph IX.AA.10, above.

7. Deleting current rule 1-100, paragraph (B), which contains definitions that apply throughout the rules, and instead including the definitions in a global terminology rule, proposed Rule 1.0.1, is a non-substantive change.
8. Changing the name of the “Discussion” section to “Comment” is a non-substantive change, simply bringing the rules in line with other jurisdictions and the California Code of Judicial Ethics.
9. In proposed paragraph (c), deleting the first clause in current rule 1-100, paragraph (C), which provides: “Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, ...” is a non-substantive change for the reasons stated in paragraph IX.A.13, above.
10. Deleting current rule 1-100, paragraph (D) [Geographic scope of the rules] and instead include in the Rules a standalone rule, proposed Rule 8.5 (based on Model Rule 8.5), is a non-substantive change.
11. In proposed paragraph (d) [current rule 1-100(E)], changing the preferred citation of the rules to the “California Rules of Professional Conduct” is a non-substantive change for the reasons stated in paragraph IX.A.15, above.
12. Numbering the comment sections is non-substantive for the reasons stated in paragraph IX.A.16, above.
13. Adding pin cites to the case citations in proposed comment [1] is a non-substantive change, intended to provide lawyers with ready access to an in-depth discussion of the point for which the relevant case is being cited.
14. Adding Comment [3], which explains that a willful violation of a rule does not require that a lawyer intend to violate the rule, is a nonsubstantive change because it clarifies proposed paragraph (b)(1).
15. Adding Comment [4], which is a nearly verbatim restatement of current rule 1-100(A), subparagraph 3, is a non-substantive change for the same reasons deletion of those sentences from the black letter is non-substantive. See discussion in paragraph 5, above.
16. Adding Comment [5], which identifies the provision of pro bono publico services as an important aspect of a lawyer’s responsibilities as an officer of the legal system, is a non-substantive change. Comments do not impose duties.

#### **E. Alternatives Considered:**

None.

## **VIII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS**

Mr. Eaton submitted a written dissent asserting, in part, that including a pro bono comment is inconsistent with the Commission's Charter and that the State Bar should instead consider adoption of a rule imposing mandatory reporting of pro bono hours. (See attached for the full text of this dissent.)

## **IX. COMMISSION RESOLUTION FOR BOARD ACTION**

### **Recommendation:**

The Commission recommends adoption of proposed Rule 1.0 [1-100] in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 1.0 [1-100] in the form attached to this Report and Recommendation.



## **DISSENT OF DANIEL E. EATON FROM RULE COMMENT 5 TO RULE 1.0 (PRO BONO)**

Paragraph 2 of the Commission Charter reads: “The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, *as opposed to purely aspirational objectives*.” (emphasis added.) Paragraph 5 of the Commission Charter reads in pertinent part: “Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly *to elucidate*, and not to expand upon, *the rules themselves*.” (emphasis added.)

Notwithstanding this mandate, the Commission adopted the following Comment 5 to Rule 1.0:

“The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are *encouraged* to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should *aspire* to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).” (Emphasis added.)

On its face, the Comment states an aspirational objective. That offends Paragraph 2 of the Commission’s Charter.

The Comment also deviates from Paragraph 5 of the Commission’s Charter. Unlike the other proposed comments to Proposed Rule 1.0, proposed Comment 5 offers no “guidance for interpreting and practicing in compliance with the Rules.” Under Proposed Rule 1.0(c), that is the only proper purpose of a Comment. The stated benefits of this Comment that the drafting team identifies, such as enhancing the ability of legal services organizations to recruit, make this point especially clear.

By adding this Comment, the Commission also deviated from an additional aspect of Paragraph 5 of the Charter which directs us to use Comments “sparingly” to “elucidate” the rule to which it is appended. This comment does not do that. Instead, it introduces a distinct concept altogether untethered to its Rule.

The proponents of this Comment admirably acknowledged that this Comment deviates from paragraphs 2 and 5 of the Charter. For me, that was enough to warrant its exclusion. The

argument for including the Comment anyway that carried the day was that pro bono service ought to be mentioned somewhere in the disciplinary rules in order to concentrate the profession's collective mind on addressing the unmet need of a substantial underserved population. I am not convinced the approach the Commission took was sound.

There is a different, better way to achieve the objectives of this Comment in an enforceable way. The Commission should have considered adopting a Rule like the one in effect in Florida that requires the mandatory reporting of pro bono hours. Florida Rule of Professional Conduct 4.6.1, subdivision (d) says in full:

(d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual membership fees statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor:

(1) I have personally provided \_\_\_\_\_ hours of pro bono legal services;

(2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided);

(3) I have contributed \$\_\_\_\_\_ to: (indicate organization to which funds were provided);

(4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or

(5) I have been unable to provide pro bono legal services to the poor this year; or

(6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired, or inactive).

The failure to report this information shall constitute a disciplinary offense under these rules.

This is a specific, enforceable way to induce more lawyers to provide substantial pro bono service to the economically less advantaged.<sup>1</sup> As one commentator put it after reviewing the demonstrated increase in pro bono service that resulted from Florida's mandatory reporting system, "a mandatory reporting system is the most efficient and effective policy to begin the process of narrowing the gap between demand for free legal aid and its availability." L. Boyle,

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<sup>1</sup> Other provisions of Florida Rule 4.6.1, such as the suggested number of annual pro bono hours a lawyer should provide, are aspirational and therefore do not belong in our Rules.



“Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements,” 20 Geo. J. Legal Ethics 415 (2007). And such a Rule also would accord with each aspect of this Commission’s Charter in a way that Comment 5 does not.

Moreover, there are other concepts, such as civility, which lawyers also should be encouraged to embrace. The Rules of Professional Conduct is not the place to offer that encouragement. Why mention pro bono aspirationally and no other “aspects of a lawyer’s professional obligations” the violation of which are not subject to discipline? The simple answer to that question is that the Commission would get consumed by debates on ideals or practices to which a lawyer should aspire and those to which a lawyer should not.

If mandatory reporting of pro bono hours is considered objectionable for some reason, the existing State Bar Pro Bono Resolution, similar local bar resolutions, and awards given out by a range of bar and other organizations remain proper vehicles to advance worthy goals such as this that do not fit in the Rules. A sense of functional humility should restrain this Commission from stuffing the Rules with concepts that exceed our mandate.

Comment 5 is neither necessary nor sufficient to address what is universally recognized as the severe shortfall in providing legal services to those with limited means. I dissent.

### **COMMISSION’S RESPONSE TO DISSENT**

The Commission disagrees and believes Rule 1.0 is the functional equivalent of a preamble to the Rules and therefore is consistent with the Commission’s Charter. The Commission acknowledges that raising the profile of a lawyer’s pro bono responsibility in this new Comment does not create a duty enforceable by lawyer discipline. At the same time, the Comment also is mindful of the fact that Comment [5] will not promote the unfair discipline of lawyers using vague or unenforceable standards. As such, the Comment is appropriate for inclusion in Rule 1.0 which defines in a general sense the scope of the Rules and a lawyer’s professional obligations. The Comment simply signals that the provision of pro bono services, while not mandated, is an important aspect of a lawyer’s responsibilities as an officer of the court and the legal system. Its inclusion in Rule 1.0 does not depart from the Commission’s overall mission to propose disciplinary standards, as opposed to purely aspirational objectives. Moreover, the Comment [5] is consistent the State Bar’s pro bono resolution which has been in place for nearly 20 years. The Commission also disagrees that the proper approach would be to require the mandatory reporting of pro bono hours (as required in Florida). Promulgation of a mandatory pro bono reporting requirement would entail the commitment of additional State Bar resources in terms of monitoring and audits to insure compliance, as is currently required under the MCLE program. This would require resource and budgetary commitments to finance such a program that are beyond the purview of the Commission.

