

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.5 [1-100(D)]

Commission Drafting Team Information

Lead Drafter: Daniel Eaton

Co-Drafters: Jeffrey Bleich, George Cardona

I. CURRENT CALIFORNIA RULE

Rule 1-100(D) Rules of Professional Conduct, in General – Geographic Scope of the Rules

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(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

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I.A. CURRENT ABA MODEL RULE 8.5

Rule 8.5 Disciplinary Authority; Choice of Law

- (a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction

in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.5 [1-100(D)]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.5 [1-100(D)]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. PROPOSED RULE 8.5 [1-100(D)] (CLEAN)

Rule 8.5 Disciplinary Authority; Choice of Law

- (a) **Disciplinary Authority.** A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
 - (1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

IV. PROPOSED RULE 8.5 (REDLINE TO CURRENT CALIFORNIA RULE 1-100(D))

Rule 8.5 [1-100(D)] ~~Rules of Professional Conduct, in General~~ Disciplinary Authority; Choice of Law

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~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

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Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

IV.A. PROPOSED RULE 8.5 (REDLINE TO CURRENT ABA MODEL RULE 8.5)

Rule 8.5 Disciplinary Authority; Choice Of Law

- (a) **Disciplinary Authority.** A lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in ~~this jurisdiction~~California is also subject to the disciplinary authority of ~~this jurisdiction~~California if the lawyer provides or offers to provide any legal services in ~~this jurisdiction~~California. A lawyer may be subject to the disciplinary authority of both ~~this jurisdiction~~California and another jurisdiction for the same conduct.
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- (1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

~~[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.~~

Choice of Law

~~[2] The conduct of a lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice~~

~~before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.~~ in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

~~[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.~~

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~~[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

~~[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.~~

V. RULE HISTORY

Rule 1-100(D)(1) was adopted in 1989 to clarify that the Rules are binding upon members of the State Bar of California acting in another jurisdiction, unless the rules of the other jurisdiction require conduct different from that required or permitted by the California Rules.

Rule 1-100(D)(2), adopted at the same time, clarifies that lawyers from other jurisdictions who may be entitled to practice law in California without being members of the State Bar (e.g., lawyers out of state appearing pro hac vice) are subject to the California Rules. Thus, every rule which is applicable to a “member” would also be applicable to a “lawyer” (as defined in current rule 1-100(B)(3)¹) who, in accordance with California law, is permitted to practice law in California. During the 1989 Commission’s deliberations, several of its members opposed including (D)(2) on the ground that the authority of the Board under Business and Professions Code § 6076 does not extend to formulating or enforcing rules governing the conduct of out-of-state lawyers. However, the first Commission included paragraph (D)(2) on the ground that the authority of the Board extends to governing the conduct of lawyers who are not members of the State Bar but who are authorized to practice law in California. The Board agreed and adopted the provision, and the Supreme Court approved it, effective May 27, 1989.

Rule 1-100(D) has not been revised since 1989.

Post-1989 Events.

In 1998, the Supreme Court issued its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, which held that lawyers who had participated in a private arbitration proceeding in California had engaged in the unauthorized practice of law. Language in *Birbrower* also indicated that under California law, a lawyer not admitted in California who took a deposition in California as part of a matter filed in another jurisdiction would be engaging in UPL. It is not an understatement to note that the *Birbrower* decision sent shockwaves through the legal profession. What followed was a sea change in the regulation of lawyers engaged in cross-border practice of law.

¹ Rule 1-100(B)(3) provides:

(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.

Both California and the ABA sought to address the fallout from *Birbrower*. The California Supreme Court convened an Advisory Task Force on Multijurisdictional Practice (MJP) to “assess whether and under what circumstances attorneys licensed to practice law in jurisdictions in the United States other than California should be permitted to practice law in California.” (Report of California Supreme Court Advisory Task Force On Multijurisdictional Practice (Jan. 7, 2002), at page 2. Out of the work of the MJP Task Force came current California Rules of Court 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services]. However, unlike the ABA, there were no concomitant changes made to current rule 1-100(D) [Geographic Scope of Rules], the counterpart to Model Rule 8.5.

The ABA appointed a Multijurisdictional Practice (MJP) Commission to study how the Model Rules might be revised to authorize MJP and avoid lawyers being subject to liability for UPL. As a result of that process, both Model Rule 5.5 [Unauthorized Practice of Law; Multijurisdictional Practice of Law] and 8.5 [Disciplinary Authority; Choice of Law] were substantially revised and adopted by the ABA House of Delegates in August 2002 on the recommendation of the MJP Commission.² The revisions made by the ABA to Model Rule 5.5, which involve many of the same concepts addressed in Rules of Court 9.45 to 9.48, are beyond the purview of this Commission. However, changes made to Model Rule 8.5 are not.

In fact, as part of its comprehensive review of the California Rules, the first Commission recommended that Model Rule 8.5(a) [Disciplinary Authority], with some non-substantive revisions, be adopted by the Board and approved by the Supreme Court. However, the first Commission recommended that only subparagraph (1) of Model Rule 8.5(b) [Choice of Law] be adopted and, in place of subparagraph (b)(2) of the Model Rule, that a provision similar to current rule 1-100(D)(1) be substituted to provide more of a bright-line standard.³ Although the Board approved the first Commission’s

² See Reports 201B and 20C, available at: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html [Last visited 7/16/15].

³ The first Commission explained its rejection of Model Rule 8.5(b)(2):

Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct.

This rule deletes the MR concept of “predominant effect” because the concept is ambiguous, over broad and undefinable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators.

The rule also deletes the “safe harbor” provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a “willful” standard, without any intent requirement. The reasonable belief of

proposed rule, it had not been submitted to the Supreme Court when the Supreme Court requested the appointment of a second Commission. The first Commission's proposed rule, along with supporting materials (public comment, etc.), is provided with this memo.

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 agrees with the policy behind this rule, but still has concerns that the rule, as written, is in conflict with section 6049.1. Section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California, unless, as a matter of law, the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can OCTC enforce a rule that permits discipline based on another jurisdiction's rules, if those rules are in conflict with California's rules? Is rule 8.5 intended to change section 6049.1? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

2. OCTC supports the Comment to this rule.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including a comment from OCTC, were received. One agreed with the proposed rule, one disagreed, and one agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

The ABA State Adoption Chart for the ABA Model Rule 8.5, which is the counterpart to current rule 1-100(D), is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.pdf

the lawyer may properly be considered as a mitigating factor rather than a complete defense.

See First Commission, *Rule & Comment Explanation Comparison Chart*, XDFT5.1 (12/10/10), at page 2.

- Twenty-four states have adopted Model Rule 8.5 verbatim.⁴ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.⁵ Nine states have adopted a version of the rule that is substantially different to Model Rule 8.5.”⁶ One state has not adopted a version of Model Rule 8.5.⁷

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

A. Concepts Accepted (Pros and Cons):

1. Recommend that the terms of the current rule be replaced with the standard used in jurisdictions that have adopted Model Rule 8.5 (both disciplinary authority and choice of law)
 - Pros: This area of lawyer regulation is uniquely appropriate for national uniformity and the preponderance of jurisdictions all have adopted the standard in Model Rule 8.5 or a slight variation of the Model Rule. The Commission charter includes consideration of “changes in the law.” Subsequent to the adoption of current Rule 1-100(D), multi-jurisdictional practice became more common and became the subject of regulation in the California Rules of Court (see Rules of Court 9.40 et. seq.) The drafting team’s recommendation to depart from the current rule and adopt the national standard facilitates predictable choice of law in lawyer disciplinary matters both in and outside of California.
 - Cons: The Model Rule 8.5 approach is arguably ambiguous to the extent that the “predominant effect” test has never been used in California disciplinary proceedings. In addition, the standard in 8.5(b) includes a “reasonable belief” standard that arguably imports a negligence standard for disciplinary purposes.
2. Recommend only one comment to the rule that cites relevant California statutory law
 - Pros: The one recommended comment is derived from Comment [1] to Model Rule 8.5 but has been revised to cite relevant statutory law on the

⁴ The twenty-four states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

⁵ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

⁶ The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁷ The one states is: Alabama.

disciplinary authority of California. The citations include a State Bar Act section referred to in OCTC's September 29, 2015 comment: section 6049.1, which provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Including this comment supplements the Model Rule standard with law specific to California.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include all of the Model Rule 8.5 comments

- Pros: The drafting team rejected all but Comment [1] of the Model Rule 8.5 comments as unnecessary and repetitive.
- Cons: The “predominant effect” standard would be new in California. Including those Model Rule comments that provide guidance on that standard, Comments [4] and [5], would promote compliance with the rule.

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. See Section IX.A above re adoption of Model Rule 8.5 approach and rejection of the current California standard on choice of law.

D. Non-Substantive Changes to the Current Rule:

1. 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.

E. Alternatives Considered:

1. The primary alternative considered was to continue the current California rule. See Section IX.A above.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommends adoption of proposed Rule 8.5 [1-100(D)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 8.5 [1-100(D)] in the form attached to this Report and Recommendation.