

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.2**

### **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE**

There is no current California rule that corresponds to proposed Rule 1.2, which is derived from Model Rule 1.2, paragraphs (a) through (c). However, Model Rule 1.2(d) corresponds to current California rule 3-210. The Commission has recommended that the concept in current rule 3-210 be carried forward as a separate, standalone rule, proposed rule 1.2.1. See Rule 1.2.1 Report.

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

#### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.2 [3-210]

Vote: 10 (yes) – 6 (no) – 0 (abstain)

#### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.2 [3-210]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE 1.2 (CLEAN)**

#### **Rule 1.2 Scope of Representation and Allocation of Authority**

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

## Comment

### *Allocation of Authority between Client and Lawyer*

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

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

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

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

### *Agreements Limiting Scope of Representation*

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

## IV. RULE HISTORY

There is no counterpart to proposed Rule 1.2, which is based on paragraphs (a) through (c) of Model Rule 1.2, in the California Rules of Professional Conduct. However, current rule 3-210 is analogous to Model Rule 1.2, paragraph (d). See Report & Recommendation for proposed Rule 1.2.1 for the history of current rule 3-210.

Although the origin and history of Model Rule 1.2 was not the primary factor in the Commission's consideration of proposed Rule 1.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 47 - 64, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **V. 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. OCTC believes, however, that subsection (b) should also require that the limitation be fully explained to the client and that the client's consent be in writing.
2. OCTC supports Comments 1 and 2.
3. OCTC believes that Comment 3 is unnecessary and aspirational. It does not explain or clarify the rule.
4. OCTC is concerned that Comment 4 is unnecessary. Further, nowhere in Comment 4 are attorneys advised that even where the scope of the representation is expressly limited, the attorney still has a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.)

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

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

Two comments, including the above comment from OCTC, were received. Both of the commenters agreed with the proposed rule only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## **VII. RELATED CALIFORNIA LAW AND ABA MODEL RULE 1.2 ADOPTIONS**

### **A. Related California Law**

The California Rules of Professional Conduct have no counterpart to ABA Model Rule 1.2(a) through (c), the concepts of which have been included in proposed rule 1.2. However, the policies promoted in ABA Model Rule 1.2 are currently reflected in California case law, statutory law, rules of court, and a rule of professional conduct.

1. ABA Model Rule 1.2(a) [Proposed paragraph (a)] – Allocation Of Authority Between Client And Lawyer

The concepts that (i) the client retains the authority to make decisions concerning the objectives of the representation, and (ii) the lawyer may make decisions that the lawyer is impliedly (or expressly) authorized to make in order to carry out the client's representation, are expressed in California case law. (See, *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403 – 405 [212 Cal.Rptr. 151] (a lawyer has the implied authority to bind a client with respect to "procedural" matters arising during the course of the

representation, but the client retains the right to make decisions that might “impair the client’s substantial rights or the cause of action itself”).<sup>1</sup>

Paragraph (a) also specifically provides that a lawyer must abide by a client’s decision whether to settle a matter. This duty is consistent with existing California case law. Lawyers have been disciplined for settling a client’s claim without the client’s knowledge or consent. (See, *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [255 Cal.Rptr. 422] [attorney found culpable of moral turpitude for settling a claim without the client’s knowledge or consent notwithstanding that the attorney’s retainer agreement purported to give the attorney the power to settle and endorse checks or releases]. See also, *In the Matter of Guzman* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314 [in finding that an attorney committed misconduct by settling a client’s case without the client’s knowledge or consent, the State Bar Court Review Department stated: “Clients have the unilateral right to control the outcome of their cases, including the right to settle or to refuse to settle a claim.”].)

## 2. ABA Model Rule 1.2(b) – Representation Of Client Is Not An Endorsement Of Client’s Views Or Activities

Model Rule 1.2(b) provides that a lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s views or activities. The purpose of paragraph (b) is articulated in Comment [5] of the rule:

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of unpopular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.

Business and Professions Code section 6068(h) states that it is the duty of an attorney to “[n]ever reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.” Similarly, current rule 2-400(B)(2) states that a member shall not unlawfully discriminate, or knowingly permit unlawful discrimination, when accepting or terminating the representation of a client. These authorities are intended to support the policy of promoting access to justice. Promulgating such concepts should avoid a potential obstacle to access to justice and zealous representation by assuring members of the legal profession and the public that a lawyer’s representation of an unpopular or otherwise notorious client is not an endorsement of the client’s views or actions.

Although the Commission is not recommending the adoption of MR 1.2(b), it does recommend

## 3. ABA Model Rule 1.2(c) [proposed paragraph (b)] – Limited Scope Representation

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<sup>1</sup> See also, *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1581 – 1582 [36 Cal.Rptr.3d 901], comparing cases that state a lawyer has the implied authority to “bind his or her client with respect to procedural matters” with cases that state there is no implied authority for a lawyer to take actions that impair the “client’s substantial rights.”

Paragraph (c) states that a lawyer “may limit the scope of the representation if the limitation is reasonable and the client gives informed consent.” Permitting attorneys and clients to engage in limited scope agreements is consistent with California case law and rules of court. In particular, the “reasonable” limitation is consistent with California case law which clarifies that a lawyer may still have a duty to inform the client of reasonably apparent “legal problems,” even though a potential claim or defense might fall outside of the scope of the limited engagement.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601], a lawyer representing an injured worker sought to limit the scope of the representation to the client’s workers’ compensation claim and entered into an express agreement to that effect. The agreement did not mention the potential for a third-party tort claim. Subsequently, when the tort case was time-barred, the client brought a negligence action against the attorney for failing to inform the client about a potential third-party tort claim.

In analyzing this claim, the Court of Appeal stated: “One of an attorney’s basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.” (*Nichols v. Keller, supra*, 15 Cal.App.4th 1672, 1683-1684.)<sup>2</sup>

In addition to case law, California Rules of Court, rules 3.35 – 3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters) permit limited scope representation under certain circumstances. Both of these rule provisions define limited scope representation as “a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person.”<sup>3</sup>

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<sup>2</sup> See also, *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940 [14 Cal.Rptr.3d 751], where the First District Court of Appeal discussed whether a defendant lawyer could be sued for malpractice for failing to raise claims beyond the scope of a retainer agreement. The court stated: “True, the extent of an attorney’s duty to act necessarily depends on the scope of the attorney-client relationship [citation], and the scope of this relationship may be limited by the agreement between the attorney and the client [citation]. But an attorney who undertakes one matter on behalf of a client owes that client the duty to at least consider and advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client’s interests.”

<sup>3</sup> See also, the Discussion paragraph to current rule 3-400 (Limiting Liability to Client), which states: “Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, *nor is it intended to prevent a member from reasonably limiting the scope of the member’s employment or representation.*” (Emphasis added.) And, Discussion paragraph [2] to current rule 1-650 (Limited Legal Services Programs), which states in part: “A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client’s informed consent to the limited representation.”

ABA Model Rule 1.2(c) requires that a lawyer obtain the informed consent of the client who will receive a limited scope representation. This concept appears in current rule 1-650 (Limited Legal Services Programs), Discussion paragraph [2], which states: "A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation." The guidance provided in rule 1-650's Discussion paragraph is narrower than the informed consent requirement in the Model Rule because the former applies only to services in the context of a limited legal service program (e.g., services sponsored by a court, government agency, bar association, law school, or nonprofit organization), while the latter is a broader standard applicable to the provision of limited scope representation in any context.

## **B. ABA Model Rule 1.2 Adoptions**

- **Arizona Rule 1.2** is identical to Model Rule 1.2:

### **Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **Alaska Rule 1.2** is a substantial departure from the Model Rule, including an enhancement of paragraph (c) concerning limited scope representation, and the addition of new paragraphs (e) and (f):

### **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to offer or accept a settlement. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

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

(c)<sup>4</sup> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.<sup>5</sup>

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<sup>4</sup> Other jurisdictions that have expanded paragraph (c) regarding limited scope representation include: Colorado, Florida, Maine, Maryland, Montana, New Hampshire, and Wyoming.

(f)<sup>6</sup> A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

- **New York Rule 1.2** is also a substantial departure from the Model Rule, including the addition of new paragraphs (e) through (g):

### **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

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<sup>5</sup> Note that a similar provision is found in Model Rule 1.4(a)(5), which provides that a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Further note that this Commission has declined to include a provision similar to MR 1.4(a)(5) in its proposed Rule.

<sup>6</sup> Other jurisdictions that have provisions addressing legal advice relating to the jurisdiction's marijuana laws include: Colorado (comment), Hawaii (rule), Illinois (rule & comment), Nevada (comment), Oregon (rule), and Washington (comment). This topic is discussed more fully in the Report & Recommendation for proposed Rule 1.2.1. The Commission has recommended including a comment similar to those in Colorado, Nevada and Oregon in that rule.



(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

- **Model Rule 1.2.** The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2,” revised October 28, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf) [Last visited 1/7/17]
- Every jurisdiction except California has adopted some version of ABA Model Rule 1.2. Among these jurisdictions, fourteen have adopted the rule verbatim,<sup>7</sup> ten have adopted substantially similar variations of the Model Rule,<sup>8</sup> and twenty-six have a substantially modified version of Model Rule 1.2.<sup>9</sup>

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

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

1. Recommend adoption of Model Rule 1.2, as revised, includes two paragraphs, (a) and (b) to expressly address allocation of authority between client and lawyer and address a lawyer’s duties with respect to limiting the scope of representation, respectively. Proposed paragraph (d) of the Model Rule, which would carry forward current rule 3-210, as modified, has been assigned its own rule number, Rule 1.2.1. See Rule 1.2.1 Report.
  - Pros: Paragraph (a) and (b) clarify the relationship between lawyer and client and eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of Model Rule 1.2. Further, the concepts in these paragraphs already exist in California law; the provisions will provide ease of access to for lawyers seeking to understand

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<sup>7</sup> The fourteen jurisdictions are: Arizona, Arkansas, Delaware, Idaho, Iowa, Kentucky, Minnesota, Nevada, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont and Washington.

<sup>8</sup> The ten jurisdictions are: Colorado, Florida, Indiana, Louisiana, Maryland, New Jersey, New Mexico, Oklahoma, South Carolina and Tennessee.

<sup>9</sup> The twenty-six jurisdictions are: Alabama, Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Virginia, West Virginia, Wisconsin and Wyoming.

their duties as set forth in those paragraphs. The specific advantages of expanding the scope of the rule are discussed in relation to each paragraph, below.

- Cons: Question whether it is necessary to include the concepts of paragraphs (a) and (b) in a set of disciplinary rules when they are already present in statutes or case law. In addition, paragraph (b) is permissive.
2. Recommend adoption of Model Rule 1.2(a), which relates to the allocation of authority within the lawyer-client relationship and which has been modified as follows:
- a. Limit a lawyer's implied authority to act on the client's behalf by the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], in recognition of this Commission's decision not to include such a provision in proposed Rule 1.6.
  - b. Limit the requirement of a lawyer to abide by a client's decision to enter a plea in capital cases, in which guilty pleas require the lawyer's consent. (See Penal Code § 1018).
- Pros: The provision does not change California law; all of the concepts in paragraph (a) are found in California law:
    - a. The concepts that (i) the client retains the authority to make decisions concerning the objectives of the representation, and (ii) the lawyer may make decisions that the lawyer is impliedly (or expressly) authorized to make in order to carry out the client's representation, are expressed in California case law. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403 – 405 [212 Cal.Rptr. 151].)
    - b. That a lawyer must abide by a client's decision whether to settle a matter is consistent with existing California case law. Lawyers have been disciplined for settling a client's claim without the client's knowledge or consent. (See, *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [255 Cal.Rptr. 422]. See also, *In the Matter of Guzman* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314.
- Cons: See "Cons" in paragraph 1, above. There is no reason to include these concepts in disciplinary rules when they already are found in statutes or case law, particularly the permissive second sentence concerning a lawyer's implied authority.
3. Recommend adoption of Model Rule 1.2(c), relating to a lawyer's ability to limit the scope of representation.
- Pros: Permitting lawyers and clients to engage in limited scope agreements is consistent with California case law and rules of court, and contributes to access to justice by making the availability of legal services more affordable.

The “reasonable” limitation is consistent with California case law which clarifies that a lawyer may still have a duty to inform the client of reasonably apparent “legal problems,” even though a potential claim or defense might fall outside of the scope of the limited engagement.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601], a lawyer representing an injured worker sought to limit the scope of the representation to the client’s workers’ compensation claim and entered into an express agreement to that effect. The agreement did not mention the potential for a third-party tort claim. Subsequently, when the tort case was time-barred, the client brought a negligence action against the attorney for failing to inform the client about a potential third-party tort claim. In analyzing this claim, the Court of Appeal stated:

“One of an attorney’s basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.” (*Nichols v. Keller*, supra, 15 Cal.App.4th 1672, 1683-1684.)

In addition to case law, California Rules of Court, rules 3.35 – 3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters) permit limited scope representation under certain circumstances. A driving force behind the adoption of these rules was increasing access to justice. Both of these rule provisions define limited scope representation as “a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person.”

- Cons: The provision is permissive and has no place in a set of disciplinary rules. The concept is already adequately addressed in Rules of Court and case law.
4. Recommend adoption of Comment [1], which is derived from RRC1 cmt. [1], and which identifies the specific statutory authority for the express exception in paragraph (a) concerning the client’s right to enter a plea in a criminal matter, and also provides a citation to a seminal California Supreme Court opinion on the allocation of authority between client and lawyer.
- Pros: The citations to the statute and case provide additional explanation to lawyers on how paragraph (a) should be applied, thus enhancing both enforcement and compliance with the Rule.
  - Cons: None identified.

5. Recommend adoption of Comment [2], which is identical to MR 1.2, cmt. [3] and RRC1 cmt. [3], and which clarifies that a lawyer may settle a matter on the client's behalf with the client's advance authorization.
  - Pros: The comment provides important interpretive guidance regarding the meaning of a client's decision to settle a matter, i.e., that the client's decision to settle within specific parameters can be given in advance, revocable at any time. (See also State Bar Formal Ethics Op. 2002-160).
  - Cons: None identified.
6. Recommend adoption of Comment [3], which moves the aspirational MR 1.2(b) into the comment of the proposed rule.
  - Pros: The purpose of Model Rule 1.2(b) is articulated in proposed Comment [3] of the Model Rule:

"Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of unpopular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."

Bus. & Prof. Code § 6068(h) states that it is the duty of an attorney to "[n]ever reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Similarly, current rule 2-400(B)(2) states that a member shall not unlawfully discriminate, or knowingly permit unlawful discrimination, when accepting or terminating the representation of a client, a provision whose concept is carried forward in proposed Rule 8.4.1. These authorities are intended to support the policy of promoting access to justice. Promulgating such concepts should avoid a potential obstacle to access to justice and zealous representation by assuring members of the legal profession and the public that a lawyer's representation of an unpopular or otherwise notorious client is not an endorsement of the client's views or actions.
  - Cons: Although the provision has been relegated to a comment, it remains aspirational and has no place in a set of disciplinary rules. It serves neither to explain the application or the meaning of the proposed rule. If it were to be placed anywhere in the Rules, it should perhaps be a comment to proposed Rule 1.0 or in a Preamble.
7. Recommend adoption of Comment [4], which includes concepts from RRC1 cmts. [7] and [8], and which provides interpretative guidance regarding the application of paragraph (c), as well as providing cross-references to the California Rules of Court that expressly permit limited scope representation under certain conditions.
  - Pros: Limited scope representation is an important component in the pursuit

of making justice more accessible. (See discussion in paragraph 3, above.) This comment provides important guidance that an agreement to limit the scope of representation is not an agreement to limit the lawyer's duty of competence and that the lawyer might still be required to advise the client of other rights or liabilities not within the scope of representation. Finally, the comment cross-references the Rules of Court that sanction limited scope representation.

- Cons: See Cons related to paragraph (c), in paragraph 3, above.

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

The only concept rejected was to include Model Rule 1.2(d) within this proposed rule. However, the Commission instead has recommended that the paragraph, which corresponds to current rule 3-210, be assigned its own rule number. See Rule 1.2.1 Report.

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. Although the proposed rule would add two provisions that are not currently found in the California Rules, neither of these provisions would be a substantive change in the current law of California. (See discussion in paragraphs A.2 and 3, above.)

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

1. Substitute the term "lawyer" for "member."
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
3. As noted in paragraph C.1, above, paragraphs (a) and (c) of Model Rule 1.2 are not substantive changes.

## **E. Alternatives Considered:**

None.

## **IX. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

### **Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.2 in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.2 in the form attached to this Report and Recommendation.