

# COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.0.1 [1-100(B)]

## Commission Drafting Team Information

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## **I. CURRENT CALIFORNIA RULE**

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

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#### **(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.

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## **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.

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

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.0.1 [1-100(B)]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.0.1 [1-100(B)]

Vote: 14 (yes) – 1 (no) – 1 (abstain)

## **III. PROPOSED RULE (CLEAN)**

### **Rule 1.0.1 [1-100(B)] Terminology**

- (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.

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

##### Rule 1.0.1 [1-100(B)] ~~Rules of Professional Conduct, in General~~Terminology

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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.

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## **Discussion: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.

\* \* \* \* \*

~~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.~~

## **V. RULE HISTORY**

The California Rules of Professional Conduct have never included a comprehensive global terminology section. The American Bar Association has included, since 1969, a “Definitions” or “Terminology” section in its Model Code of Professional Responsibility and the Code’s successor, the Model Rules of Professional Conduct, respectively. As part of the State Bar’s comprehensive revision and renumbering of the rules that became operative in 1989, rule 1-100 was revised to include a new paragraph (B), which contains definitions for five terms (“Law Firm,” “Member,” “Lawyer,” “Associate,” and “Shareholder”) that are referenced throughout the rules. (See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” Bar Misc. No. 5626, December 1987.)<sup>1</sup> The purpose of adding this

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<sup>1</sup> In the December 1987 memorandum, the addition of definitions was summarized as follows:

“Paragraph (B) is new and defines words and phrases used throughout the rules to assist attorneys in interpreting and applying the rules. Including a definition of the term ‘client’ was considered but rejected because such a definition was thought to be both



paragraph was to assist attorneys in interpreting and applying the rules. Including a definition of the term "client" was considered but rejected because such a definition was thought to be both over and under-inclusive, depending on the circumstances. A Discussion paragraph was added to explain that "law firm" does not include associations or people who are unauthorized to practice law. Other definitions, which were viewed as rule-specific, were included as part of the rule to which they are relevant.<sup>2</sup>

Rule 1-100(B) was last amended in 1992. (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, No. S024408, pages 8 - 9.) There were two changes. First, in subparagraph (B)(1)(b), the reference to a law corporation within the definition of the term "Law Firm" substituted the word "lawyer" for "member" to conform to California professional corporation law and the State Bar's law corporation rules permitting a non-California attorney to be an employee or shareholder in a law corporation. Second, in subparagraph (B)(3), the definition of "Lawyer" was revised to include foreign attorneys. In part, both of these changes arose from ambiguities in the meanings of the terms "member" and "lawyer" as used throughout the 1989 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 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 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. (*Geffen v. State Bar* (1975) 14 Cal.3d 843, 853; *In the*

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over and under-inclusive, depending on the circumstances." (December 1987 memorandum at page 14.)

<sup>2</sup> For example, the current rules, adopted and approved in 1989 and 1992, contain definitions for "communication" and "solicitation" in rule 1-400(A) and (B), respectively; a definition for "candidate for judicial office" in rule 1-700; definitions for "law practice," "knowingly permit," and "unlawfully" in rule 2-400(A); a definition for "competence" in rule 3-110(B); a definition for "sexual relations" in rule 3-120(A); a definition for "disclosure," "informed written consent," and "written" in rule 3-310(A); and a definition for "administrative charges" and "civil dispute" in rule 5-100(B) and (C), respectively.

*Matter of Petilla* (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 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.*<sup>3</sup>

2. OCTC supports the Comments to this rule.

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Ten comments, including the above comment from OCTC, were received. One agreed with the proposed rule, two disagreed, five agreed only if modified, and one did not indicate. A public comment synopsis table, with the Commission’s responses to each comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule.

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

The ABA State Adoption Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.0: Terminology,” revised July 29, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_0.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_0.pdf) [last accessed 1/27/17]
- Four jurisdictions have adopted Model Rule 1.0 verbatim.<sup>4</sup> Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 1.0.<sup>5</sup> Sixteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.0.”<sup>6</sup>

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<sup>3</sup> See *People v. Rader* (Col. 1992) 822 P.2d 950, 953 [citations omitted].

<sup>4</sup> The four jurisdictions are: Arkansas, Delaware, Idaho, and Louisiana.

<sup>5</sup> The thirty-one jurisdictions are: Arizona, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

<sup>6</sup> The fourteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Michigan, Mississippi, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and Wisconsin.

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

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

**General Concepts Recommended for Adoption.**

1. Recommend adoption of a global terminology section with definitions of terms that are used throughout the Rules of Professional Conduct.
  - Pros: 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.
  - Cons: None identified.
2. Similar to the California Code of Judicial Ethics, recommend placing an asterisk next to every instance where a global term appears in the Rules (or alternatively, bold or italicize the term).
  - Pros: Similar highlighting of defined terms has been incorporated to good effect in the Code of Judicial Ethics. The highlighting will provide notice that the term so marked is defined in the terminology section so that a lawyer reading the rule in question would know to consult the definition in this Rule in determining how the rule should be applied.
  - Cons: None identified.
3. As to the substantive content of the definitions, recommend adoption of the Model Rule 1.0 definitions to the extent those definitions conform to California law and, where the Model Rule definitions and California law or settled public policy are not aligned, revise those definitions to reflect California law or policy.
  - Pros: Where the Model Rule and California meanings of a term are aligned, 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. (See, e.g., Rules of Court 9.45 – 9.48 and proposed Rule 8.5 [Choice of Law].) Changing a Model Rule definition to reflect California law or settled policy will ensure continuation of important public policies, including client protection, that are reflected in the California approach. (See, e.g., proposed definition of

“informed consent” and “informed written consent,” and rejection of the Model Rule concept, “confirmed in writing,” below.)

- Cons: None identified.

**Specific Blackletter Definitions.** Each of the proposed definitions is discussed in the following paragraphs:

4. In paragraph (a), recommend adoption of the RRC1’s definition of “belief,” which is nearly identical to the Model Rule definition. See also “reasonable” and “reasonable belief,” below.

- Pros: The definition is used throughout the Rules (e.g., Rules 1.1 [3-110], 1.6 [3-100], 1.16 [3-700]), justifying a global definition. The RRC1 definition made only non-substantive changes to the Model Rule definition, i.e., substituting “means” for “denotes,”<sup>7</sup> and the present tense “supposes” for “supposed” to correspond to the tense of “believes.”

- Cons: None identified.

5. In paragraph (c), recommend adoption of RRC1’s definition of “firm” with minor revisions.

- Pros: The definition is used throughout the Rules (e.g., Rules 1.5.1 [2-200], 5.1 to 5.3, 5.4), justifying a global definition. In addition, “firm” is defined by reference to its organizational attributes rather than its constituent members, which obviates the need to specifically define the terms “shareholder” and “associate” in the rule, as is done in current rule 1-100(B).

Further, RRC1 included a reference to governmental law offices (this is not stated in the Model Rule but is intended, as is shown by the Model Rule Comment). This change emphasizes the need to comply with the California principle that all lawyers are bound by the Rules of Professional Conduct, including government lawyers. See *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150.

In addition to using semi-colons and deleting the “or” after “sole proprietorship,” the phrase “authorized to” is used instead of “engaged in” to conform the definition to the Model Rule definition and to clarify that the Rules only cover associations authorized to practice law. The phrase “a lawyer acting as a” is added in front of “sole proprietorship” to clarify that the lawyer is subject to the Rules.

- Cons: None identified.

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<sup>7</sup> The drafting team, similar to RRC1, recommends substituting “means” for “denotes” throughout the blackletter. “Means” is more specific and definite than “denotes.”

6. In paragraph (d), recommend adoption of RRC1's definition of "fraud," which is identical to the Model Rule definition, and to modify Comment [5]. (See discussion below re Comment [5].)

- Pros: It is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction. (See proposed Rule 8.5 concerning choice of law.) Further, as clarified in Comment [5], 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. See Rules 1.2.1(a)[lawyer "shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, ...."]; 1.16(b)(2) [Lawyer may withdraw if "the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud"]; 3.3(b) ["A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e)."] Comment [3] also clarifies that "fraud," as used in these Rules, does not include negligent conduct, including negligent misrepresentations or omissions.

Fraud is also mentioned in Rules 1.5 [fees] and 8.4 [Misconduct]. Under proposed Rule 1.5(b)(1) (as approved by this Commission), a factor in considering whether a fee is unconscionable is "whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee," and proposed Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." In each of the foregoing, the prohibition is on a lawyer "engaging" in fraudulent conduct, not that the lawyer has committed fraud in the sense that all elements of the common law tort of fraud must have been proven. In the legal profession, great emphasis is placed on a lawyer's honesty and requiring only "conduct involving fraud" reflects that emphasis.

As to how the definition of fraud should be qualified, i.e., in the blackletter of the rule or in a comment, the Commission believes it should be in a comment. As noted, in applying a rule, e.g., Rule 3.3, to a specific set of facts, it is not necessary that reliance or damage be shown because that would frustrate the rule's intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder. Guidance on how a rule should be applied is one of the approved purposes of a comment, so that qualifying provision should remain in a comment, where the rationale for not requiring damages or reliance, which are typically required elements of fraud under the common law in every jurisdiction, can be more fully explained. Put another way, placing the qualification in a comment permits an explanation for why the definition is qualified and avoids the confusion that would be generated by contradicting

the definition of fraud (law of the “applicable jurisdiction”), which presumably requires both reliance and damage. Further, an expanded explanation does not belong in a blackletter provision; it belongs in a comment. Please see discussion of proposed Comment [3], below.

In addition, it should be noted that RRC1 also deleted the phrase “substantive or procedural” from the Model Rule definition. RRC1 explained the phrase was removed “because of difficulty with the concept that a procedural requirement can define fraud. These three words also have been removed in Alaska, Florida, North Dakota, Ohio and Tennessee, often with substantial additional changes.”

- Cons: None identified.

7. In paragraph (e), recommend adoption of a definition of “informed consent,” modified to identify two disclosures required for consent to be “informed”: (i) the “relevant circumstances” and (ii) the “material risks” of the representation, the latter retained from the Model Rule. The Commission has also added the clause “actual and reasonably foreseeable “adverse consequences of the proposed course of conduct,” (see current rule 3-310(A)(1)’s definition of “disclosure”), to clarify what is intended by the phrase “material risks.”

- Pros: The inclusion of the term “material risks” clarifies that the definition is a global definition that is not limited to the conflicts context and conforms the definition more closely to the Model Rule definition. The inclusion of “relevant circumstances” and “actual and reasonably foreseeable adverse consequences” conform the definition to California case law. See, e.g., *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429-31.

As to the contra argument that the concept of informed consent belongs in specific conflicts rules, the concept is not unique to conflicts. (See, e.g., current rule 3-100; proposed Rule 1.6 [3-100]; proposed Rule 1.4 [3-500].)

- Cons: The definition of “informed consent” belongs in specific conflicts rules, not in a global terminology rule.

8. In paragraph (e-1), recommend adoption of RRC1’s definition of “informed written consent,” which is based on current rule 3-310(A)(2).

- Pros: The definition is used throughout the current Rules (e.g., Rules 3-310(C), (E), (F), 5-210) and has been incorporated into other rules by this Commission (e.g., 1.8.6, 1.8.7, 1.9, 1.10, 1.11, 1.12). Unlike the Model Rules or 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, more client-protective approach to consent should be carried forward.

- Cons: None identified.

9. In paragraph (f), recommend adoption of RRC1's definition of "knowingly," etc., which is nearly identical to the Model Rule definition. See also "reasonably should know," below.

- Pros: This scienter requirement is used throughout the Rules, justifying a global definition. Limiting this definition to "actual knowledge" which may be "inferred from the circumstances" – rather than expressly including willful blindness or gross negligence – is consistent with the scienter requirement determined by the Commission to be appropriate for the rules that use these terms. In any event, "actual knowledge," under existing case law, appears to cover willful blindness. See, e.g., *Levy v. Levine* (1901) 134 Cal.; 664, 671-672; *In re Matter of Carver* (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, \*4. And to the extent the scienter requirement in a rule should be broader than actual knowledge, the rule itself can expand its particular scienter requirement. See, e.g., Rule 8.2 (prohibiting a lawyer from making "a statement that the lawyer knows to be false or *with reckless disregard as to its truth or falsity*").
- Cons: Limiting the definition to actual knowledge is contrary to the State Bar Act and California law governing lawyer discipline, lowers the professional standards required of California lawyers, misleads attorneys as to their professional obligations, and creates confusion in California law governing lawyer discipline.

10. In paragraph (g), recommend adoption of RRC1's definition of "partner," which is identical to the Model Rule definition.

- Pros: It is important to globally define this term, which is used throughout the Rules, because it clarifies that "partner" is not limited to its traditional meaning, i.e., it does not only apply to a member of a partnership but also includes shareholders in law corporations, etc.

- Cons: None identified.

11. In paragraph (g-1), recommend adoption of RRC1's definition of "person" even though it has no counterpart in the Model Rules.

- Pros: This definition is used throughout the Rules, justifying a global definition. (See, e.g., definitions in this Rule; see also proposed Rules 1.4.1, 1.6, 1.7, 1.8.1, 1.8.3, 1.8.5, 1.8.10, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 3.1, 3.3, 3.4, 3.5, 3.6, 3.8, 4.1, 4.2, 4.3, 5.1, 5.2, 5.3, 5.3.1, 5.4, 5.5, 7.1, 7.2, 7.3, 8.1 and 8.4.1). The proposed definition will eliminate potential confusion

over whether the term “person” includes an organization. Six other jurisdictions have adopted definitions of “person;” the proposed definition is based on the definition adopted in Michigan.

- Cons: That a “person” means both a natural person and an organization is well-settled and need not be the subject of a definition.

12. In paragraph (h), recommend adoption of RRC1’s definition of “reasonable,” etc., which is identical to the Model Rule definition.

- Pros: This term is used throughout the Rules and conforms to California law.
- Cons: None identified.

13. In paragraph (i), recommend adoption of RRC1’s definition of “reasonable belief,” etc., which is identical to the Model Rule definition.

- Pros: This term is used throughout the Rules and conforms to California law.
- Cons: None identified.

14. In paragraph (j), recommend adoption of RRC1’s definition of “reasonably should know,” which is identical to the Model Rule definition.

- Pros: This term is used throughout the Rules and conforms to California law.
- Cons: None identified.

15. In paragraph (k), recommend adoption of RRC1’s definition of “screened,” which modifies the Model Rule definition primarily by the addition of clause (ii).

- Pros: The addition of clause (ii) imposes bilateral duties of non-communication on the law firm, i.e., it prohibits not only the screened lawyer from communicating with other firm lawyers about the matter but also places a similar prohibition on all other lawyers in the firm.
- Cons: None identified.

16. In paragraph (l), recommend adoption of RRC1’s definition of “substantial”. The pros and cons of including the term “substantial” are:

- Pros: The term “substantial” as defined in the Model Rules and RRC1’s proposed Rules is accurate and provides important guidance in applying the many rules where the term “substantial” acts as a trigger for imposing a duty on a lawyer. As defined, the term “substantial” as used in the Rules refers to the qualitative nature of an event, i.e., “a material matter of clear and weighty importance.” Its usage is similar to “significant.” The primary dictionary definition of “substantial,” on the other hand, refers to the quantitative nature



of something rather than its qualitative nature, i.e., “large in amount, size, or number.”<sup>8</sup> Because the common usage departs from how the term is employed in the Rules, a definition is warranted.

- Cons: None identified.

17. In paragraph (m), recommend adoption of RRC1’s definition of “tribunal,” modified to add the term “administrative body” to clause (i).

- Pros: RRC1’s definition included within its scope courts and their equivalents acting in an adjudicative capacity to which lawyers should owe the same duties of candor as to courts of general jurisdiction. The term “administrative body” has been added to the list of entities acting in an adjudicative capacity to which lawyers should owe those duties because governmental entities, particularly local governmental entities, have administrative bodies, such as personnel boards and civil service commissions, that adjudicate disputes and render decisions that can be binding on the parties. Because an administrative body acting in an adjudicative capacity is acting in a capacity similar to an ALJ or arbitrator, there is an expectation from the body, the parties, and the public that a lawyer representing a client before that body is providing legal opinions and therefore adhering to his or her ethical duties as a lawyer. California courts also have ample experience distinguishing between administrative bodies acting in an adjudicative capacity from those acting in a non-adjudicative capacity, and there is nothing to suggest that courts in the many states that have adopted the ABA definition of “tribunal” – which uses the same distinction – have had any difficulty applying it.

The definition as proposed would not inhibit a client’s right to petition because the duty is limited to administrative bodies that are acting in an adjudicative capacity. There is nothing to suggest that the right to petition is different in scope when a court, arbitrator, or ALJ is acting in an adjudicative capacity versus when an administrative body does so. Finally, 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” – which is broader and includes “legislative” bodies.

- Cons: Given practical considerations, imposing the same duties of candor as are owed a court of general jurisdiction on a lawyer appearing before an administrative body will risk violating the right of petition of the client’s lawyer.

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<sup>8</sup> See, e.g., Merriam-Webster’s online dictionary, at: <http://www.merriam-webster.com/dictionary/substantial>.

Similarly, Dictionary.com’s primary definition for “substantial” is “of ample or considerable amount, quantity, size, etc.” See: <http://dictionary.reference.com/browse/substantial>

18. In paragraph (n), recommend adoption of RRC1's definition of "writing," etc., which is based on the Evidence Code, (see current rule 3-310(A)(3)), and also include RRC1's second sentence concerning electronic writings.

- Pros: This term is used throughout the Rules and conforms to California law. Moreover, including the second sentence clarifies that an electronic signature (or other modern forms of signature) are sufficient to establish that the writing is "signed." This sentence, based on the second sentence in MR 1.0(n) and also accepted by RRC1, should avoid potential confusion over whether electronic or other modern forms of signature will suffice.
- Cons: None identified.

**Introduction to Comments to Proposed Rule 1.0.1.** The Commission has recommended six comments based on RRC1's proposed comments, which in turn were largely derived from the Model Rule comments. Half of RRC1's comments are recommended for deletion. (RRC1 Comments [3], [4], [7], [8], [11] and [12].)

Because this Rule provides definitions for terms that are employed throughout the Rules of Professional Conduct, the Commission believes that including the following comments, which provide important interpretive guidance regarding the defined terms, is warranted.

19. Recommend adoption of Comment [1] concerning the definition of "law firm".

- Pros: Comment provides helpful interpretive guidance for determining whether a grouping of lawyers might constitute a law firm, e.g., for purposes of conflicts or fee splitting.
- Cons: None identified.

20. Recommend adoption of Comment [2] concerning the concept of a lawyer who is "of counsel" to a law firm, or is designated as such by use of a similar term. The comment is a substantially shortened version of RRC1 Comment [2], which has no counterpart in the Model Rule.

- Pros: The comment provides helpful guidance on determining whether certain lawyers associated with a law firm should be considered part of the firm for purposes of a rule that uses the term "law firm" or "firm." The term "of counsel" (and similar terms) can have a variety of meanings and have been the subject of litigation. Providing guidance on what the term means in a particular situation will permit lawyers to better determine whether a rule applies and thus enhances compliance with the Rules.
- Cons: There is no reason to include this guidance in the rule. Sufficient guidance is available in the case law, e.g., the two opinions cited in the comment.

21. Recommend adoption of Comment [3] concerning the definition of fraud.

- Pros: As noted, (see paragraph 6, above), this comment provides important qualifications on what constitutes fraud for purposes of the Rules and also provides an explanation for these qualifications. Also as noted, the qualification on the definition belongs in a comment, not in the blackletter of the Rule.
- Cons: None identified.

22. Recommend adoption of Comment [4] to clarify the term, “informed consent.”

- Pros: The comment clarifies that the definitions of “informed consent” and “informed written consent” are global definitions that are not limited to the conflicts context. As a result, the communication necessary to provide such consent will vary depending on the rule involved and the circumstances giving rise to the consent requirement.
- Cons: The blackletter of paragraph (e) does not require any further elaboration. It already identifies the components of a disclosure sufficient to render the client’s consent informed: disclosure of “the reasonably foreseeable adverse consequences and material risks of the proposed conduct” and “reasonably available alternatives.”

23. Recommend adoption of Comments [5] and [6] regarding the term “screened.”

- Pros: Provides important, concise guidance on the implementation of an effective ethical screen.
- Cons: Similar guidance can already be found in California case law. (See, e.g., *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010); *Hendriksen v. Great Am. Sav. & Loan*, 11 Cal.App.4th 109 (1992).

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

1. Retain the definitions in current rule 1-100(B)(4) and (5) for “associate” and “shareholder,” respectively.

- Pros: In current rule 1-100(B).
- Cons: It is recommended that these terms be removed because they were not retained in RRC1’s proposed rules and it is unlikely that they will reappear in RRC2’s proposed Rules. Compare, for example, current rule 2-200 (refers to “associate”) to proposed Rule 1.5.1 (refers only to “law firm”) concerning fee splitting. See also the definition of “partner,” below, which includes a shareholder in a law corporation.

2. Retain the definition of “member” in current rule 1-100(B)(2).

- Pros: None identified.
- Cons: “Member” as defined in rule 1-100(B)(2) has been, and is likely to be, retained in only one Rule, proposed Rule 5.3.1 [1-311]. That is not a sufficient reason to retain that term in a global terminology rule and, in any event, the term is defined in Rule 5.3.1. Moreover, member is used often in the proposed Rules to mean something entirely different, e.g., a “member” of a law firm [Rule 1.0.1(g)], a member of a legal services organization [Rule 6.3], or even as a member of the legal profession (Rule 1.0, cmt. [5].)

3. Retain the definition of “lawyer” in current rule 1-100(B)(3).

- Pros: None identified.
- Cons: RRC2 has decided to recommend that the word “lawyer” be substituted throughout the rules for “member,” except in proposed Rule 5.3.1 [3-111], which defines the word “member”. That global substitution obviates the need to define “lawyer” and proposed Rule 8.5 adequately explains which lawyers are covered by the rules.

4. Add the following concepts to the terminology rule: advance for fees; client (Evidence Code § 951); independent lawyer; law clerk; matter; of counsel; personally and substantially; public official (defined in proposed rule 4.2 [2-100]); retainer [defined in proposed rule 1.5 [4-200]]; substantially related; practice of law (already rejected by Commission).

- Pros: All of the foregoing terms are used either in the Model Rules or RRC1’s proposed Rules, or both.
- Cons: The foregoing terms are not used with sufficient frequency to warrant their inclusion in a global terminology rule, have a common meaning that is not subject to misunderstanding, or have various meanings that are better left to explanation in the specific rule in which it is used.

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. The Commission believes that none of the proposed revisions of current rule 1-100(B) constitutes a change in duties for California lawyers.

2. The only change that is arguably a substantive change is the definition of “firm” or “law firm.” The proposed term is defined by reference to its organizational attributes rather than its constituent members. See Section A.5, above.

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

1. The Commission believes that the proposed definitions in proposed Rule 1.0.1 are non-substantive changes for the following reasons:
  - a. Although the current California Rules of Professional Conduct do not include a global terminology rule other than rule 1-100(B), for the most part proposed rule 1.0.1 incorporates terms that are already recognized in California case law.
  - b. Some terms already have counterparts in the current rules, e.g., “law firm” is defined in current rule 1-100(B)(1), “informed consent” and “informed written consent” are defined in current rule 3-310(A)(2), and “writing” is defined in current rule 3-310(A)(3). None of these proposed terms and definitions change the duties of California lawyers.
  - c. None of the proposed terminology paragraphs derived primarily from language in Model Rule 1.0 alter current duties of California lawyers. These definitions include terms that might be referred to as “scienter” terms or standards that are already found in the current rules. This category would include proposed rules 1.0.1(a) (“belief”); 1.0.1(f) (“knows”); 1.0.1(h) (“reasonable”); 1.0.1(i) (“reasonable belief”); 1.0.1(j) (“reasonably should know”). Similarly, proposed rule 1.0.1(l) (“substantial”) is a term found in the current rules. All of these definitions would provide guidance on what is intended when the word or phrase is used in the proposed Rules. ~~It is noteworthy that OCTC did not object to the adoption of any of the foregoing terms.~~ OCTC objects to the use of “knows” and “knowingly” but that objection should be evaluated in the context of a specific rule to determine whether a substantive change is being made. Simply by including in a terminology rule a definition of “knows” and “knowingly” the Commission is not making a sweeping change to the concept of “willfulness” as basic requirement for finding culpable misconduct.
  - d. ~~Nor did OCTC object to p~~ Proposed rule 1.0.1(d) (“fraud”), which simply clarifies that when the term “fraud” and “fraudulent” appears in the rules, the meaning is to be determined by the law of the applicable jurisdiction, which would be determined by reference to proposed rule 8.5 (Disciplinary Authority; Choice of Law).
  - e. When the State Bar submitted its brief on ~~RRC1’s~~ the first Commission’s proposed Rule 1.0.1, it identified only three definitions that might arguably be substantive changes: (i) proposed Rule 1.0.1(e-2) (“information protected by Business and Professions Code section 6068(e)”); (ii) proposed Rules

1.0.1(k) (“screened”); and proposed Rule 1.0.1(m) (“tribunal”). The Commission has declined to recommend RRC1’s paragraph (e-2).<sup>9</sup> As to RRC1’s definition of tribunal, which this Commission has modified to add “administrative body,” the Commission agrees with RRC1 that the definition of tribunal should omit legislative bodies because of potential issues relating to the constitutional right to petition. (See Section IX.A.17, above), As to the term “screened,” the Commission does not believe that either the blackletter definition or the comments related to the definition are contrary to California law.

2. Substitute the term “lawyer” for “member.”

- Pros: The current 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.

3. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). This Rule is numbered 1.0.1 rather than 1.0 as in the Model Rules or in nearly every jurisdiction that has adopted a version of the Model Rules. That is because the Commission has assigned the number “1.0” to the Rule that sets forth the purpose and scope of the Rules, which in Model Rules jurisdictions is typically set out in unnumbered Preamble and Scope sections.

- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would assist them in complying with their duties under the Rules, 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

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<sup>9</sup> The Commission did not include a definition of “information protected by Business and Professions Code § 6068(e)(1)” for three reasons. First, in an April 15, 2014 letter, the Supreme Court directed the State Bar to remove paragraph (e-2), which defined the term by reference to comments in another rule. Second, even assuming that the Court’s concern was with a definition that appeared in a comment to another Rule, the Commission declined to recommend adoption of any definition of the term, even in proposed Rule 1.6’s black letter. Third, it is uncertain whether a rule of professional conduct can define what is in effect a statutory term.

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.

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

1. No alternatives to the proposed global terminology rule were considered.

#### **X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

##### **Recommendation:**

That the Commission recommends adoption of proposed Rule 1.0.1 [1-100(B)] in the form attached to this Report and Recommendation.

##### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 1.0.1 [1-100(B)] in the form attached to this Report and Recommendation.





Robert L. Kehr  
Commission Member  
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M E M O

To: Randall Difuntorum  
Kevin Mohr

From: Robert L. Kehr

Date: January 29, 2017

Re: Dissent to proposed Rule 1.0.1(m)

This message states my dissent from proposed Rule 1.0.1(m), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

The Commission's Charter directs us to "...ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Proposed Rule 1.0.1(m) presents a serious violation of those directions, would cause a radical change in California's current standards,<sup>1</sup> and would intrude on the rule-making authority and the customs and practices of administrative agencies.

Proposed Rule 1.0.1 defines terms that are used in multiple places in the proposed Rules (definitions used only in a single Rule are contained in that Rule). One of the important definitions is the term "tribunal".

Here is the first Commission's definition:

"Tribunal" means: (i) a court, an arbitrator, or an administrative law judge 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

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<sup>1</sup> I don't intend to repeat this thought in each of my Dissents, but it is important to keep in mind that California has a rich body of established civil and disciplinary case law and advisory ethics opinions that provide a solid foundation for lawyers, OCTC and the State Bar Court, and civil courts. Each proposed change in the current Rules of Professional Conduct should be examined carefully to be certain that it will not cause needless confusion or other harm. OCTC has made this point in several of its dissents and, while I don't always agree with its conclusions, I believe its concern is both valid and important.

more issues and whose decision or recommendation can be binding on the parties if approved by the court.

The first Commission carefully limited the definition to courts and their equivalent. The current Commission has expanded the proposed definition to include administrative agencies:

“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. (italics added)

The term “tribunal” is used in nine other Rules. The extreme time limitations under which we are operating make it impossible for me to discuss the foreseeable consequences of this expanded definition in all nine Rules. Instead I will restrict myself to a few observations that I hope will show the scope and depth of the error in the proposed expanded definition:

*First*, there is no definition of “administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved”. There likely will be future conflicts about when the expanded definition would apply, but the language appears broad enough to include every federal, state, and local administrative agency that has the authority to grant or deny licenses, permits, or approvals of any sort. The Federal Register lists 440 federal administrative agencies.<sup>2</sup> These include the obvious, such as the IRS and the SEC. It also includes the less generally known, such as the Comptroller of the Currency<sup>3</sup> and Federal Motor Carrier Safety Administration.<sup>4</sup> It goes without saying that none of us could begin to understand the full significance of the “tribunal”, such as whether one or more of the proposed Rules would conflict with the requirements or practices of those administrative agencies or with the statutory schemes that created them. The problem is multiplied many times over by adding California state and local administrative agencies and agencies outside California with which California lawyers deal. Because we do not know, and the Commission made no attempt to consider, these application issues, I believe that the expanded definition of “tribunal” is an aspirational statement that is inappropriate in California, with its robust and professional disciplinary system. It also is inappropriate because our Rules of Professional Conduct routinely are used in civil litigation as standard of conduct, and the expanded definition therefore poses an indefinitely broad threat to California lawyers. We would be flying blind in attempting to tell lawyers, and what no doubt are thousands of administrative agencies, how to deal with one another. As an example, proposed Rule 3.4(d) prohibits payment to a witness dependent on the outcome of the testimony, but is this improper with experts testifying on regulatory

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<sup>2</sup> <https://www.federalregister.gov/agencies>

<sup>3</sup> It is an agency of the U.S. Department of the Treasury and, among other things, rules on applications for one bank to buy another. See: <http://www2.occ.gov/topics/licensing/corporate-activities-weekly-bulletin/public-comments-on-applications.html>

<sup>4</sup> The FMCSA web site describes it as responsible for development and enforcing regulations for motor carriers (truck and bus companies). See <https://www.fmcsa.dot.gov/mission/we-are-fmcsa-brochure>

matters? Proposed Rule 3.5 provides another example. This proposal, titled “Contact With Judges, Officials, Employees, and Jurors”, for the most part applies to courts and their equivalents as shown by the paragraph (b) prohibitions regarding communications with a “judge or judicial officer”. However, its paragraph (a) prohibits gifts to any “employee of a tribunal”. This likely would conflict with administrative regulations governing dealings between its employees and ....

*Second*, there are Rules that are perfectly understandable if applied to courts or their equivalent, but whose application makes little sense if applied to administrative agencies. One example is in Rule 3.3. It is based largely on current rule 5-200 (“Trial Conduct”) – a rule that, based on its title and content, is perfectly well understood as applying to a lawyer’s dealings with courts.<sup>5</sup> That clarity would be lost with the proposed expanded definition. For example, proposed Rule 3.3(d) states in full:

(d) In an *ex parte* proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal\* of all material facts known\* to the lawyer that will enable the tribunal\* to make an informed decision, whether or not the facts are adverse to the position of the client.

Many license and other regulatory applications typically are heard *ex parte*. At the federal level this might include applications to the SEC to issue securities permits, liquor license applications at the state level, and building permit, rezoning, and zoning variance applications locally. Proposed paragraph 3.3(d) easily can be read as imposing an affirmative burden on a lawyer who represents an applicant in any of those situations to file trial- like declarations of the sort an imagined opponent would file arguing facts that might give pause to the administrative agency. If this were required, the predictable result is that applicants would not hire lawyers to advance their regulatory interests in any *ex parte* application, and the applicants either would go it alone or use lawyers *sub rosa*. An applicant who nevertheless uses a lawyer to advocate on its behalf would be faced with pointless delay and substantial additional expense.

*Third*, there are Rules that contain “tribunal” only in a portion of the Rule, but the presence of that term with its expanded application to administrative agencies would permit the argument that other portions of the Rule apply in administrative proceedings. Rule 3.4 is an example. The defined term is used in its proposed paragraphs (e) and (f). Does that mean that proposed paragraph (a) (saying that a lawyer may not “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.”) should be understood as applying to administrative agencies? Perhaps, and if so, what is “evidence” in the workings of different administrative agencies (the term has a technical and well-understood meaning only in court proceedings), and by what measure could obstruction be “unlawful”? Similarly, does the reference to trials in

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<sup>5</sup> The fact that it is understood as applying to courts perhaps is shown most simply by the fact that it is discussed in California Practice Guide: Professional Responsibility (The Rutter Group), at Ch. 8-C, which is titled: “Restrictions on Advocacy in Court Proceedings”.

proposed paragraph (g) (saying that a lawyer shall not “(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.”) apply in an administrative proceedings? We no longer can be certain that a “trial” is something that happens in a court room or its equivalent. Would labeling them as “trials” in this context lead to argument that other trial requirements would apply?

*Fourth*, some administrative agencies are involved in matters that involve intense policy differences and personal and political passions. At the local level there are land-use issues that pit adverse developers against one another or pro- and anti-development forces (develop or preserve?). The latter point is echoed at the state level with the work of California’s Coastal Commission. One of many possible federal examples is the Bureau of Land Management, whose web site states: “The BLM has responsibility for coal leasing on approximately 570 million acres where the coal mineral estate is owned by the Federal Government. Surface ownership of these lands belongs to either the BLM, the United States Forest Service, private land owners, state land owners, or other Federal agencies.”<sup>6</sup> Lawyers are understood, correctly in my view, as having a special role in the functioning of courts, and that special role is the basis for current rule 5-200. Courts to a substantial degree must rely on the information provided to them by the lawyers appearing in the court; a court (unlike administrative agencies) has no independent investigatory arm and, except through the work of the appearing lawyers, has no way of learning the relevant facts. This significant degree of reliance explains each of the five subparagraphs of current rule 5-200.

The proposed expanded definition would limit the ability of lawyers to engage in the sort of robust advocacy now common in administrative proceedings and, perhaps even more important, will make lawyers the target of their client’s adversaries. Lawyers who advocate for a client in an administrative hearing regarding, say, the grant or denial of a coal lease, a permit for off-shore drilling, the licensing of a nuclear power plant or the grant or denial of a building permit within the coastal zone regulated by the Coastal Commission, will be accused by the client’s opponents of having violated proposed Rule 3.3(a) by (shall not “knowingly make a false statement of fact or law to a tribunal”). It is one thing for a lawyer’s statement of facts to be challenged, as now happens. It would be quite a different thing for the lawyer to be accused of professional misconduct – a charge that, even if we think it baseless, would wrongly injure the client’s interests by injuring the lawyer’s reputation and ability to advocate for the client.<sup>7</sup> The disciplinary argument would be fodder for an argument about the credibility of the lawyer/advocate that would carry weight in some jurisdictions. It also is predicable that this will

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<sup>6</sup> Coal leases are only one example but, as a reminder of the passions involved, I have been told that the EPA has been directed to remove from its web site all information on climate change.

<sup>7</sup> One commenter predicted the following: “Dear Sierra Club counsel, you have made a false statement of fact or law to the public agency (tribunal). You are required to take the following remedial measure (which is to inform the tribunal that what the developer told the tribunal is the correct information). If you do not do so, I will report you to the State Bar.” In place of the Sierra Club, one could substitute in this example any for or against an administrative application of most any kind.

lead disciplinary complaints for tactical reasons and to additional burden on the disciplinary system.<sup>8</sup>

For reason suggested by these abbreviated comments, I respectfully dissent from proposed Rule 1.0.1(m).

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<sup>8</sup> Although not mentioned in the proposed Rules 3.3 or 3.4, there of course is a First Amendment aspect to governmental petitioning. Even assuming that eventually would prevent the imposition of professional discipline, it would do nothing to save the lawyer and client from reputational damage or the client from the risk of diluted advocacy due to the lawyer's instinct for self-preservation.

